Can a State More Effectively Regulate Corporations Under the Reserve Clause of its Constitution than Under its Police Power?

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CAN A STATE MORE EFFECTIVELY REGULATE CORPORATIONS UNDER THE RESERVE CLAUSE OF ITS CONSTITUTION THAN UNDER ITS POLICE POWER?

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When the Railroad Regulation Act and Public Utilities Acts were passed by our legislature, they were deemed to have been passed under the police power of the state; but as the acts have undergone keen attacks in the courts by eminent counsel for the railroads and utilities, it would seem a new idea has arisen for their effective administration with reference to the power under which the acts were passed. The Supreme Court of Wisconsin seems finally, although with some hesitation, to have bottomed the act on the reserve power of the Constitution.¹

THE RESERVE POWER

The reserve power of the Constitution is found in Section 1, Article XI, and is as follows:

Corporations without banking powers or privileges may be formed under general laws but shall not be created by special act, except for municipal purposes, and in cases where in the judgment of the legislature, the objects of the corporation cannot be obtained under general laws. The general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage.

The legislature has enacted in statutory form also a reserve clause in the following language:

Section 1768. The legislature may at any time limit or restrict the powers of any corporation organized under any law and, for just cause annul the same and prescribe such mode as may be necessary for the settlement of its affairs.

Six years after the adoption of our State Constitution the case of Madison, W. & M. P. Co. vs. Reynolds, 3 Wis., 287, and the

¹ Manitowoc vs. Manitowoc N. T. Co., 145 Wis., 131.
LaCrosse vs. LaCrosse G. & E. Co., 145. Wis., 408.
Kenosha vs. Kenosha Home Telephone Co., 149 Wis., 338.
Superior W. L. & P. Co. vs. Superior, 174 Wis., 257.
case of *Pratt vs. Brown*, 3 Wis., 603, came before the Supreme Court and the scope and effect of Section I, Article XI, were discussed and it was in effect declared that all rights and franchises of a corporation are received, held, and exercised solely upon the faith of the sovereign grantor and during its pleasure. In the case of *Attorney-General vs. Railroad Companies*, 35 Wis., 425, the court says: (Page 573)

The object and historical origin of the provision in the Constitution of this state are matters known to all professional men. They were, through this paramount authority, to retain and secure to the state full power and control over corporate franchises, rights and privileges which it might grant—a power and control which the state was in a measure deprived of by the federal constitution, as that instrument had been interpreted in the celebrated Dartmouth College case. With the grant of exemption from taxation was annexed the reservation that such grant might be altered or revoked by the legislature at any time after its passage. It was a qualification of the grant, and the subsequent exercise of the reserved power cannot be regarded as an act impairing the obligation of contracts. And the court sustained the exercise of the reserved right.

This has been the unanimous opinion and decision of this court, always, in all cases before it. And, by force of the constitutional power reserved and of the uniform construction and application of it, the rule in Dartmouth College Case, as applied to corporations, never had place in this state, never was the law here. The state emancipated itself from the thraldom of that decision, in the act of becoming a state; and corporations since created here have never been above the law of the land.

Subject to this reserved right, and under the rule in the Dartmouth College Case, charters of private corporations are contracts, but contracts which the state may alter or determine at pleasure. Contracts of that character are not unknown in ordinary private dealings; and such we hold to be the sound and safe rule of public policy. It is so in England. It is so under the federal government itself. The material property and rights of corporations should be inviolate, as they are here; but it comports with the dignity and safety of the state that the franchises of corporations should be subject to the power which grants them, that corporations should exist as the subordinates of the state, which is their creator, *durante bene placito*.

Justice Timlin in his concurring opinion in *Milwaukee Electric Railway & Light Company vs. Railroad Commission*, 153 Wis., 192, gave this question considerable study and in his opinion, at page 623, reviews not only the Wisconsin Constitutional provisions with reference to the reserve clause but also those of other states.

Justice Barnes in *Manitowoc vs. Manitowoc N. T. Company*,
had the reserve clause under consideration and on page 28 says:

Furthermore, the right conferred on the Railroad Company to use the public streets, under Section 1862 or Section 1863, becomes one of the corporate franchises of the corporation to which it is granted, the City acting as a delegated agent of the State in granting it. (Citing cases.) This being so, the reserve power of amendment or repeal, contained in Section 1, Article XI, Constitution, would seem to empower the legislature to modify the conditions on which such franchise was given, as well as to repeal or amend the franchise itself.

Justice Owen in Superior W. L. & P. Co. vs. Superior, 174 Wis., 257, page 284, says:

We believe that when it was included in the Constitution it was placed there for the purpose of reserving to the people of this State full power and control over corporations of its creation; that the purpose to be accomplished thereby was to reserve to the State those sovereign rights of which the states had been shorn by the decision in the Dartmouth College case, and that any construction which limits the scope of this power to a narrower field amounts to a judicial deprivation of sovereign rights which the people believe they had preserved to themselves by the terms of Section 1, Article XI, of the Constitution.

This construction implies no denial of vested or property rights in valuable privileges granted to a corporation, essentially connected with its franchise and necessary to its business, which conduced to an acceptance of its charter and an organization under it. Such privileges are property. But in this state they are not unencumbered property. They are encumbered with the right of the state to alter or repeal them. The title of the grantee is necessarily qualified because that is the only title the state can give. The constitutional provision under consideration deprived the legislature of the power of granting an unqualified right. The grantee takes them subject to this power of the state to alter or repeal. The corporation which invests its money in reliance upon such privileges does so in the faith that the power will not be unjustly or unreasonably exercised. And here it may be said that the power is not one to be used for the purposes of spoilation or oppression. It is a power which the state is permitted to invoke only for the promotion and the protection of public interests. That is the purpose for which it was reserved. It is not to be used arbitrarily or capriciously or for the purpose of punishment or retaliation. That has been decided by this court (citing cases). It is an instrument of justice, not a weapon of discipline.

Thus the courts in Wisconsin have sought to make effective the reserve power in our Constitution and especially with reference to the regulation of railroads and public utilities. But instead
of the broad powers announced by Justice Timlin that “all rights and franchises of a corporation are received, held, and exercised solely upon the faith of the sovereign grantor and during its pleasure,” it has been somewhat limited by the narrow construction given to the reserve power by Justice Owen limiting it only “for the promotion and the protection of public interests” and not at the pleasure of the legislature as heretofore announced.

THE POLICE POWER

When one becomes a member of a society he necessarily parts with some right or privileges which as an individual he might retain. A body politic is a social contract by which the whole people covenant with each other, and each citizen with the whole people, that all shall be governed by certain laws for the common good. This does not confer on the whole people power to control rights exclusively private. It does authorize the establishment of laws requiring each citizen to so conduct, and so use, his own property as not to unnecessarily injure another. This is the very essence of government and has its foundation in the maxim, “So use your own as not to injure another’s property.” From this source came the police powers, which are nothing more or less than the powers of government inherent in every sovereignty; that is, the power to govern men and things—the power to make laws under these powers. The government regulates the conduct of its citizens, one toward another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. Justice Marshall in the case of State vs. Redmon, 134 Wis., 89, 105, defined police power as follows:

What is this police power about which so much is said and which is so commonly and generally speaking, legitimately invoked as a justification for legislation regulating the affairs of life? . . . Many attempts have been made to define police power. There is good reason to say that the multitude of such attempts with the many variations in phrasing the matter have not added very much to the simple expression, that it is the power to make all laws which, in contemplation of the Constitution, promotes the general welfare. That both defines the power and states the limitations upon its exercise, it being understood that it is a judicial function to determine the proper subject to be dealt with, and that it is a legislative function, primarily, to determine the manner of dealing therewith, but ultimately a judicial one to determine whether such manner of dealing so passes the boundaries of reason as to overstep some constitutional limitation, expressed or implied. . . . It is a great power, having
more to do with the well being of society than any other, yet one which, if exercised autocratically, would supercede some of the most cherished principles of constitutional freedom.

In other words, the police power of a state embraces regulations to promote the public convenience, or the general prosperity, as well as regulations designed to promote the general health, public morals, or public safety. It is not confined to the suppression of what is offensive, disorderly or unsanitary, but extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people.

When private property is affected with a public interest it ceases under the common law to be *juris privati* only. This has been the doctrine of the common law for several hundred years. Property becomes clothed with a public interest when used in a manner to make it of public consequence and to affect the community at large. When one devotes his property to a use in which the public has an interest he grants to the public an interest in that use, and must submit to be controlled by the public for the common good.

The following callings have been classed as being in a special sense public occupations: (Anciently—in common law) The business of carriers, ferrymen, wharfingers and millers, largely because such kinds of businesses were monopolistic in their nature. The following more modern occupations and callings have been considered and treated as public occupations: Railroads, telegraph companies, telephone companies, turnpike companies, canal companies, warehouse companies (formed for general accommodation of the public), stockyard companies, water, light, heat and power companies, river improvement companies, banking and insurance companies, and companies formed for the gathering and distribution of news of public quotations.

It will readily be seen that the public must patronize companies of the kinds and classes stated, and that there can be no such thing as general and effective competition in such lines of business.

These principles were brought out forcibly before the Supreme Court of the United States in the case of *Munn vs. Illinois*, 94 U. S. 113, decided in 1876, where the validity of an act of the legislature of Illinois fixing the maximum grain warehouse charges was involved.

It was under this doctrine of the police power that the railroad
rate regulation act and the public utility acts were passed to secure to the public adequate service at reasonable rates, and it should be noted that these acts were directed only against corporations which were engaged in a public calling and devoting their property to a public use, and it was not until the later decisions of our court that these laws were deemed to have been passed under the reserve power in our constitution.

Reserve Power Compared with Police Power

It will be seen that under the police power it is only when a corporation is affected with a public interest, and when its property is used in a manner to make it of public consequence and to affect the community at large, that it comes within the police power of the state, while the reserve power may be exercised against any corporation whether public or private. How far the limitation placed upon it by Justice Owen, in Superior W. L. & P. Co. vs. Superior, 174 Wis., 257, will prevent its exercise as against private corporations, when he says, "It is a power which the State is permitted to invoke only for the promotion and the protection of public interests," remains for the future to solve. Justice Timlin said, "All rights and franchises of a corporation are received, held and exercised solely upon the faith of the sovereign grantor and during its pleasure." Chief Justice Ryan said, "They were through this paramount authority to retain and secure to the State full power and control over corporate franchises, rights and privileges, which it might grant . . . ." and corporations since created here have never been above the law of the land." The writer of this article, and the then City Attorney, in their brief, filed with the Supreme Court in the Milwaukee Electric Railway & Light Co. vs. Railroad Commission of Wisconsin, 153 Wis., 592, 602, took the position that the legislature has power to regulate appellant’s rate of fare as a valid exercise of the power reserved to it under Section 1, Article 10, of the Constitution. Justice Timlin was the only judge who at all agreed with this view, as is evidenced by his concurring opinion in the case.

If the State can at its pleasure alter, repeal or amend a corporate charter, this right cannot be limited only to public service corporations.

Were we to classify the four essentials of corporate existence
they would be placed in accordance with their importance in the following order:

1. Immortality, or the right of perpetual succession.
2. The right to contract, which includes the right to enter into contracts, to charge for services and collect tolls.
3. The right to hold property.
4. The right to sue or be sued.2

What is there to prevent the State Legislature from enacting a law limiting the number of years a private corporation as well as a public corporation may remain in existence, or limiting its right to contract only reasonably, thus limiting its right to contract generally, or limiting the amount of property which a corporation might hold, and do this under its reserve power, to alter, amend or repeal any corporate power heretofore granted? It would seem that the State's control over corporations is far greater under its reserve power than under its police power.

2 Brief submitted on behalf of City of Milwaukee by Daniel W. Hoan, City Attorney, and Max Schoetz, Jr., of Counsel, in Milwaukee Ry. & L. Co. vs. Railroad Commission, January term, 1913, case No. 116.