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GOVERNMENT CONTROL OF TRANSPORTATION CHARGES.—PART I.

1. *Introduction, Historical and General.*

The American democracy is self-distrustful. It was in the beginning, and continues increasingly so. The only department of the government in which conservative citizens seem to have enduring confidence, the judicial, is the least democratic, the least in contact with the popular will. Our written constitutions gave to the courts at the start the control and definition of the legislative power. Nowadays, more and more, the judiciary are looked to for the exercise of that control, for the restriction to the utmost of the legislative assemblies, whose acts are anticipated chiefly with dread.

This American idiosyncracy, of throwing upon the courts so large a measure of responsibility for the conduct of things in general, gives to those bodies an appalling amount of work, especially in the department of law with which this paper deals. In case of those enterprises considered to be of a public nature, and so subject to regulation by the legislative

power, the courts find it necessary to make minute business investigations to find whether the legislature has infringed some constitutional right, and at times there are curious results. For example, United States District Judge Seaman, in the Milwaukee Street-car Case, according to press accounts, has decided, as a matter of law, that the four-cent fares required by governmental action will of necessity reduce the income of the Milwaukee company so as to amount to the taking of property without due process. At the same time the financial statements of companies in Detroit and Toronto, cities similar to Milwaukee in area and population, show large profits on considerably smaller fares.[1] The same law or ordinance might then be constitutional for Detroit and unconstitutional for Milwaukee.

The United States Supreme Court has already given us, in the Nebraska Freight Rate Case,[2] a decision under which a law may be unconstitutional this year, but constitutional next year, by operation only of changing economic conditions brought about by lapse of time. This decision, under the conditions prevailing at the time the case went to court, would almost certainly render unconstitutional any law whatever regulating railroad charges, in thirty-eight states of the Union, including every state likely to pass such a law.[3]

In view of cases like these a grave doubt arises whether such legislative regulation of charges is a practicable thing. Back of this is the further question, always mooted but never decided, whether interference with contracts of individuals or corporations really belongs among the powers of government. To take the more natural order, the inquiries to be made in this discussion are two: (1) Has a government the right to dictate the terms of the contracts of its subjects? And (2), if so, can it practicably enforce its dictation?

In this introductory part, a short view of the *laissez faire* doctrine, with a sketch of early government price regulation,

[1] *The Outlook* for June 18, 1898.

[2] Smyth *v.* Ames, 169 U. S. 466, 18 Sup. Ct. 418 (1898).

[3] See article by Mr. H. P. Robinson, Editor of the Railway Age, in the *North American Review* for April, 1898.

in general, will lead up to the first of the before mentioned inquiries, and will prepare the way for a narrowing of the question to transportation charges.

The advocates of *laissez faire* presented their policy as pre-eminently a policy for the future. As time goes by, they said, the supposed need for governmental interference will disappear. People will become more self-reliant, and will learn to do by private enterprise the things which now wait on government initiative. John Stuart Mill found the only possible justification for a tariff in the establishment of "infant industries" in new countries. Herbert Spencer excused past extension of governing functions by the imperfect civilization of those times: "In the primitive man, and in man but little civilized, there does not exist the nature required for extensive voluntary co-operations. Efforts willingly united with those of others for a common advantage imply, if the undertaking is large, a perseverance he does not possess. Moreover, where the benefits to be achieved are distant and unfamiliar, as are many for which men nowadays combine, there needs a strength of constructive imagination not to be found in the minds of the uncivilized. The implication is that, during long stages of social evolution, there needs, for the management of all matters but the simplest, a governmental power great in degree and wide in range, with a correlative faith in it and obedience to it. And hence the fact that, only little by little, can voluntary co-operation replace compulsory co-operation and rightly bring about a correlative decrease of faith in governmental ability."[1]

Presumably, Mr. Spencer here refers to the construction of pyramids, canals, temples, etc., by ancient nations, acting through their governments. The inference that might be drawn, however, that voluntary associations were not numerous or powerful in the early civilizations, seems subject to a little modification. Voluntary commercial associations or guilds are known to be of great antiquity. The first city governments are supposed to have been their outcome; for ex-

[1] Social Statics. Abridged and revised by Herbert Spencer. Appleton's Edition of 1892, pp. 414 and 415.

ample, those of the Hanseatic League certainly were. The *Eranoi* in Greece, the *Collegia* of Rome, the *Arti Majori* of Florence, the Twelve Great Companies of London, are all evidences that private action, even in antiquity and in the Middle Ages, though rare and impotent compared with modern enterprise, was far more common than that of the government. The charters which the companies obtained were, in the first instance, merely confirmations of customs they had already exercised of their own accord; but later, in the increasing importance of the Crown, they were regarded as special grants of the King, and so subject completely to his control. Accordingly, the London Company, the Plymouth Company, the East India Company and all the English colonial corporations enjoyed their powers directly under the Crown, were considered as exercising the royal prerogative, and seemed to be merely the agents of the government. The King could do as he liked with his creatures, and, consequently, few disputes as to the powers of corporations came into the courts. [1]

So corporation law, as we know it to-day, is almost wholly a modern product—not because there were no voluntary associations at the beginning of the common law, but because they speedily came to be either themselves political corporations, as in the case of the towns, or the servants and creatures of political corporations, as in the case of the great colonial trading companies. It is safe to say that many times more voluntary combinations have been organized in the half century since Spencer's Social Statistics was first published, than in all time before. Has the result been that anticipated by the learned philosopher? Have governments more and more withdrawn themselves from interference with industry

[1] Religious corporations are hereleft out of account. The zeal for Mother Church furnished the "perseverance" and "imagination" required for such bodies by Mr. Spencer. Their unrestrained energies, resulting in the ownership by them at one time of over one-third of the land of England, and in the consequent mortmain laws and confiscation of the monasteries, furnished a striking instance of the principal characteristic of a corporation—perpetual succession—and of how the momentum of power inevitably drew to it the attention and interference of the state.

and with contracts, as men in their private capacity have shown themselves able to accomplish greater and greater results? Or have the power and energy of these combinations produced the very opposite effect to that expected by the *laissez faire* philosophers?

Judge Caldwell, dissenting, in *Hopkins* v. *Oxley Stave Company*,[1] declares ironically: "What each individual member of a labor organization may lawfully do, acting singly, becomes an unlawful conspiracy when done by them collectively. Singly they may boycott; collectively they cannot. The individual boycott is lawful, because it can accomplish little or nothing; the collective boycott is unlawful, because it might accomplish something."

This statement contains, perhaps, more truth than was intended by the learned judge. The tremendous power exerted by associations is exactly what makes them dangerous and to be feared, exactly what gives the public an "interest" in them and draws to them the attention of the law. And this is true not merely with reference to labor organizations.

Herbert Spencer (I quote continually from him as the ablest representative of his school) said, in 1850, after running over many possible opportunities for government interference, "the hours of labour too—what must be done about these? Having acceded to the petition of the factory workers, ought we not to entertain that of the journeymen bakers? And if that of the journeymen bakers, why not, as Mr. Cobden asks, consider the cases of the glassblowers, the night men, the iron founders, the Sheffield knife grinders, and, indeed, all other classes, including the hardworked M. P.'s themselves? And when employment has been provided and the hours of labour fixed, and trade regulations settled, we must decide how far the state ought to look after peoples' minds and morals and health. There is this education question: having satisfied the prevalent wish for government schools with tax-paid teachers, and adopted Mr. Ewart's plan for town libraries and museums, should we not canvass the supplementary

[1] 83 Fed. 912, 931 (1897).

proposition to have national lecturers? And if this proposal is assented to, would it not be well to carry out the scheme of Sir David Brewster, who desired to have men 'ordained by the state to the undivided functions of science'—'an intellectual priesthood'—'to develop the glorious truths which time and space embosom?'"[1] And so on in the same strain. It is interesting to observe that almost all of these satiric questions have since been answered in the affirmative, or at least are favorably considered, even to that concerning the scientific men, who would be developed and supported by the proposed National University at Washington. It is interesting, too, to note that the "police function," which alone Spencer and his school asserted to be that of the state, and by which they meant the barest "protection" of individual members of society against aggression, has come in the United States to cover almost any action desired by the "expediency philosopher." The "police power" apparently now affords an excuse for any legislation considered by legislatures and courts to be for the public advantage, intellectually, morally, physically, or economically. "Between the one extreme of entire non-interference and the other extreme in which every citizen is to be transformed into a grown-up baby, there lie innumerable stopping places; and he who would have the state do more than protect, is required to say where he means to draw the line, and to give us reasons why it must be just there and nowhere else?"[2]

This demand on its face seems reasonable and to inquire whether such a line can be drawn is one purpose of the present discussion.

Mr. Arthur T. Hadley, in an article on "Legal Theories of Price Regulation,"[3] remarks: "The common law . . . recognized the public commercial end, which the Roman law did not."

Mr. Hadley's language might lead to the inference that the *Common Law*, the law of England, as distinguished from that

[1] Social Statics. 1892 Ed. of Appleton, pp. 129, 130.
[2] Social Statics, p. 131.
[3] I Yale Review, 56, May, 1892.

of the continent, was especially careful of the interests of trade and regarded high prices as contrary to public policy, because discouraging to a healthy commerce.

Mr. James Parsons seems to adopt a very different view. Feudal ideas revolving about the central notion of landed property dominated the early common law. Man was considered a mere *locum tenens*, and land the chief person, so to speak.[1] The laws of commerce were exotic, being introduced into the English law, under the name of the Law Merchant, from the civil law. The Law Merchant brought in the conception of Partnership, whereupon "a new form was required to express the new undertaking and embody the partner's contract. But the courts preferred to take what they had at hand.[2]

"They took the old formula, made it answer for the occasion without introducing any variation, without adapting it to the new subject matter. The joint obligation was the uncouth form, which was turned to account and held to express the firm contract. This kind of obligation never did correspond to any business transaction, and, in place of it, the continental countries, *which were foremost in trade* (italics mine), have, from the earliest times, recognized a commercial contract. The commercial contract has at last become, with us, the real exponent of the partner's status."[3] And again he says: "Look at the common law, and see how it frustrates at every turn the design of the partners."[4] As this design was trade, it is easy to see what Mr. Parsons thinks of the care for commerce supposed to have been exercised by the old common law.

The commercial greatness of the Anglo-Saxon in nations,

[1] Principles of Partnership, p. 8, *et passim*.

[2] This preference of the courts for "what they have on hand" appears strikingly in later phases of commercial law, *e. g.*, that of corporations. See "Law Relating to Corporate Liability for Acts of Promoters," 36 AM. LAW REG. & REV. (N. S.) 545, by Malcolm Lloyd, Jr., for the struggle of the courts to apply their ready-made doctrines of ratification and "recovery for benefits conferred" to corporations.

[3] Principles of Partnership, p. 239.

[4] Page 242.

Mr. Parsons points out, has been in spite of the early jealousy of the common law, just as the immense counting-house transactions of the English have been accomplished, notwithstanding their bungling systems of weights and measures.

It may well be doubted, then, whether the feudal lords who ruled the common law had any very great love for trade as such. That occupation was mostly carried on by ex-villeins and their descendants who had bought charters of exemption from ordinary feudal services, and thus escaped the menial tasks their base birth would otherwise have compelled them to. Trading was considered but a shade lower than the labors of pure villeinage and became a matter of interest to the lord only when it directly attacked his pocket. As the common law at first dealt with the partnership not to encourage the trader, but simply for the protection of his creditor, so it treated the merchant as a mere convenience to his lordly customer. It is interesting to observe that the first statutes giving expression to this feeling of the common law, were enacted just after the Black Death, when the villeins generally were giving their masters great annoyance. The laws regulating prices seem to have been a part of the Statutes of Labourers, a part of the same endeavor to control a troublesome set of serfs, who, to the lords' astonishment, took the opportunity given them by the Black Death to manifest a little independence. "Quia magna pars populi et maxime operariorum et servientium nuper in pestilentia moriebatur," sadly runs the old Statute, "nonnulli, videntes necessitatem dominorum et paucitatem servientium, *servire noluerunt, nisi salaria reciperent excessiva*, et alii mendicare, malentes *in otio quam per laborem perquirere victum suum*"—"have refused to serve unless they receive excessive wages, and some preferring to beg at leisure rather than by labor to get their living," it was ordained: (Cap. I.) that "Every person able in body under the age of sixty years, not having to live on, being required, shall be bound to serve him that doth require him, or else committed to the gaol, until he find surety to serve;" (Cap. II.) "If a workman or servant depart from service before the time agreed upon, he shall be imprisoned;" (Cap. III.) "The old wages

and no more shall be given to servants." And in Cap. IV. it is said "Item quod carnifices . . . et omnes alii venditores victualium quorumcunque teneanter hujusmodi victualia vendere *propretio rationabili* . . . ita quod habeant hujusmodi venditores *moderatum lucrum et non excessivum*, etc.—"that butchers . . . and all other sellers of all victuals whatsoever shall be bound to sell the same victuals for a reasonable price . . . so that they may have a *moderate gain* and *not excessive*.[1]

The Act of 37 Edw. III. cap. V.[2] provided against ingrossing "merchandise to inhance the price of them," "for the great mischiefs, which have happened . . . of that the merchants, called grocers, do ingross all manner of merchandise vendible; and suddenly do enhance the price of such merchandise within the realm, putting to sale by covin and ordinance made betwixt them, called the fraternity and guild of merchants." . . .

It is impossible to read these statutes without coming to the conclusion that regulation of prices was not for the purpose of fostering commerce, any more than the restriction of apparel or the fixing of wages which went in the same act. These regulations were all a part of the attempt of the governing landed aristocracy to prescribe to the lower classes the conduct of their lives. It follows, that little argument from those "antique rudimentary times," from those conditions existing in the breaking up of the feudal system, can be used

[1] See 2 Gen. Stats., p. 162.

[2] Statute of Laborers, 29 Edw. III. A. D. 1349, 2 Stats. at Large, pp. 26–28. This act and many others of a similar nature passed later were repealed by 5 Eliz. c. 4, A. D. 1562. The Statute of Eliz. did not fix an arbitrary rate of wages, but provided for a commission in each shire (like some of our railway commissions), the members of which "conferring together, respecting the plenty or scarcity of the time and other circumstances necessarily to be considered" should "limit, rate, and appoint the wages." The commissions were to be composed of the justices of the peace. See 6 Gen. Stats., p. 164. Artificers were compellable to work in hay-time and harvest. Anyone *giving* more wages than assessed by the justices was to be imprisoned ten days without bail and fined five pounds, and any one *taking* such excessive wages was to suffer imprisonment for twenty-one days. The act was repealed 1875, 38 & 39 Vic. ch. 86, sec. 17.

either for or against legislative action at the present day. The attempt has been made on both sides, however. On the part of governmental control it has been said that "the common law[1] theory (was) that the price of a commodity is a public matter," being "based on the assumption that the public as a whole has an interest in price, . . . in the price of everything sold in the markets of the nation."[2] From this we are led to infer that price regulation has nothing in it opposed to Anglo-Saxon traditions and that it should be easy to adopt a policy which appealed so strongly to our fathers.

On the other hand, Mr. Albert Stickney,[3] after reproducing most of the English statutes, says: "These statutes are quoted at some length, for two purposes; the one is, to show how thorough and complete was the experience already had under the English law prior to our separation from the mother country, in attempts to control trade and commerce and especially prices, by statute; the other is, to show the magnitude and intricacy of the undertaking which lies before legislators of the present day if they enter on that line of legislation. Utterly hopeless, and utterly fruitless, in anything save annoyance, all such legislation always has been, *and so far as we can form a judgment in the light of history*, always will be.

"It will appear, too, that the latest attempts in this country to control the so-called 'trusts' and 'monopolies' of to-day are on the same line with these statutes set forth."

It is rather difficult to form a "judgment in the light of history" when the present conditions are so different from those of "history." It is hard to argue from the failure of a small governing class to regulate every detail of the daily lives of their inferiors, at a time when combinations were rare and inefficient, when society was

[1] It is to be supposed that the learned author means the general consensus of feeling in the common law time, expressed both by decision and by statute.

[2] Mr. Wm. Draper Lewis in 32 AM. LAW REG. & REV. (N. S.), p. 10. See, also, 36 AM. LAW REG. & REV. (N. S.), p. 8.

[3] State Control of Commerce and Trade, p. 37, 1897.

scarcely organized industrially, and what Professor Cairnes calls "non-competing industrial groups" had not yet been developed by modern machinery. It may be noted, too, that Mr. Stickney lays small stress on those statutes about the success or failure of which there is dispute—for example, the shipping and navigation laws, which came after the turbulent times of feudalism.[1]

[1] This "navigation" legislation, which was just as much "interference" as the actual setting of prices, is nowadays considered by all, except the few remaining adherents of the Manchester school, to have been largely the cause of England's colonial greatness. The policy is still in part adhered to by Great Britain in her subsidies to steamship lines, in her gigantic naval operations and her Chamberlain colonial administration. If England had been ruled by philosophers like Mr. Spencer, it is doubtful whether she would ever have had dominion beyond her own borders. Mr. Spencer is never so sarcastic as when describing the conquest of a colony inhabited by natives whose natural rights to live in savagery, if they so choose, are being violated.

Mr. Stickney (State Control of Commerce and Trade, p. 98) also adduces, as examples of the futility of legislative attempts to interfere in private affairs, the statutes passed in New England and New York just after the Revolutionary War, designed to control the prices of commodities in the Continental currency. For example, the Massachusetts statute of 1777, "An Act to Prevent Monopoly and Oppression," declared "that the prices of all the articles produced in America hereinbefore enumerated . . . shall be taken and deemed to be the prices of such goods and articles in the town of Boston; and that the selectmen and the committees of the several towns in this state shall be and hereby are impowered to affix and settle in their respective towns what such articles and goods shall be sold for in their towns, respectively, according to the proportion the price such goods have borne in such towns with the price they have been at in the town of Boston, according to the ancient usage and custom of such towns." The act also provided that persons having necessaries for the army and navy, and refusing to sell them, thereby subjected their stores to be opened by warrant; and also that if any person had more of any article "than is necessary for the consumption of his own family and immediate dependents, and which he holds with an apparent design, in the judgment of the major part of the selectmen of the town where he lives or where such articles shall be, to sell, trade upon, and not for his own consumption as aforesaid, and shall refuse to sell and dispose of the same for the common currency of this state, or the United States of America, and at the prices affixed and settled by this act, or by the selectmen and committee in pursuance of it," a warrant should issue, at application of any needy person, "to open any store, warehouse or granary in which such article or articles may be," and the commodities thus obtained should be sold by the selectmen to

Per contra, neither can the attempt of a feudal oligarchy to enact sumptuary legislation be used as a precedent for a modern democracy.

We may admit that "legislation in England, after the mediæval days, gradually ceased to regulate the cropping of the fields, or dictate the ratio of cattle to acreage, or specify modes of manufacture and materials to be used, or fix wages and prices, or interfere with dresses and games (except where there was gambling), or put bounties and penalties on imports or exports, or prescribe men's beliefs, religious or political, or prevent them from combining as they pleased, or travelling where they liked. That is to say, throughout a large range of conduct, the right of the citizen to uncontrolled action has been made good against the pretensions of the state to control him."[1] We may admit all this, and yet refuse to acknowledge its application to circumstances essentially new. To do that would be to attempt "to derive permanent principles from transient phenomena."[2]

The reasons or justifications usually given for legislative or judicial intervention fall under three general heads.

(1.) The parties to the contract may be considered of a peculiarly public character, either: (a.) Because they are artificial persons created by the state; or (b.) Because, being natural persons, they have received from the state certain favors, as bounties or monopolies.

"such necessitous person, so much . . . as he stands in need of . . . at the price affixed as aforesaid."

Mr. Stickney argues, from the failure of these and like endeavors to legislate out of existence the evils of an inflated currency, the necessary failure of all efforts, under all circumstances, to control by legislation what Mr. Stickney calls "private employments."

The legal tender acts, passed at the same time as the others and for the same purpose, were also a dead letter. Mr. Stickney, writing before 1861, might have gone on to prove that, according to all experience, any legal tender act must have been a complete failure. There is little use in attempting to generalize from the exceptional examples afforded by times of war and economic distress.

[1] Herbert Spencer, "Man *v.* The State," p. 396.

[2] John B. Clark, "The Limits of Competition," II. Pol. S. Q., p. 45, 1887.

(2.) The subject matter of the contract may be asserted to be of an intrinsically public nature and so under public control. For example: (a.) In a sale the commodity sold may belong to the people at large; or (b.) In a contract of service, the thing to be done, the service, may be stamped with a peculiarly public character. The reasons under these heads alone have even the appearance of clear definition. Those under the third may be expressed in the all-comprehensive words "public policy"[1] or more at length:

(3.) The effect of the contract on the public interests, hygienically, morally or economically. Of course, the admission of so broad a reason practically means giving the legislatures a free hand, and the advocates of freedom of contract have been most earnest to deny the existence of the third rule.

They have opposed the extensions of the "police power" as the champions of personal liberty. Says one of them, "Well did the great Hungarian orator say that God has bestowed two supreme boons on man-celestial bliss hereafter and liberty on earth. Under the delusive pretence of helping us to the first, the fanatical votaries of interference would deprive us of the second."[2]

Having thus left ourselves in a measure free from at least the earliest and crudest part of "that codeless myriad of precedent, that wilderness of single instances,"[3] the common law, and from feudal legislation of the same period, either its

[1] It is strange that there should still be ambiguity in these terms. Mr. C. C. Bonney, of Chicago, as long ago as 1864, gave the following clear and conclusive definition: "Public policy is a universal rule of law, for the promotion of the right and the suppression of the wrong. It embraces in one complex rule, the conclusions of the *common sense of mankind.* It enters into every law and every contract, and exercises a controlling influence in their interpretation and application:" Bonney on Railway Carriers, p. 34.

Mr. Frederick N. Judson, of St. Louis (Address Am. Bar Assoc. 1891, 25 Am. L. Rev. 889), says: "It has been defined as the prevailing opinion as [to] what is for the public good. The public policy of one generation is not that of another." These attempts at definition are rather comprehensive than precise, but, perhaps, are as "definitive" as the nature of the case will allow.

[2] The Interference Theory of Government. By Chas. A. Bristed, 1867.

[3] Tennyson, Aylmer's Field.

original enactment or its subsequent repeal, we shall be ready to examine the reasons for and against government regulation and restriction of the right to contract.

It is not proposed to discuss here that portion of the "police power," now a synonym for general legislative authority, which guards the public health and morals. For purposes of this discussion only the economic side will be regarded. The grounds usually given may then be diagrammed as follows:

1. Public Character of Parties.
    a. Artificial Persons.
    b. Natural Persons Under Special Governmental Favor.
2. Public Subject Matter of Contract.
    a. Sale of Public Commodity.
    b. Contract of Public Service.
3. Public Effect of Contract, in
    a. Creation of Monopoly or
    b. Injury of Trade (including "oppression of third persons") or
    c. Rise of Prices.

Roy Wilson White.

(To be continued.)