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Repository Citation
J. Barnes, Government Regulation of Public Service Corporations, 3 Marq. L. Rev. 65 (1919).
Available at: http://scholarship.law.marquette.edu/mulr/vol3/iss2/5

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GOVERNMENT REGULATION OF PUBLIC SERVICE CORPORATIONS

A lecture delivered by the Hon. J. Barnes, formerly Chairman, Railroad Rate Commission of Wisconsin, Justice of the Supreme Court of Wisconsin, and General Counsel of the Northwestern Mutual Life Insurance Company, before the Marquette College of Law.

A few years ago when the matter of legislative regulation of certain public service corporations was a live issue, and the subject of much ill tempered and acrimonious discussion, many intelligent and well meaning persons considered the proposed legislation not only to be novel but to be extremely unfair in its character. The manufacturer, the merchant, the farmer, and others pursuing different callings, might dispose of what they had to sell and purchase what they desired to buy in the most inviting markets. The people would not tolerate any interference with these universally recognized rights, and if our law makers were so rash as to attempt to do so, the courts stood as a barrier between the constitutional rights of the citizens on the one side and legislative lawlessness on the other. And the inquiry naturally arose in the minds of thinking men—why should railroads and other public service corporations be sought out as an exception? Why should the rates which such corporations might charge for their services, the character of the service they should furnish, and a multitude of other things, be fixed by the law making power or through legislative agencies? In other words, by what right did the state propose to assume practical control over properties which it did not own, to the exclusion of the recognized owners of such properties? I say practical control advisedly, for when the state dictates to a railway company how many trains it shall run, where it shall run them, where they must stop, what it must furnish in the way of depot and freight house accommodations, how it shall keep up its track equipment and road bed, what safety devices and appliances it must adopt or install, and finally, what charge it shall exact for the service it renders, the state is in all essential particulars assuming a control over the railway property paramount to that exercised by the corporation owning it.
While such legislation was viewed by many as being strange and unfair, a half dozen years ago, in the early seventies, when the states of Wisconsin, Illinois, Iowa and Minnesota enacted more or less drastic laws regulating common carriers, such acts were looked upon by many as confiscatory and revolutionary. The railroad was the one great overwhelming cause of the rapid development of this country. It annihilated distance to a great extent, and transported inland commerce at a tithe of what it would cost to transport it in any other manner except by the use of waterways, and they were comparatively scarce. The demand for railway building was greater than the means that were forthcoming to meet it. Cities, towns and counties voted liberal aids to induce railroad construction. Farmers mortgaged their farms to supply like aid, and, unfortunately, in many instances lost them. With this present persistent desire for the building of these great highways, the builders naturally dictated their own terms with those with whom they had to deal. They met with little in the way of check or hindrance from the state. They were builders rather than dreamers or students of history or of ancient precedents or principles of law that apparently had become obsolete. They regarded the properties which they owned as their own private belongings, and considered their right as fixed to treat them as a farmer might treat his farm or a merchant his stock of goods. Any one who was dissatisfied with a rate or a service might withhold his patronage. Aside from this he was popularly thought to be remediless. It is little wonder that the legislation referred to was looked upon as a result of a political cataclysm, the finished product of demagogues bent on substituting chaos for law and order.

No class of persons have more to fear and less to hope from the subversion of law and a reign of anarchy than have the owners of public service corporations. From the standpoint of self interest they should be the last to set the laws at defiance, because upon their enforcement and observance depend not only the stability but the very existence of their properties.

Yet, upon the passage of Chapter 273, Laws of Wisconsin for 1874, familiarly known as the Potter Law, we find the president of one of the two large railway corporations, then as now doing business in the state, addressing a letter to our governor, in which he stated that the company which he represented would ignore the law and refuse to comply with its terms. This railway president was not a bad citizen. He simply thought, in com-
mon with many other honest and fair-minded men, that the act in question violated the principles of our fundamental laws as found in our state and national constitutions, and when the courts failed to agree with him, he undoubtedly thought that they, too, had listened not wisely but too well to the voice of the proletariat.

From whence does the state derive its right to say to corporations and individuals engaged in certain callings that it will regulate their business in its essential details, even to fixing the price which may be charged for a given service, while it may not do so as to other corporations and individuals engaged in other callings? While the application of the principle involved to latter day public service corporations is new because the corporations themselves are of recent origin, the principle itself was established in remote ages and in another country. However much the Anglo-Saxons might wish to enslave others, they were a liberty loving people when what they conceived to be their own rights were involved. For those they were ready to fight, and to die if necessary. The struggle of the feudal barons and great hereditary lords against the encroachments of the crown which secured the *magna charta* had not resulted in victory for the latter when the commonalty began to assert its rights and to initiate what seemed to be a well nigh hopeless contest. After the barons were vanquished, the powers of the crown were gradually increased, and the successive sovereigns were usually endeavoring to augment these powers. On the one side was wealth, education, organization, and a military force. On the other, unorganized numbers lacking most of the essentials necessary to the waging of a successful fight. But an intermittent fight was kept up which resulted in one king losing his crown and another his head, and even so strong, so popular and so arbitrary a sovereign as Elizabeth was obliged at times to heed the voice of the common people.

From the early times the law recognized a distinction between public and private callings. The reason for that distinction is as cogent today as it was five hundred years ago.

The individual engaged in a purely private business may sell what he has to offer to whomsoever he chooses and at whatever price he is able to secure, or he may refuse to sell at all if the price offered is not satisfactory. He is neither subject to regulation nor to control by the government, unless perchance he is dealing in some article which affects the morals or health of the community, in which event, the state, in the exercise of its police
power, may impose such restraints as the welfare of the body politic demands.

The individual engaged in a public business, on the contrary, generally speaking, must furnish adequate service at a reasonable charge to all who apply, without discrimination, and the state may, within reasonable limitations, prescribe what the service shall be and how much may be charged therefor.

A cursory reference to some of the early acts of the parliament of Great Britain would induce the belief that regulation was extended quite as much to private as to public business, and at times the line of cleavage was not closely drawn. But most of the acts passed were intended to reach some form of monopoly, and the original distinction between a public and a private business depended largely upon whether such business was monopolistic in its nature or one which invited and in fact furnished free competition. In view of this distinction, it will readily be seen that what might be a public calling in one generation, might, owing to changed conditions, be a private one in another, and vice versa.

Monopolies that existed during the formative period of the common law were of various kinds. There were the trade guilds which monopolized certain industries. None but its members might carry on the craft or trade to which the particular guild was devoted within the limits of the city wherein the organization was established, or within its suburbs. Trading with outsiders whose wares were not guaranteed by guild regulations was strictly prohibited on the theoretical ground that such guarantee was an evidence of honest workmanship, and was necessary to prevent deceptions and frauds. It is easy to see that such a system was well calculated to lead to extortionate charges and exactions, and to breed grave abuses.

Then there were the merchant guilds, whose privileges were obtained from the king and embodied in town charters. These guilds usually had the exclusive right to carry on trade in the city and its suburbs and to buy and sell freely without the payment of tolls or customs. Their power to force up prices, if unrestrained, was limited only by the ability of the customer to pay the price demanded.

The crown had the undisputed prerogative from time immemorial to grant exclusive privileges to favored individuals to deal in certain articles of commerce within an area that was large or small, as the sovereign willed. The monopolies established in
this way were extremely obnoxious at times to the people. There were certain other lines of business regarded as being public and subject to regulation, which were monopolistic only in a restricted sense, if at all. These included occupations which required the investment of considerable sums of money for those times and callings which invited public patronage and depended upon it for their support. Inn keepers, millers and bakers furnish examples of this class. These general classes of monopolies were what might be termed artificial ones. The power which created them might destroy them, and there was little excuse for their existence except as they might enhance the revenues of the king or pay his obligations.

There was still another class of monopolies which might not inaptly be termed natural ones. In this class is included those business enterprises which from their nature will not admit of free competition. The right or franchise to enable the individual to embark in such a business was granted by the king. At the present time the enterprises falling within this class are much more numerous than formerly. For example, we have railways, street railroads, telephone and telegraph lines, public warehouses, water works and lighting plants, pipe lines, turnpike companies, toll bridges, plants erected for the sale and distribution of heat and power, and others that might be named. Ancient examples of persons falling within this class are wharf and dock proprietors, draymen, owners of stage coach lines, ferrymen, and common carriers generally.

We find as early as the year 1266 a statute (51 Hen. 3) regulating the price of bread and ale according to the price of wheat and barley, and prohibiting what in modern parlance would be called "cornering the market" in these commodities. This statute in terms refers to still earlier ones on the same subject.

In 1349 another statute (23 Ed. 3) was passed regulating the wages of laborers, and requiring butchers, fishmongers, refactors, inn-keepers, brewers, bakers, poulterers, and other sellers of foods, to dispose of their commodities at a reasonable price.

In 1359 (43 Ed. 3), and again in 1441 (19 Hen. 6), the fees which doctors might charge were regulated.

So, coming down through the years prior to the American Revolution, and without going into wearisome details, we find that tailors were obliged by law to serve all who desired to be served and who were able to pay, and at reasonable prices (G. B. 22 Ed., IV 49, pl. 15). Blacksmiths were placed in a like cate-
gory (Kelinay 50, pl. 4); and so were inn-keepers (G. B. 46, Ed. III, 19 pl. 19; G. B. 2, Ed. IV, 13 pl. 9). Carpenters, however, were not subject to control or regulation, presumably because this occupation was not controlled by a guild, and there was sufficient competition to secure reasonable rates of charge (Kelinay 50, pl. 4).

During the reign of Henry VII, the price of long bows was regulated by statute (3 Hen. VII), and during that of Henry VIII, the fares of Thames watermen (6 Hen. VIII); the prices of books (25 Hen. VIII), and the prices of beer barrels (35 Hen. VIII) were regulated. During the reign of Charles II (16 & 17 Car. II) the price of coal in London was regulated, and during that of William and Mary (3 W. & M.) the price of land carriage was regulated by parliament.

In Jackson vs. Rodgers, 2 Show., 328, decided in 1684, the plaintiff was permitted to recover damages of the defendant, who was a common carrier, from London to Lymmington, because of the refusal of the defendant to carry the merchandise which was offered to him with the requisite fee for the carriage. The chief justice said that the action was maintainable "as well as it is against an inn-keeper for refusing guests, or smith on the road who refuses to shoe my horse, being tendered satisfaction for the same."

It would appear to us at the present day that many of the callings regulated were purely private, and that the distinction between a public and a private calling was not recognized. If we place ourselves as nearly as we may in mediaeval times, a different situation is presented. Such commodities as salt, barley, flour and like articles can now be readily obtained. There is an abundance of competition to regulate prices. We have plenty of blacksmiths to shoe our horses, and plenty of physicians to minister to us. In mediaeval England the situation was entirely different. The roads for the most part were impassable for vehicles and goods had to be transported by pack horses. The forests were infested with robbers so that travel was unsafe. Giving to one person or even to one guild an exclusive right to sell a necessary article of food or clothing within a considerable radius, of necessity compelled those living in proximity to the place where the business was carried on to patronize it. The public generally was compelled to do business with the owner of the monopoly, and was in at least as bad a situation as the inhabitants of the
city of Milwaukee would be if there was but a single grocery store within a radius of fifty miles of the city.

Many of the English statutes regulating the prices at which certain commodities might be sold were repealed before our early colonial days because the necessity that prompted their enactment no longer existed. Conditions, in some of the colonies at least, were such as to prompt the passage of like acts. So in Massachusetts the price of bread was regulated in 1646; the price of beer in 1645; the price of labor in 1630; in 1635 merchants and shopkeepers were forbidden to charge excessive prices, and the revised laws of the colony in 1649 show that the rate of interest charge for the use of money, and the rates of wharfage, ferriage and mill tolls had been regulated. New York regulated wharfage rates in 1734.

Up to the time of the separation with Great Britain, it had never been seriously doubted that the state had the undoubted right to regulate the business of those engaged in public callings, and a long line of statutes and court decisions extending through more than five centuries show how frequently the right had been asserted. At all times the business of the common carrier was regarded as public. In the evolution of the law certain elastic principles were established for determining whether a certain calling was private or public.

When one becomes a member of a society he necessarily parts with some rights or privileges which as an individual he might retain. A body politic is a social compact by which the whole people covenant with each citizen 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 to say, the power to govern men and things—the power to make laws. Under these powers the government regulates the conduct of its citizens, one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good.

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.

Omitting the kinds of business which are subject to regulation and control in the interests of peace, safety, health or morals, and which involve only police power in the narrower sense of the term, the following callings have been classed as being in a special sense public occupations: anciently at common law the business of carriers, ferrymen, wharfingers and millers; largely because such kinds of business were naturally monopolistic in their nature. Because of the relation in which they stand to the public, and because of their similarity to the kinds of business mentioned, 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 and of market 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. Indeed, competition in many of the callings enumerated is not only impossible, but would be inadvisable. If several hundred telegraph companies were doing the work of the two principal companies now in existence, the cost of transmission of messages would be multiplied and the delays in transmission very greatly enhanced. The same is true of telephone companies and of water and light companies, and it is to a very great extent true of railway companies. It is an economic waste to build two public utilities where one can properly take care of the business offered. It means the making of two original investments where one only is necessary; it means large maintenance charges for each plant, and a large amount of general office expenses, as well as interest on capital invested, all of which must ultimately be paid by the consumer. There can be no such thing as competition between railways companies that is
general and effective. While most of the larger shipping centers and many of the smaller ones have more than one line of railroad, there are and always will be a great majority of our shipping points that are and will be dependent upon one line of railroad, and it does not follow by any means that because a certain place happens to have two or more lines of railroad that it has anything like competition in the matter of rates of charge. The number of railroads must necessarily be limited; they must necessarily make the same charge for transporting the same class of merchandise between common points or the one making the lowest rate would secure all of the business. This situation necessarily results in an agreement express or implied as to what the rates between competitive points shall be, and when two or three persons are making an agreement upon such a matter, it is practically as easy to agree on a high rate of charge as it is to agree on a lower one.

Aside from the reasons which were anciently given for declaring certain kinds of business public rather than private, there exist additional reasons why many of the kinds of latter day callings enumerated should be held to be public rather than private. The occupations named are of such a character that as to many of them the right of eminent domain must necessarily be conferred in order to enable them to carry on their business. This is true of railroads, canals, turnpikes, and some others. As to nearly all of such occupations it is necessary to have a franchise or grant from the state, or from some duly authorized political subdivision thereof, to enable a person or corporation to embark in the business in the first instance. This is true of light and power companies, as well as some others. Railroads have uniformly been held to be public highways, and there is this additional reason why the business which they carry on is of a public character. Under our Federal Constitution, the right of eminent domain can be conferred only for a public purpose. Private property may not be taken for a private use, and most of the state constitutions, including our own, have a similar provision.

The statutes and the common law of England in existence at the time of the American Revolution became the common law of this country. The same right to regulate the business of those engaged in public callings that had existed in England before the Revolution was vested in the people of this country after the Revolution, and, unless the people in some way deprived themselves of this very important right, it necessarily exists at the
present time. The only way in which the people could surrender this right would be by constitutional provision. All powers not delegated to the Federal government by the Federal Constitution were expressly reserved to the states. By the Federal Constitution, Congress was empowered to regulate commerce between the several states, as well as with foreign nations and with the Indian tribes. Consequently, any calling that involves interstate commerce naturally falls within Federal jurisdiction. The only provisions of the Federal Constitution which it has been seriously claimed could by any possibility deprive the state and the nation of the right to control business of a public character are found in the provision of the Fifth Amendment, which prohibits any person from being deprived of life, liberty or property without due process of law, and in the Fourteenth Amendment, which provides that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

One other subject might be mentioned in passing. The Supreme Court of the United States, in the Dartmouth College case, decided that a franchise granted to a corporation constituted a contract between the corporation on the one side and the public on the other, and that such contract could not thereafter be modified or changed without the consent of the corporation, because otherwise such attempted amendment would impair the obligation of the contract. This decision was made at a time when the number of corporations was comparatively small and their business was unimportant. If made a half or three-quarters of a century later it might have worked untold mischief. Coming when it did, it enabled the new states admitted into the union to either omit this particular provision from their constitutions, or to reserve the right, as the state of Wisconsin did in its constitution, to amend, alter or repeal any corporate franchise granted. It enabled the states already admitted into the union and, having such a constitutional provision, to reserve in the act granting the franchise the right to amend, alter or repeal it. As a matter of protection, most of the states, including our own, expressly reserves such right in grants of this character. It might be said that there is no provision in the Federal Constitution prohibiting the passage of a law impairing the obligation of a contract and that where such provisions exist, they are found in the state constitutions.

It was strenuously contended that the fixing of rates of charge
for a public service corporation deprived it of its property without
due process of law, and denied to such corporations the equal
protection of the laws which was guaranteed by the Constitution.
It was not claimed that there was any deprivation of the title to
the property or of the right to use it, but it was argued that the
power to fix rates might well work a practical confiscation of the
property, by depriving it of any earning power for its owners,
and thus precluding them from obtaining any beneficial use in
the same. In answer to this it was said that when the owners
of such properties devoted them to a public use, they granted to
the public an interest therein to the extent of permitting the public
to regulate the rates of charge that should be made, and that the
Constitution did not prohibit the incidental hardships that might
arise from the fixing of rates, and applied only to an actual taking
of the physical properties. In the two leading cases which first
passed upon this point, *Atty. Gen. vs. Ry. Co.'s.*, 35 Wis. 425,
decided in 1874, and *Munn vs. Illinois*, 94 U. S. 113, decided in
1876, it was held that the legislature was the sole judge of what
was a reasonable rate of charge, and that the courts would not
treat the question of the reasonableness or unreasonableness of
a legislative made rate as being one for judicial cognizance. The
Federal Supreme Court, however, refused to stand by the doc-
trine of the Munn case to its full extent, and subsequently held
that the power of regulation was not without limit; that it did
not confer power to destroy or confiscate; that a state, under the
guise of regulating rates, could not compel a railway company to
carry persons or property without reward, and neither could it do
what virtually amounted to taking private property for a public
use without just compensation or without due process of law.
*Stone vs. Farmer L. & T. Co.*, 116 U. S. 307. This doctrine
was affirmed and amplified in the later cases of *C. M. & St. P.
362; *Smythe vs. Ames*, 169 U. S. 466, and many other cases.
These decisions lay down the principle that a legislative made
tariff of rates that will not admit of the carrier earning such com-
pensation as under all the circumstances is just to it and to the
public, would deprive such carrier of its property without due
process of law and deny to it the equal protection of the laws,
and would therefore be repugnant to the Fourteenth Amendment
to the Constitution of the United States. It will thus be seen
that the original contention of the carriers finally prevailed in part, not to the extent of prohibiting the states or Congress from regulating rates at all, but to the extent of holding that in every instance where a rate was fixed, a judicial question was presented for the courts to determine, that is, was the Constitution violated in fixing the particular rate by making it so low as to be confiscatory?

It has been uniformly held that a corporation is a person within the meaning of the fifth and fourteenth amendments to the Federal Constitution. *Covington & L. T. R. Co. vs. Sandford,* 164 U. S. 578, and cases cited. As such, they are entitled to an equal remedy in the laws and to equality before the law and to equal protection in the courts. A variety of laws have been challenged as unconstitutional because violative of these constitutional rights. Should rates of railways be regulated while other public service corporations are not interfered with in this way? Different rules governing their liability to employees from those applicable to other corporations have been promulgated by legislative action from time to time. The hours of labor of certain classes of their employees have likewise been fixed, and many other acts have been passed which apply solely to railway companies. Some of these acts have been sustained by the courts, while others have been set aside. Different circumstances and conditions often call for legislation which applies only to such circumstances and conditions, which fact has led the courts to say that there is an exception to the broad rule of equality before the law, and that such exception recognizes the right of the legislature to make certain classifications. Such classifications, however, must be based upon substantial distinctions, must be germane to the purpose, cannot rest on existing circumstances only, and cannot preclude additions to those included in the class, and must include all within the class. So it is held permissible to prescribe the number of hours that train dispatchers and train operators may be required to work, and the number of hours rest that must be given them after they have been on duty the prescribed time. This classification is justified on the ground that the public safety requires that the particular duties which these employees are called upon to perform shall not be entrusted to employees who are physically and mentally exhausted and therefore not in a condition to perform them properly.

Likewise acts which preclude the carrier from defeating a recovery by a trainman in an action for personal injury because
the injury was due to the negligence of a fellow servant, are upheld because of the peculiar hazard of the employment. So, too, it is held that, as to the regulation of rates, railways are in a class by themselves, and that they are not denied the equal protection of the laws because the amount of their charges is regulated, while the rates of some public service corporations may not be the subject of regulation. One railroad might not be singled out to the exclusion of all others that would naturally fall within the general class to which it belonged, and neither could a single road be excluded from a class to which it properly belonged. But even railways, for certain purposes, may be divided into different classes, and different requirements may be exacted from one class from those exacted from another. As an example of this,—for many years we had the railroads of Wisconsin divided into different classes for the purpose of taxation, and also for the purpose of limiting the charge that could lawfully be exacted for the carriage of passengers. Railway managers played the part of opportunists rather than of far-sighted business men in seeking to place the companies they represented beyond public control or regulation. Had they accomplished what they sought, I believe they would have succeeded in eliminating privately owned railroads from the United States.

The difficulties in the way of effective legislation of railways are numerous as well as serious. It goes without saying that no legislative body can prescribe a reasonable tariff of rates for the carriers subject to its jurisdiction. To make such a tariff requires an exhaustive and intelligent investigation of the needs of the community and of economic conditions therein. Numerous classifications of freight must be made and different rates of charge exacted for the carriage of each class. These classifications are justifiable not only from the standpoint of the utilitarian, but also from the standpoint of equity and justice. To make these adjustments so as to permit certain kinds of traffic to move at all, and at the same time so as not to impose excessive burdens on other classes, is a work that requires the exercise of a large amount of research, intelligence and practical common sense. I might digress and give concrete examples which would more clearly illustrate what I mean, but I do not care to go into any general discussion of this phase of railroad regulation, further than to say that our legislatures as now constituted have neither the time nor the machinery at their command to make rates intelligently; and if such rates are made at all, they must be made through some
legislative agency, rather than by the legislature itself. The futility of state legislatures endeavoring to prescribe rates led to the creation of commissions to do this work, and the attempt to confer the power of regulation on such commissions raised a much more serious constitutional question than was originally involved in the cases wherein the right of the state to legislate directly on the subject was attacked. Our government is divided into executive, legislative and judicial departments. Each department is a separate, independent and co-ordinate arm of the government, and the courts have been averse to so construe laws as to permit one department to trench upon rights that naturally and legally belong to another. The courts likewise have been averse to permitting any delegation of the powers conferred on these departments to subordinate bodies or tribunals, where such delegation was not by express provision or by reasonable implication authorized by some provision of the constitution. The making of a rate has always been held to be a legislative function. While at times various courts have given relief to suitors who sought to recover unreasonable and exorbitant charges exacted by carriers, they have always refused to fix or determine what would be a reasonable rate of charge to make for the future, on the ground that such function is legislative and not judicial. The legislature may say what the rule of conduct shall be in reference to a given subject from and after the date on which the law is made. Courts sit to decide controversies, and in such controversies determine what the law was when the controversy arose. To illustrate this point, I might call your attention to one or two cases decided in Wisconsin which are typical of what the courts hold in other states. In 1891 the Wisconsin Legislature authorized the Commissioner of Insurance to prepare a standard fire insurance policy, and provided that, after the date named, no insurance company doing business within the state should issue or use any other form of contract, and further provided that no provision other or different from that contained in the form prepared should be attached to any contract of insurance issued by any company doing business in the state. The act further provided a penalty for failure to comply with its terms. The court held that the matter of prescribing the form of an insurance policy was legislative; that such power could not be delegated to any other officer or tribunal, and that the law was unconstitutional and void. Dowling vs. Lancashire, 92 Wis. 63.

By another act, the State Board of Health was authorized to
make such regulations as it might in its judgment deem necessary for the protection of the people from contagious diseases, and the board was also empowered to designate what were contagious diseases dangerous to public health. Under this statute, a regulation was promulgated prohibiting any child from attending public school who had not been successfully vaccinated. The court, in passing upon the validity of this law, held that the Board of Health was an administrative body which had no legislative power, and that none could be constitutionally delegated to it; that the adoption of the regulation in question was an attempt on the part of the board to exercise legislative power, and that the act of the board in adopting the regulation was void, as was likewise the attempt of the legislature to confer such power upon the board. State ex rel. Adams vs. Burdge, 95 Wis. 391.

Numerous other cases might be cited from our own court and from other courts where the holding was of like tenor and effect, but these two will serve for purposes of illustration. By way of attack on the right of the legislature to create commissions and confer upon them the power to make rates, it has been urged with much force, and, it must be confessed, with a great deal of logic and reason to support the contention, that legislative powers were being conferred. As far as my research goes, the Supreme Court of Illinois was the only one that met the question squarely. While recognizing the intent of the makers of its Constitution, to keep the functions of the three departments of government separate and distinct, and to prohibit the delegation of legislative powers, it said, in substance and in effect at least, that no set of men were wise enough to lay down a set of rules to meet the exigencies of the future for all time to come; that the growth of the population, the multitude of new questions that were arising, and the utter impossibility of the various departments of government being able to deal intelligently with the questions that naturally fell within their jurisdiction, were such that the necessities of the situation and the public weal demanded that a liberal construction of the provisions of the Constitution be adopted. Because of the necessities of the case, and not because the court entertained any serious doubt that legislative power was being delegated, the court sustained the act creating a railroad and warehouse commission for the state of Illinois.

Nearly every other court in the country which has passed upon the question has approached it from a somewhat different angle. In substance they say that no legislative power is delegated to
commissions of this character. The legislature may, by a general law, provide that the rates of charge for the carriage of persons and property exacted by common carrier shall be fair and reasonable, and may make it unlawful for any common carrier to demand or receive compensation for service in excess of what is reasonable. Having made these general declarations, the courts further say that it is entirely competent for the legislature to appoint some subordinate body or tribunal to ascertain the fact as to whether or not the law has been violated. So, while a legislature might not create a railroad commission and authorize such commission to establish reasonable rates of charge for common carriers, it may, in the first instance, itself prohibit the exaction of unreasonable or discriminatory charges, and may empower the commission to investigate the facts and determine whether a given charge violates the law, and to what extent it must be reduced so that it will cease to be unlawful. Many laws are passed that become operative only upon the ascertainment of some fact, or upon compliance with some condition by some body or officer. It must be confessed, however, that the logic of the decisions referred to, while plausible, is subject to grave doubt.

In any event, it is a settled principle of the jurisprudence of our country that the power to fix rates may be delegated under general provisions such as have been alluded to. * * * Were it decided otherwise, but two alternatives were left to the people, government ownership of railways or constitutional amendments granting the power of regulation. The matter of amending the federal constitution is so difficult, and there was so little hope from that source, that government ownership would probably be the only practical relief from the situation. Until regulation is given a fair trial and is found wanting, the government should not embark in an enterprise of this kind and magnitude.