PUBLIC REGULATION OF QUASI-PUBLIC CORPORATIONS.

It was that ancient master of the common law, Sir Edward Coke, who, protesting that reason was the very life of the law, gravely observed that a corporation could not be excommunicated because it had no soul. So, likewise, Sir William Blackstone, in his famous commentaries, recorded for the instruction of succeeding generations that a corporation could not commit treason or felony because it was incapable of suffering a traitor's or felon's punishment. These two learned opinions were epitomized for popular use in the sententious saying of Selden that "A corporation has no neck to be hanged by, nor soul to be damned by." Somewhat akin to these views is that of Chief Justice Marshall that "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law," for which the great chief justice has been derided by modern critics and professors of the law as a veritable old fogy, unskilled in the magic mysteries of corporation law. And yet popular judgment still holds him and these three ancient worthies in high esteem; and from what can be seen of the operations of "Standard Oil," "Consolidated Copper" and "United States Steel," the public fully concurs in their opinions, and seems inclined occasionally to exercise its powers to regulate these artificial beings for the promotion of the public welfare.

There lived, also, in England, in olden times, another judge, "whose words were regarded with as much care as if they had been found in Magna Charta," who made bold to declare that "Whenever conveniences are affected with a public interest they cease to be *juris privati* only." These words of Lord Hale, found in his treatise *De Portibus Maris*, as expressive of existing law in the seventeenth century, were invoked in England in the eighteenth century as the basis of the acts regulating common carriers and inn-keepers, and (by Lords Kenyon and Ellenborough) for the regulation of warehouses.

The suggestions in Commissioner Garfield's report of last December that the doctrine of public regulation be now further

applied by the federal government to American railroads, and that the measure will receive the support of the administration and the antagonism of the great railway corporations, presages an approaching conflict which gives special interest to the law relating to the regulation of *quasi*-public corporations.

Prior to 1876, this doctrine of public regulation of private corporations seems not to have commanded general attention in the United States. The *Dartmouth College Case*, decided in 1819, had conclusively settled the law to be that the charter of a private corporation was a contract between the state and the corporation which could not be impaired by state law. For a half century the general idea, commonly accepted throughout the country, seems to have been that this decision afforded complete protection to all railway corporations, and effectually prevented any interference by legislation. Or better stated, perhaps, the public sentiment in favor of internal improvements was so stong that no challenge was made by the public which would seem to interfere with the rights of self regulation by all the transporting corporations.

In 1871 and 1872, under the impulse of the Granger movement, which was the organization of farmers, planters and graziers for their own protection and advantage, the great northwestern states had enacted statutes regulating tolls and tariffs of railways and public warehouses; and in 1875, these statutes having been challenged for unconstitutionality in the state courts, three cases were brought before the Supreme Court of the United States for argument, involving the statutes of Illinois, Iowa and Wisconsin. They were commonly known as "The Granger Cases," and were argued in January, 1876, as the Chief Justice declared, "by the most eminent counsel in a manner worthy of their well-earned reputation," before a court composed of Waite, Chief Justice, and Associate Justices Clifford, Swayne, Miller, Davis, Field, Strong, Bradley and Hunt. Concluding his opinion, the Chief Justice said: "We have kept the cases long under advisement in order that the decision might be the result of our mature deliberation." The opinions were delivered March 1st, 1877, in all three cases by the Chief Justice—Justices Field and Strong dissenting. The Illinois statute required a license for public warehousing of grain in cities of over 100,000 population, and fixed a maximum price for storage. The Wisconsin and Iowa statutes established maximum rates of fare and freight for railroads operating in

those states respectively. The validity of all these acts was sustained by the courts, and the cases are reported in 94 U. S., pages 113 and 178, inclusive. The keynote of these decisions is found in the following sentence from the opinion in the case of *Munn v. Illinois:*

"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."

This was a criminal prosecution against individuals for warehousing without license. The other two cases, styled respectively *C. B. & Q. R. R. Co. v. Iowa*, and *Peik v. C. & N. W. Ry. Co.*, were bills filed against state officers to restrain them from enforcing the rate statutes of the several states against the railroad companies; and the doctrine above stated was applied alike to warehousemen and railway companies.

The effect of the decisions of these "Granger cases" was firmly to settle, as tersely stated in the Munn case, that "When private property is devoted to a public use it is subject to public regulation." No discrimination whatever was made against corporations. Natural and artificial beings were by these decisions placed upon the same footing and subjected to the same rules, and the private warehousemen and the incorporated railroad companies were all treated alike; all were held equally subject to the legislative power of the state, because their property was devoted to a public use. So much for the Granger cases and the law firmly established by them.

Corporations which are thus subject to public regulation have by common usage come to be called *quasi*-public—almost public. They cannot be properly called public corporations for their object is profit-making. They are stock corporations voluntarily organized by corporators, and managed by a board of directors chosen by the stockholders. They have all the powers, attributes, and incidents pertaining to private corporations, and would be called such but for their public uses, functions or relations. Whether a private corporation is *quasi*-public is to be determined by the answer given to the following questions: 1. Is its property devoted to a public use? 2. Are its franchises of a public nature? 3. Must it deal with all persons without arbitrary discrimination? 4. Has it the power of eminent domain? If the answer to any or all of these questions is affirmative then the corporation is *quasi*-public.

No difficulty is experienced in answering these questions with regard to a railway company. It possesses all these faculties, and is of course subject to public regulation. Its property is devoted to public use; its franchises are of a public nature; it is a common carrier and must necessarily have the power of eminent domain. Those, therefore, who have denied the public power of regulating railroads have made themselves fair subjects for the shafts of ridicule by antagonizing all the rules of law upon this subject.

Prior to the year 1887, the regulation of railways had been left entirely to the several states; but in that year Congress saw fit to assume the power granted it by the Federal Constitution "to regulate commerce among the several states" upon the basis declared in the Granger cases, and accordingly passed the Interstate Commerce Act. Among its requirements are reasonable and equal charges without discrimination or rebate; publication of rates; official disclosure on inquest of any violation of these regulations, and statutory pardon to those making it; forbidding pooling or unnotified change of rates; establishing the rule of long and short haul for freight and persons; permitting lower charges for train loads than for car loads, and for car loads than small consignments. This act, challenged before the courts as unconstitutional, has been uniformly sustained as valid legislation. Its enforcement is committed to a body of commissioners called the Interstate Commerce Commission. It cannot be said that this commission has thoroughly abolished rebates and discriminations and brought about that ideal kind of railway transportation which the framers of the act had in mind; but it must be conceded that the commission has done much by the enforcement of this act to eradicate the evils theretofore existing, and to insure reasonable and impartial transportation. The commission has been somewhat hampered by the narrowness of its scope of power and the unfavorable decisions of partial judges. Congress is expected soon to relieve the commission of its impotency by conferring additional power upon it to the end that it may, if possible, eradicate the unendurable evils and wrongs of a corrupt and corrupting system of transportation.

In 1890 Congress still further exercised its constitutional power in the passage of the Sherman Act. This act declared every contract or combination in restraint of trade or commerce among the several states to be illegal, and fixed penalty therefor. It forbade monopoly and conspiracy to monopolize inter-

state commerce, and assessed punishment therefor. The constitutionality of this act was sharply challenged in the celebrated case of *Northern Securities Co. v. United States*, 193 U. S. 197. But after elaborate argument and careful consideration by the full court, it was declared valid by the casting vote of Mr. Justice Brewer, upon the ground that the Northern Securities Company was "an unreasonable combination in restraint of interstate commerce," and must therefore be dissolved. *Id.* p. 363. Most of the states have similar statutes forbidding unlawful restraints and monopolies by railway companies, and they, too, have been generally sustained by the courts.

In many states, also, acts have been passed regulating the railway fare and freight charges, or authorizing commissions so to do, as is done in the Interstate Commerce Act. These acts have been the subject of frequent and strenuous contention in the state and federal courts, resulting in a variety of decisions which are not entirely harmonious. The Granger cases above referred to seem to concede to the legislature absolute power of regulation. At least there was no limitation placed upon the legislative power to regulate rates in those decisions. Later cases, however, decided by the same court, have declared those statutes void which fix rates, or allow them to be fixed, so low as to deprive the railway companies of profit in their business, upon the ground that they work unlawful confiscation of private property. In the *Railway Commission Cases*, 116 U. S. 331, Chief Justice Waite declared the opinion of the court that "under pretense of regulating fares and freights the state cannot require a railroad corporation to carry persons or property without reward. Neither can it do that which in law amounts to a taking of private property for public use without just compensation or due process of law." The same doctrine was repeated in *Georgia Railroad & Banking Co. v. Smith*, 128 U. S. 174; and in *Chicago, M. & St. P. R. R. Co. v. Minnesota*, 134 U. S. 418, it was held that a state law prescribing rates of charges and forbidding judicial inquiry as to the reasonableness of such rates was unconstitutional, as denying to the railway company the benefit of due process of law. The whole subject was thoroughly reviewed by Mr. Justice Harlan in an exhaustive opinion delivered in *Smyth v. Ames*, 169 U. S. 466, resulting in the declaration that a state law which would not permit the carrier to earn just compensation would be invalid as depriving it of its property without due process of law, and that while the rates were primarily proper matter for legisla-

tive determination, the question whether they amounted to practical confiscation could not be so conclusively determined by the legislature as to prevent it from becoming the subject of judicial inquiry.

Under this modified doctrine the courts necessarily assume the power and duty of testing whether a legislative act is a reasonable regulation of rates. This must depend of course upon the special facts operating in each case. Presumably the legislative decision is just; but if the enforcement of the law will deprive the company of just compensation, the courts will prevent its enforcement.

These decisions result in bringing state statutes to the same test of reasonableness which has long been applied to municipal ordinances regulating rates for public utilities. It may seem strange that the courts shall have the power to nullify a legislative act because it is unreasonable; and yet, there is no other standard of constitutional judgment. The legislature may regulate rates in the public interest, but may not confiscate private property. If the act simply regulates, it is reasonable and constitutional; if it operates as a confiscation, it is unreasonable and unconstitutional.

Speaking of these decisions of the Supreme Court, Mr. Justice Brewer, in *Cotting v. Stock-Yards Co.*, 183 U. S. 79, tersely sums up: "It is declared that the present nature of the property is the basis by which the test of reasonableness is to be determined." And Mr. Justice Holmes, in *San Diego Land & Town Co. v. Jasper*, 189 U. S. 442, declared: "What the company is entitled to demand in order that it may have just compensation is a fair return upon the reasonable value of the property at the time it is being used for the public."

The courts must, of course, decide what is reasonable value upon due consideration of the various elements entering into a just valuation. This subject has given the courts no little trouble; nor is this strange, for the same problem generally arises in ascertaining all values. It has been suggested that the courts should consider the cost of the plant, original and added; operating expenses; revenue under the proposed rates; present cost of construction, and the amount of stocks and bonds of the company. The Supreme Court of California, in *San Diego Water Co. v. San Diego*, 118 Cal. 556, said: "In determining such values, three, and we believe only three, methods are possible: (1) either by ascertaining what the property could be sold for (its market value); (2) by ascertaining what it would cost to

replace it; or (3) by ascertaining the revenue it is capable of producing." The first of these would require actual sale; the second would depend solely upon expert opinion. The revenue basis seems the fair and feasible one. The courts, however, have declined to be governed exclusively by any particular method, treating the question as a practical one to be tested in each case by its own peculiar circumstances. The question was considered in *Smyth v. Ames*, *supra*; *San Diego Land & Town Co. v. National City*, 174 U. S. 739; *Same v. Jasper*, 189 U. S. 439; and *Stanislaus County v. San Joaquin & K. R. C. I. Co.*, 192 U. S. 201, with the general result that no one method of estimating values is to control; but that cost of plant and operation, and depreciation and fair profit were all elements which "ought to be taken into consideration, and such weight be given them when rates are being fixed, as under all the circumstances would be just to the company and to the public."

The object of public regulation of railroads is to protect the public against (*a*) physical dangers incident to the operation of the railroad; (*b*) discomfort and inconvenience to the traveling public and shippers; (*c*) the oppressions and exactions suffered from the abuse of the tremendous powers conferred upon them by law.

If it be said that our consideration of this power of public regulation has been confined solely to the matter of rates, it is fair to answer that to a profit-making corporation this is the most important of all forms of regulation; and if it can or must submit to regulation of this sort it will scarcely be heard to complain of any other. So, too, if the public may regulate railway corporations, it goes without saying that it may control all lesser ones, including canals, turnpikes, street railways, bridges, ferries, water companies, gas companies, electric light and power companies, telegraphs, telephones, irrigation companies, storage companies, levee companies, and the like. They are created by the state and endowed with franchises and powers which are alike, in a greater or less measure, of public use. They have devoted their property in some degree to public service, for which they demand compensation. Some of them, if not all, may exercise the sovereign power of eminent domain, solely because the property taken by them is for public use. Power and duty are correlative. Public service must follow public franchises and powers, and the public has the right to demand that the service shall be good and the charges reasonable. This can be effected only through the

medium of the legislature and the courts, and through these the public has the right to require that justice shall be done to all.

The substance of our brief paper on this interesting subject may be thus summarized: (1) the objects of the regulation of *quasi*-public corporations are the protection of public safety in life and property, and the prevention of public imposition and extortion; (2) all federal and state statutes and municipal ordinances, reasonable in terms and operation, and obviously tending to promote these objects and effect these results, are valid; (3) all those in which public regulation is a manifest pretext for inter-meddling with corporate affairs, or which result in the confiscation of corporate property are null and void.

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