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## Control of Public Utilities by the State

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is likely that most suits to foreclose tax certificates which have been brought in the past were instituted with a view to obtaining the costs, attorney fees, etc. But the statute was amended in 1899, so as to limit the costs which could be recovered in such a case to the amount of the face of the certificate or certificates embraced in such action. A somewhat novel question has frequently arisen as to whether the defendant in such a case could make an effective redemption of the tax certificates without paying the costs incurred up to the time of such redemption. I have not been able to find any decision which squarely settles this point.

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## CONTROL OF PUBLIC UTILITIES BY THE STATE

It is the layman's opinion that corporations have the controlling hand over the people of the community. This conclusion of the people is very easily corrected when we study public utility service from the legal standpoint.

It is not necessary for a public utility to be a corporation,<sup>1</sup> but for the better control and regulation by the state, it would be more advantageous if persons engaged in a public service performed such service under the form of corporations.

In the famous Dartmouth College case,<sup>2</sup> the Supreme Court of the United States laid down the hard and fast rule that a charter given by the state to incorporators is a contract and that the state could not change the same for it would then be breaching the terms of the contract made with the incorporators.

Wisconsin, in order to have control of corporations, realized that it could not follow the rule laid down by Chief Justice Marshall in the Dartmouth College case, and in order to avoid the effect of this decision, adopted in its Constitution the reserve power clause, which gives the state the right to amend, alter, or revoke the charter of any corporation granted by the state after the adoption of the Constitution.<sup>3</sup>

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1. Wisconsin Statutes, Sec. 1797 M-1.

2. 4 Wheaton 518.

3. Wis. Const., Art. XI, Sec. 1.

"Public service corporation" is a term used to include all transportation and transmission companies, all gas, electric light, heat and power companies, and all persons authorized to exercise the right of eminent domain, or to use or occupy any street, alley, or public highway, whether along, over or under the same, in a manner not permitted to the general public.<sup>4</sup>

Where the use of the street by a street railway company for street railway purposes is a joint use with the public, neither the company nor the public has a right to endanger the use thereof by the other.<sup>5</sup>

"Such parts of the common law as are now in force in the Territory of Wisconsin, not inconsistent with this Constitution, shall be, and continue part of the law of this state until altered or suspended by the legislature."<sup>6</sup> The legislature must use clear and express words in a statute to show its intention to abrogate the common law in this state. The common law cannot be changed by mere inferences from the words used.

Under the common law a state has power to regulate the rates of public utilities so that there will be a fair return on the money invested in the service. This power is granted to the legislature by the common law. We have adopted another method; our legislature has declared that all rates shall be reasonable, and has delegated to the Railroad Commission the duty to fix and declare what are reasonable rates.<sup>7</sup> The Railroad Commission of Wisconsin is vested with jurisdiction to supervise and regulate every public utility in the state, and to do all things necessary and convenient in the exercise of such power and jurisdiction.<sup>8</sup>

A traction company can make a contract fixing rates of charges for a given service, provided it violates no law and is not inimical to public policy; but by so doing it cannot prevent the legislature from exercising its governmental function of regulating rates.<sup>9</sup>

Sections 1797-1 to 1797-37, Revised Statutes of 1913, were adopted to secure non-discrimination, and just and reasonable rates for all services rendered by railroads as common carriers of persons and property within this state.<sup>10</sup>

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4. *Townsend vs. Norfolk, etc. R. Co.*, 105 Va. 22, 115 Am. St. Rep. 842.

5. *Fisher vs. Waupaca Electric L. & R. Co.*, 124 N. W. 1068.

6. Wis. Const. XIV, Section 13.

7. Sec. 1797 M-3, Wis. Stats.

8. Sec. 1797 M-2, Wis. Stats.

9. 145 Wis. 13.

10. 159 Wis. 130.

## CONTROL OF PUBLIC UTILITIES

A perpetual grant to a railroad company to regulate rates is impossible, for the reason that the legislature cannot perpetually grant, give or barter an attribute of sovereign power.<sup>11</sup> From the decisions in the railroad cases and the express words of the statute we must draw the conclusion that the railroads' and other public utilities' rates must be fair and reasonable, and subject to the state's supervision on the question of the reasonableness of the same.

The inhabitants of a municipality have a voice in the controlling of street railways in their community, for while the state can grant a charter to a street railway corporation, it cannot give it a franchise to do business on certain designated streets of the city; the corporation must get such a franchise from the city itself.<sup>12</sup>

Private corporations and individuals can place their commodities upon the market and sell to whom they see fit at any price agreed upon; but the public service corporations must deal with all who can pay for their services, and must charge a uniform and reasonable price for the same. They must deal with all who comply with all reasonable conditions, and cannot discriminate against any person. The very nature of their calling requires them to furnish their service or commodity to all who apply.<sup>13</sup>

The Railroad Commission fixes rates which it thinks are reasonable, and the reasonableness of such order can be tested by either party in a proceeding before the Commission. The Commission's ruling can be reviewed in an action brought against it in the Circuit Court of Dane County, and from the decision of this Court an appeal may be taken to the Supreme Court of Wisconsin.

The State of Wisconsin would save money and time if the legislature would take away from the Commission the power to determine whether a rate is reasonable or not after the Commission has declared a certain fixed rate.

The power of the Commission should be limited to fixing rates; then let the parties go into the courts and test out the question of the reasonableness of such rates, without first appear-

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11. 159 Wis. 130-135.

12. Wisconsin Statutes, Sec. 1862.

13. Wisconsin Statutes, Sec. 1797 M-3.

ing before the Commission. This would save the time now taken to produce testimony and for the Commission to decide the question. All this would be saved, for in an action against the Commission in the court the same ground is again covered which was fought out before the Commission. The natural tendency of the Commission is to decide that the rate fixed by them is reasonable and just, and the matter is seldom finished until it has been threshed out before the court.

The better procedure after a rate is fixed would be to follow the common law remedies instead of instituting the present statutory proceedings before the Railroad Commission.

Corporations have rights which we must respect, for they are granted directly by the United States Constitution in the due process of law clause. They have a right to hold property and to deal freely with the same as individuals; the only reason which can be given for the control by the state of the use and regulation of the property of public service corporations is that they have certain privileges given for the purpose of their occupation which others do not enjoy, and hence they must surrender some of the rights and privileges given to the people generally.

The police power of the state is a sovereign power granted to each government as an inherent right, so that the government can maintain itself. The common use of police power is to protect property, health and public morals and to promote the public welfare.

Under this power the state can compel a railroad to use certain kinds of cars for the carriage of its passengers, and can compel boats to have certain protections against loss at sea, and otherwise. The cities have the same power as is given to the state, and use it to great advantage by requiring street car lines to extend their lines and run cars oftener, and by ordering the water works and gas companies to extend their mains further and give better service. The police power of a government is like the blacksmith's right arm, with which he swings the sledge and bends the iron into shape. In the same way the government can shape the control of public utilities to promote public welfare and to protect public property, health and morals.

## CONTROL OF PUBLIC UTILITIES

The general public has such an interest in the business of common carriers of passengers, such as railroads or street railways, that such business is properly the subject of regulation under the police power of the state<sup>14</sup> so far as such carriers are engaged in intrastate business;<sup>15</sup> this includes the right to license or tax such carriers.<sup>16</sup>

One engaging in the business of common carrier by automobile operated on the streets of the city and obtaining a license to use the public streets in the prosecution of his business is subject to the police power, and he holds his property and exercises his right subject to such regulations as the legislature may reasonably impose for the safety and convenience or welfare of the public.<sup>17</sup>

The state's power to tax corporations is the same as its power to tax individuals. The following property elements of corporations are subject to taxation:

- (1) The primary franchise, the right to be a corporation.
- (2) The secondary franchise, as the right to occupy streets by street railways.
- (3) The property, real and personal, tangible and intangible.
- (4) The capital stock authorized, subscribed or paid in.
- (5) Earnings, gross or net profits.
- (6) Shares of stock owned by the stockholders.

It is possible that all of these elements might be taxed at one time, though it would be what is in some sense multiple taxation. The matter is statutory, and there is but little uniformity in the statutes or the decisions of the various states upon the subject of corporate taxation.

Money raised by taxation must be for the benefit of the public, but if money raised by taxation is given to a private individual to be used by him as he pleases, or for some purpose really not public, as to build himself a house, this amounts to a perversion of the taxing power. A tax thus exacted for a purely private purpose takes property without due process of law. "To lay with one hand the power of the government on the property of a

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14. *Bowlin vs. Lyon*, 56 Am. R. 355.

15. *Huston vs. Des Moines*, 156 N. W. 883.

16. *Public Service Common Second Dist. vs. Booth*, 156 N. Y. S. 140.

17. *Huston vs. Des Moines*, 156 N. W. 883,  
See 1797-62-63-64 Wis. Stat.

citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes is none the less a robbery because it is done under the form of law and is called taxation."<sup>18</sup>

In Wisconsin it seems that the state cannot aid by taxation public service corporations or persons engaged in public utilities. Our public utilities and public service corporations are run by private individuals who receive therefrom a profitable return. The tax thus levied to help such industries would be for a private purpose. So it was held in a case where a tax was levied for the purpose of aiding a hotel, which is required by law to furnish accommodations to all who apply.<sup>19</sup>

In order to promote the city's or the state's welfare, grants of land were given to railroad companies for the purpose of inducing them to enter the localities making the generous donations. Our legislature has seen fit to discourage this practice of donating to railroads land for their tracks.

In Wisconsin it was held that a county could not levy a tax for the purpose of making donations to a private corporation engaged in a public service as a railroad, and the court went further and said that the county could not levy a tax for the purpose of buying stock in a corporation, but could buy its bonds.<sup>20</sup> Chief Justice Dixon said, "For, if such incidental public benefits or advantages alone will support a tax for donations of money to persons or corporations engaged in one kind of private business, then they certainly must in another, and if it should be shown, as it undoubtedly can in numerous towns and places, that the establishment of mills and manufactories would be greatly beneficial to the inhabitants, far more so, perhaps, than the building of a railroad, then it would follow that the people of such towns and places could be taxed for the purpose of giving money to persons or corporations proposing to build such mills and manufactories. This last is a proposition upon which no one will insist, and we are clearly convinced that that contended for in this case is equally untenable."

Where the state lays burdens it also grants privileges to counterbalance the burden placed upon the service. The privilege of eminent domain is not given merely as an act of compensation

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18. *Loan Association vs. Topeka*, 20 Wall. 655, 664.

19. *Weeks vs. Milwaukee*, 34 Wis. 242.

20. 22 Wis. 167.

to public callings, but rather as a necessity. The power of eminent domain is a governmental privilege by which private property is taken for public use with just compensation to the owner thereof.

We have learned that the state cannot tax to raise money for a private person, but only for a public use. If it cannot do this constitutionally, then it surely cannot grant a purely private person or corporation the right of eminent domain.<sup>21</sup> It cannot say at what price a man must sell his service, unless his business is affected with a public interest.<sup>22</sup>

The work of public callings would be greatly hindered and interfered with if the right of eminent domain were not given to them, for there are some people who cannot realize that every time they fight against the installation or expansion of a public calling they are interfering with one of the powers which the state has; for another definition of a public calling is, "That calling which the state can lawfully engage in, but permits individuals or corporations to engage in, is a public calling."

Let us take an example of what would happen if a railroad did not have the power of eminent domain. Suppose that some of the land owners would not sell their property or allow the railroad to cross their land; the company would be required to build a track around the property of the owners who refused to sell. This would greatly inconvenience travel and make it dangerous for the public to travel upon such tracks, and would interfere with speed of the railroads, delay traffic and result in other great mischief to the public.

The right of eminent domain does not include the right to take any property the corporation sees fit; it must be for a public use. The company must go into the courts to seek its right to condemn property before it can use it for its own purposes.

A street railway company must exercise the power of eminent domain when it runs interurban cars over the city street tracks unless it has a franchise to furnish interurban service. The courts have held that the laying of tracks and running of street railway cars is a proper street use, and no extra burden upon the street, for it is simply making travel easier and more convenient for the public. But to run *interurban* cars upon the same tracks is subjecting the abutting land owners to an additional street burden, for which the company is liable and must make compensation.

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21. *Richard vs. Wolf*, 82 Iowa 358.

22. *Munn vs. Illinois*, 94 U. S. 113.



If a street railway company wants to enter into interurban service it must get a franchise for that purpose and also condemn the land in the streets over which it runs. Any abutting land owner can go into a court of equity and have an injunction issued to restrain the improper use of such highway.

In *Schuster vs. Milwaukee Electric Railway & Light Company*,<sup>23</sup> the court said that in order for a street railway franchised by the city to run city service only and later engage in interurban service, it must receive a franchise from the city permitting it to furnish such interurban service, and after it has received its franchise it must then condemn the land of the abutting owners and compensate them for the same. An abutting owner is not estopped by mere delay short of the statutory period in setting up his claim.

A railroad company operating under a charter from the State of Wisconsin, and doing an interstate business, is subject to a three-fold supervision: its charter, by which the State gives it the right to be a corporation, is subject to State control; its intra-state business is under the supervision of the Wisconsin Railroad Commission; and its interstate business is regulated by the Interstate Commerce Commission.

The state protects the employees of all public utilities by the Workmen's Compensation Act, but this protection is further extended to the employees of interstate railroads by the Federal Employment Act. These statutes show that the state wants to protect all its citizens who are engaged in labor and to offer them compensation for their injuries while in such occupation. The Federal Act offers protection to those engaged in interstate commerce where there is a conflict between the laws of different states.

The right to interfere with, regulate, and even acquire, the property of public service corporations cannot be doubted. Ranged as individuals before the law, their rights are no greater than those of the individual owner of property. But being possessed, as they are, of a public utility, they are not only frequently, but must necessarily be constantly, subject to the will of the sovereign state as the representative of the people. The mere fact that they have been allowed to develop and enjoy a public

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23. 142 Wis. 578.

utility through neglect or otherwise of the governing body, gives them no right that may not be regulated. Nor does the fact that their ingenuity, genius, and foresight have created a public service where none theretofore existed, in any way alter the situation. In all cases the fact remains and the test is: are the rights of the people in the service so great as to render it necessary to their welfare? If so, it may be controlled, regulated, even at times appropriated, if the public good so demands.

FRED W. AHLGRIMM, '18.

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## LAW OF THE AIR

The problem of the aeroplane is probably as old as that of perpetual motion. From the time of the traditional Darius Greene with his home-made flying machine, which landed with such disastrous results upon the barnyard manure pile, until the advent of the Wright brothers, men worked and labored in vain upon such a dream. Today, the aeroplane is a vivid reality.

Thousands of aeroplanes now fly over the various battle grounds of Europe, under the most adverse circumstances, prying into the secrets of the enemy, bringing back tell-tale photographs and maps, which show the topography of the country and the position and strength of the enemy. Renowned war critics have already ventured to predict that the aeroplane will be a major factor in winning this war.

Even as this is written, the service flag of the Marquette College of Law has more than a hundred stars, a considerable portion of which represent men in the aeroplane corps. This great world war will not last forever. Eventually peace will come. Thousands of birdmen now engaged in the business of war will turn their talents and machines to the new conditions of peace, — namely, commerce, transportation, aerial mail service, and pleasure.

There will be accidents and property destruction through negligence, and the aggrieved parties will seek their remedies through the courts of law. Then a most perplexing question will arise, — "What is the law?"