STATE AND MUNICIPAL REGULATION OF TRANSPORTATION CHARGES.

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The question of State and municipal regulation of transportation charges naturally leads to two distinct lines of investigation —the one legal, the other social and economic, the former a question of right and power, the latter of the wisdom of the exercise of rightful power. In any attempt to investigate the legal side of this question, it is first essential to consider the status of the transportation service. In this country the business of transportation has not been assumed by the States, but remains in the hands of corporations or natural persons who conduct their business by means of their own private property. Any attempt therefore, to regulate transportation charges involves, in some degree, an interference with the exercise of the full rights of private property. From this source arises the question upon what principles and under what circumstances may the State interfere with the right of private property, either in the way of appropriating it to public uses or of regulating its use by individuals or corporations.

The State undoubtedly has the right to take so much of each person's property for the purpose of public revenue as it may deem necessary, subject only to the condition that such taking shall be equitable. Also, wherever it may be necessary, the State may take private property for public uses, and for public uses only, provided that this is accomplished by due process of law and just compensation is made.[1]

Again, under the police power, the State has wide and indefinite control of the use which the citizens may make of their own property, basing its action upon the maxim, *sic utere tuo ut alienum non lædas.*[2] Under the exercise of this power, the State may make that which has previously been invested with the attributes of

1 Kent's Com. Lect. XXXIV. Story, Const. §§ 1955–6.

2 Kent's Com. Lect. XXXIV.; also Cooley, Principles of Const. Law, p. 238.

property to be no property, when this is necessary for the public health, the public morals, or the public peace and order, or it may prevent certain modes of enjoyment of property.[3] But the exercise of this power does not involve a taking of private property in contemplation of law, however great may be the loss inflicted. The loss is generally not direct, but incidental. It is *damnum absque injuria.* Here, therefore, no compensation is necessary, but there must be due process of law.[4]

But, in the consideration of our present subject, those forms of industry which are carried on under legal grant, either actual or presumptive, are the most important. In these instances there is no question of the completeness of the power of the State to regulate the facilities offered to the public, or the charges for services performed, by imposing conditions precedent upon the grantees.[5] Not until the State has bound itself by entering into contract relations is there any hindrance to the exercise of this power; and even this limitation upon the part of the State may be avoided by a provision in the State constitution, or in the act under which these privileges are conferred, to the effect that the State reserves the right to alter, amend, or repeal all charters which may be granted by it.[6] Thus far we have considered the powers of the legislature in the light of the rules of the common law; but the rules of the common law are themselves of no force whatever as against positive statutes. The institution of private property itself might be abolished by an act of the legislature, if it were not for the limitations upon their power contained in the constitutions of the several States and of the United States.[7]

Section 8, Article I., of the United States' Constitution confers upon Congress the sole power of regulating interstate commerce. The provision of the Fifth Amendment, that no person shall be deprived of his property without due process of law and that private property shall not be taken for public use without just compensation, is held to be a limitation upon the powers of the national government alone.[8] But a similar clause has been

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3 Cooley, Principles of Const. Law, p. 328.

4 Cooley, Principles of Const. Law, p. 324, and cases there cited; also Kent's Com. Lect. XXXIV.; Story, Const. § 1954; Munn *v.* Illinois, 94 U. S. 113.

5 Budd *v.* New York, 143 U. S. and Munn, etc., *supra:* Cooley, Principles of Const. Law, pp. 244 *et seq.*

6 Cooley, Principles of Const. Law, pp. 313 *et seq.;* also Dartmouth Col. *v.* Woodward, 4 Wheat. 519.

7 Munn *v.* Illinois, 94 U. S. 113.

8 Chicago, Mil. & St. Paul. R'w'y Co. *v.* Minn., 134 U. S. 418; Cooley, *supra*, p. 327.

adopted in most of the State constitutions. The only absolute limitations of the power of the States in this respect are contained in Section 10 of Article I. of the Constitution and in Section 1, of the Fourteenth Amendment. Thus the States may not impair the obligation of their contracts, nor deprive any person of his property without due process of law, nor deny to any person within their jurisdiction the equal protection of the laws.[9]

In the case of Budd *v.* New York, Mr. Justice Brewer in an able dissenting opinion would make the only grounds for regulation of transportation facilities or charges, the necessary exercise of the police power of the State, or the granting of special privileges, either actually or presumptively, as in the case of corporations or where individuals perform a public service or devote their property to a public use. But the majority opinion of the Court confirms the doctrine of Munn *v.* Illinois, and says: "When therefore one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use and must submit to be controlled by the public, for the common good, to the extent of the interest he has thus created."[10] The United States Supreme Court has, therefore, taken a really advanced socialistic position, and, as a ground for the regulation of industry and commerce, has placed public interest in its use on the same basis as a public use of property.[11] In the Sinking Fund cases, 99 U. S., Mr. Justice Bradley says when a business becomes a practical monopoly, so as to be able to exact tribute from the people, it is subject to regulation by the legislature, holding such to be the principle of Munn *v.* Illinois. But in the case of Chicago, etc. Railway Company *v.* Minn., 134 U. S. 418, the court quotes approvingly from Stone *v.* Farmer's Loan and Trust Co., 116 U. S. 307: "This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation."

These powers, according to the opinion in Munn *v.* Illinois, may be exercised over private carriers as well as over public carriers, provided only the public interest in their business be sufficiently great. The people in their constitution, or the legislature by statute, may decide that what has hitherto been regarded as private business, is invested with a public character. And this decision is fully supported by Budd *v.* New York. This power of

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9 Munn *v.* Illinois, *supra.*

10 Cases cited, *supra.*

11 See dissenting opinion by Brewer, J. in Budd *v.* N. Y.

regulation may be exercised directly by the legislature, or indirectly by means of a board of commissioners.[12] It is suggested, although not positively asserted, that the legislature itself cannot, in its regulation, go to the extent of taking private property without allowing recourse to the courts.[13] But it is certain that the legislature cannot empower commissioners to fix rates finally, without opportunity for a judicial hearing on the question of their reasonableness.[14]

Municipal corporations, in their governmental capacities, are not only subject to all the limitations of State legislatures, but they are themselves mere agents of the State government. Their right to regulate transportation charges must, therefore, be a delegated right, and this right can be no wider than the terms of their charters will permit.[15]

The facts which are urged as requiring State regulation of transportation charges are: (1) that the railroads make excessive profits; (2) that their rates are excessive; (3) that they make unjust discriminations, either by their classification of freight, or between different localities, or between individual shippers; (4) that by their combinations, pools, or trusts they are acquiring too much power.[16] As the result of a careful investigation of the whole question, Prof. Arthur T. Hadley concludes that the first two charges are practically groundless, and that the third charge is the only one of serious importance. He shows conclusively that discrimination by classification of freight is beneficial not only to the railroads, but also to the public in general; and that local discrimination is not only inevitable where competition exists at some points, and not at others, but also generally beneficial. Individual discrimination is the chief evil to be remedied; but this cannot be done away with unless combination be allowed.

Of the remedies that have been attempted, the limitation of dividends and enforced competition have proved unavailing and anything but satisfactory. The law of competition, which operates so beneficially in enterprises where the permanent investments are small as compared with the circulating capital, utterly

12 Cooley, *supra*, p. 245 and cases there cited; also Chicago, etc., Railway Co. *v.* Minn. 134 U. S.

13 Stone *v.* Farmer's Loan and Trust Co., 116 U. S. 307; but see *contra* Munn *v.* Illinois, *supra.*

14 Cooley (as above) p. 324; also Chicago, etc., Railway Co. *v.* Minn., *supra.*

15 Cooley (as above), Chap. xvii.

16 See Railroad Transportation by Hadley, *passim*, especially chapters vi. and vii.

fails in the case of those industries where large permanent investments for but one narrowly defined purpose are required. The only alternatives for the railroads are ruin, discrimination, or combination. Ruin cannot be endured; individual discrimination is an unmixed evil; combination is the only resource.

To the enforcement of *pro-rata* laws, there can be no serious objection, provided only that such laws may be enforced upon all the rival routes. The effect will then be to level up, rather than to level down, the rates. Otherwise local discrimination must be allowed. Prof. Hadley admirably sums up the whole question when he says: "The system of making rates to develop business or of 'charging what the traffic will bear,' rightly applied, has been the means — and we shall find it to be the only possible means — of securing efficient service and low rates." The most satisfactory method of regulation has proved to be the establishment of commissions with little or no power to control carriers directly, but solely for the sake of securing publicity. In Massachusetts and elsewhere such commissions have succeeded in bringing about an improvement of transportation facilities and have exercised a decisive influence on the policy of the railroads with regard to rates. The chief fact which aids a competent commission in this work is that the permanent interests of the corporation and of the public are almost always closely allied. The system of maximum charges either is so burdensome as to impair the efficiency of the service, or leaves such a wide range for the exercise of discretion on the part of the managing officials as to amount to practically no restriction.

After all, the strongest arguments against an active policy of regulation or state ownership or control of railroads are the social and political dangers involved. When once you teach a man that he may rely on state aid, you destroy his chief incentive to industry. The spirit of dependence thus created destroys those elements of character which constitute the real strength and prosperity of the State. The extension of government activity in the industrial field opens vast opportunities for political corruption and bribery. Far better is it to rely more on individual exertion and the operation of natural laws than, on every slight occasion, to invoke the interposition of government.