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it was thereby performing a public function regardless whether it was acting in either a proprietary or a governmental capacity. 11

A strike by the employees of a municipality acting in its proprietary capacity would have a far less detrimental effect on the public welfare than strikes by employees of a vital private industry. The holding in the principal case has a far reaching effect since large numbers of people are now employed by federal, state and municipal governments. 12 While the decision in the instant case is supported by all previous decisions, 13 a far more satisfactory result would have been reached if the court had recognized that the municipality was acting in a corporate capacity and allowed the right of the defendants to strike.

PUBLIC UTILITIES—PECULIAR CHARTER PROVISION RESERVING TO PEOPLE OF HOME RULE CITY THE EXCLUSIVE POWER TO REGULATE PUBLIC UTILITY RATES AS DENIAL OF DUE PROCESS

Plaintiff, a taxpayer, brought an action against defendant city, to have declared void an ordinance governing the operation and rates of defendant tramway corporation. On dismissal of the action by the trial court, plaintiff brought error. Held, reversing the judgment, that the ordinance was an unconstitutional attempt by the city council to grant, extend and to enlarge franchise privileges and to regulate charges for service by defendant corporation, contrary to the state constitution 1 and a section of the municipal code 2 adopted pursuant thereto. The council exercised the power given exclusively to the people of the city to initiate ordinances which grant franchises and regulate the rates of public utilities using the streets of the city. Berman v. Denver, 209 P.2d 754 (Colo. 1950).

By statute or constitutional provision the regulation of, and fixing of rates for, public utilities situated and operated wholly or principally within a municipality, may be reserved to a municipality or the citizens thereof. 3

12. There were approximately six million employees of the federal, state and local governments in 1947, about one-tenth of the total working population of the nation. See Manuel, Public Employment, 8 Gov't. Emp. No. 4 (April 1947); 2 Vand. L. Rev. 441 (1949).
13. See notes 1, 2 and 3 supra.

1. Colo. Const. Art. XX, § 4; "No franchise relating to any street, alley or public place of the said city and county shall be granted except upon the vote of the qualified taxpaying electors."
2. Berman v. Denver, 209 P.2d 754, 760 (Colo. 1950); "'All power to regulate the charges for service by public utility corporations is hereby reserved to the people, to be exercised by them in the manner herein provided for initiating an ordinance.' (Emphasis added) Denver Municipal Code, 1927, § 280, p. 141."
However, the federal⁴ and state⁵ requirements of due process of law must be met, regardless of the constituency of the rate-fixing authority. Such requirements include notice of the proceeding and an opportunity given to the person whose rights are being adjudicated to be heard as to the reasonableness of the rates to be fixed.⁶ It is well settled that the term “person,” as protected by the due process clause of the Federal Constitution, includes corporations as well as public utilities.⁷ It follows, therefore, that no public utility can have its rates fixed unless such basic constitutional limitations are complied with.

In the instant case, the court upheld the exclusive power of the people to act as the rate-fixing agency and denied such power to the city council. However, it appears that the charter provision upon which it based its decision is in violation of state and federal requirements of due process of law.⁸ By the terms of this section of the municipal code, the rates which public utilities may charge are determined in the same manner as that for initiating or amending an ordinance. They are determined privately by those citizens who desire to sponsor the measure, or by representatives of those who have signed petitions. The rates thus decided upon are written up in a measure, which is then submitted to the city council, whose duty at this point is merely ministerial. It has the alternative to adopt the measure without amendment, or, if it so desires, to refer it to a vote of the citizens at large. The measure fixing the rates which the public utility may charge, if adopted, takes the status of law. Nowhere is provision made for an open hearing at which the public utility can testify in its own behalf regarding the reasonableness of such rates.

It is submitted that a failure so to provide amounts to a violation of

⁴ U.S. Const. Amend. XIV, § 1. “No state shall . . . deprive any person of . . . property without due process of law.”
⁵ Colo. Const. Art. II, § 25. “No person shall be deprived of life, liberty or property, without due process of law.” Subsec. 11. “Due process implies that every individual or corporation shall have timely notice and reasonable opportunity to defend his rights.”
⁶ See notes 4 and 5, supra.

Colo. 229, 161 Pac. 151 (1916), writ of error dismissed, 248 U.S. 294 (1919) (wherein the court stated that the authority to surrender the state’s or municipality’s power to regulate public utility rates, despite a contract or franchise between a municipality and a public utility fixing such rates, is not to be implied from a statutory provision that no license or franchise shall be granted to a utility to operate within the streets or alleys of a city in any other form or manner than by ordinance passed and published in a prescribed manner); St. Louis v. Bell Tel. Co., 96 Mo. 623, 10 S.W. 197 (1888); Bluefield Waterworks & Improvement Co. v. Bluefield, 69 W. Va. 1, 70 S.E. 772 (1911).
due process of law, and that this is no less true where the failure stems from an ordinance initiated and sponsored by the sovereign people themselves.9

TAXATION—FLORIDA CLASS C INTANGIBLES TAX CONSTRUED AS A PRIVILEGE EXCISE

Petitioner, a Delaware corporation, sought a peremptory writ of mandamus ordering the Comptroller to refund a Class C Intangible Personal Property Tax1 which it was required to pay as a condition precedent to recording a mortgage. The company had its principal place of business in Florida and owned real property in Florida, including that covered by the mortgage. The debt was represented by a note held by a New York insurance corporation, payable in New York, and secured by the mortgage on Florida real estate. Held, overruling State ex rel. Seaboard Air Line R.R. v. Gay,2 that the Class C tax is an excise on the privilege of recording the mortgage rather than an ad valorem tax, and that neither domicile nor business situs is necessary. The motion for writ was refused. State ex rel. United States Sugar Corp. v. Gay, Fla. Sup. Ct., Dec. 23, 1949.

Recent Supreme Court decisions3 have somewhat abrogated the effect of the maxim mobilis sequuntur personam.4 Today the courts uniformly uphold the constitutionality of a state statute taxing intangibles where either a domicile or a business situs are found within the state.5 And there is apparently sufficient jurisdiction to tax if the state has afforded protection to or conferred benefits upon the subject of the tax.6 In the Seaboard case, supra, the Florida Supreme Court construed the Class C tax as imposing an ad valorem levy upon the debt itself, holding that since there was no domicile or business situs within Florida there was no jurisdiction to tax.7

In the instant case, the statutes8 were held to impose an excise on the privilege of recording the mortgage.9 No mortgage may be enforced unless this

2. 160 Fla. 445, 35 So.2d 403 (1948).
4. Movables follow the person.
6. See, e.g., Greemough v. Tax Assessors of Newport, supra at 492; State Tax Comm'n of Utah v. Aldrich, supra at 180; Curry v. McCanless, supra at 367.
8. See note 1 supra.
9. This construction would seem to be preferred despite the designation by the legislature that the Class C levy is an “Intangible Personal Property” tax. The C tax is to be paid only once, upon recording, and not annually as are most ad valorem taxes. Middendorf v. Goodale, 202 Ky. 118, 259 S.W. 59 (1923). But cf. Wheeler v. Weightman, 96 Kan. 50, 149 Pac. 977 (1915). In addition, payment is not compulsory but optional. Crosland v. Federal Land Bank, 207 Ala. 456, 93 So. 7 (1922), reed on other grounds, 261 U.S. 374 (1922). Still another construction might have made this a tax on the mortgage itself. See (1948) Annual Survey of American Law 239 n.57.