

## GOVERNMENT CONTROL OF TRANSPORTATION CHARGES.—PART II.

### *The Right to Interfere.*

#### A. The Attitude of the Courts in the "Due Process" and "Pursuit" Cases.

In taking up the first of our two inquiries, "Has a government the right to dictate the terms of the contracts of its subjects," we encounter a problem peculiarly American, in that here the question is judicial rather than legislative, and involves a discussion of the *power* to pass any proposed law, as well as the *policy* of doing so. The American people, before the Revolution, had received a striking lesson of the impolicy of arbitrary exercise of authority by a general legislative body. So the Constitution was ratified only on the understanding that a "Bill of Rights" should be added, to limit the power of Congress. In the Civil War and Reconstruction periods another lesson was learned of the danger of arbitrary action by local legislatures. So the Fourteenth Amendment, limiting state legislative power, became a part of the Constitution, and a large proportion of the litigation in the Federal courts now arises under its provisions.<sup>1</sup>

Many state constitutions contain Bills of Rights which embody statements similar to that of the preamble to the Declaration of Independence, that among "inalienable rights" are "life, liberty and the pursuit of happiness"—or, as often expressed, "life, liberty, *property* and the pursuit of happiness"—and which sometimes also contain a reproduction of that clause in the Fourteenth Amendment which forbids deprivation of life, liberty or property "without due process of law." Under this general language it is very easy to declare unconstitutional almost any law which seems to the judiciary im-

<sup>1</sup> See "The Fourteenth Amendment," by W. D. Guthrie, p. 27, *et passim*.

politic, especially if the word "liberty" receives the definition given it by Chief Justice Sharswood—"absence of restraint, except by *equal, just and impartial laws.*"<sup>1</sup>

The result of this attitude is the "new canon of constitutional law, viz., *that a statute interfering with 'natural rights' must be shown to be authorized, not that it must be shown to be prohibited.*"<sup>2</sup>

The advocate of any scheme of constructive legislation has thus thrown upon him a double burden of proof. He must not only show a need that will be met by the proposed statute, must not only show that public policy calls for the law, but he must go farther and affirmatively prove, to the satisfaction of the judiciary, that the legislature has the enacting power. Such decisions as have upheld laws interfering with "natural rights" have admitted<sup>3</sup> a presumption, created by constitutional Bills of Rights, against the power to enact such laws, and have rebutted that presumption by calling in another, viz., that all constitutional restrictions leave untouched the "police power" of the state. This "police power," which alone can be exercised in abridgment of the "natural rights of man," is as shadowy and uncertain as are those rights themselves. No definition is possible. One can only say that it means *the power to pass laws*. It cannot mean laws of any particular kind, for statutes on every imaginable subject have been held to be within it.

It "is but another name for that authority which resides in every sovereignty to pass all laws for the internal regulation

<sup>1</sup> See 1 Sharswood's Blackstone, p. 127, n.; also 1 Lewis's Bl. p. 127. The latter editor adds to Sharswood's note, "Perhaps, however, liberty is not attained until, as under the Constitution, State and Federal, in the United States, there is a sphere of individual liberty of action which is protected from governmental interference, *i. e.*, the right to pursue any calling."

<sup>2</sup> Mr. Richard C. McMurtrie, in 32 AM. LAW REG. (N. S.) 1, 9, January, 1893.

<sup>3</sup> *E. g.* "That no general *power* resides in the legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or of services, or interfere with freedom of contracts, we cannot doubt:" Andrews, J., in *Peo. v. Budd*, 117 N. Y. 1, 15 (1889).

and government of the state, necessary for the public welfare;”<sup>1</sup> “nothing more nor less than the power of government inherent in every sovereignty to the extent of its dominions.”<sup>2</sup>

The limit of its field depends on the court before which the question comes. The dividing line between this “police power,” this general right of the legislature to pass the laws it deems best for the well-being of society, on the one hand, and on the other, the “inalienable natural rights,” the constitutional “free-born,” “Anglo-Saxon” right not to be bothered by laws, is drawn, in most instances, not from judicial but from economic considerations. The decision is apt to be, because the policy of the law under discussion does not appeal to the judges, because the “paternal theory of government is odious” to them, because they think the “happiness” of mankind will be best promoted by the least governmental interference.<sup>3</sup>

<sup>1</sup> *Peo. v. Budd*, 117 N. Y. 1, 14; 5 L. R. A. 559, 565 (1889), Andrews, J.

<sup>2</sup> Taney, C. J., in the License Cases, 5 How. 504, 583 (1847).

<sup>3</sup> The majority opinions in cases pronouncing “interference” laws unconstitutional, and the dissenting opinions in cases reaching an opposite result, are full of language showing this utter confusion of policy and power, of legislative and judicial functions. Gordon, J., in *Godcharles v. Wigeman*, 113 Pa. 431 (1886), a “Company Store” case, grows angry over the “insulting attempt to put the laborer under a legislative tutelage.” In *State v. Goodwill*, 33 W. Va. 179, 186 (1889), another case involving a “Truck Act,” Snyder, P., says the law “is a species of sumptuary legislation which has been universally condemned, as an attempt to degrade the intelligence, virtue and manhood of the American laborer and foist upon the people a paternal government of the most objectionable character, because it assumes that the employer is a knave and the laborer an imbecile.” It is refreshing to turn from this to the opinion of Lucas, P., *State v. Peel Splint Coal Co.*, 36 W. Va. 802, 838 (1892), a case virtually overruling the preceding. He says, “How far this act may be objectionable as being what the counsel call ‘paternal legislation’ I have not considered, deeming that a matter for the legislature, not for the courts.” In contrast are the words of Brannon, J., dissenting, at p. 856, “Vain would be the pursuit of happiness if the right of contract necessary to secure the bread of life and raiment and home be taken away.” Like this is the pathetic language of the New York Court of Appeals in pronouncing unconstitutional a law prohibiting the manufacture of tobacco in tenement house “sweat shops,” when it declaims against the iniquity of “forcing the cigarmaker from his home and its hallowed

A most striking indication of the widespread character of this belief in implied or general restrictions on legislative power, is found in the discussion in other states of the provision in the constitution of the State of Massachusetts, which empowers the legislature "to make, ordain and establish, all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same."<sup>1</sup> It is also declared in the first article that "all men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and

associations and beneficent influences:" Re Jacobs, 98 N. Y. 98, 113 (1885).

Mr. Justice Brewer is, perhaps, the most thoroughgoing individualist on the Supreme Bench, and never hesitates to display his philosophy of government in his judicial opinions. While a member of the Kansas court, he said, in a dissenting opinion (*State v. Nemaha County*, 7 Kans. 542, 554-5 (1871)), "The object of the constitution of a free government is to grant, not to withdraw, power. . . . The habit of regarding the legislature as *inherently omnipotent*, and looking at what express restrictions the constitution has placed upon its action, is dangerous, and tends to error. Rather, regarding first, those essential truths, those axioms of civil and religious liberty upon which all free governments are founded; and secondly, statements of principles in the Bill of Rights, upon which the governmental structure is reared, we may then properly inquire what powers the words of the constitution, the terms of the grant, convey." He approves (p. 557) the practice of declaring an act of the legislature void "*because it does not fall within the general grant of power to that body.*"

In his dissent, in *Budd v. New York*, 143 U. S. 517, 551 (1891), the learned justice avows how "odious" to him is the "paternal theory of government" and expresses his apprehension that "Looking Backward" may be "nearer than a dream." Again, dissenting, in *Brass v. Stoeser*, 153 U. S. 391, 410 (1894), he fears "that the country is rapidly traveling the road which leads to that point where all freedom of contract and conduct will be lost." In *Holden v. Hardy*, 169 U. S. 366 (1897), holding constitutional an eight-hour law for miners, Mr. Justice Brewer once more dissented, but delivered no opinion.

<sup>1</sup> Mass. Con. Pt. II, ch. 1, sec. 1, art. 4.

obtaining their safety and happiness." This seems to differ from corresponding articles of other constitutions only in that it speaks of "seeking" happiness instead of "pursuing" it. Nevertheless, the language first quoted has actually been considered to give the Massachusetts legislature an *extraordinary degree of power, and thus to explain decisions of the Massachusetts courts upholding laws impairing the freedom of contract!*<sup>1</sup> The implication being that these laws would be invalid in the absence of such general grant of power as that in the article cited. Such ideas go far to show what a preponderance of authority we have come to assign the judiciary in the United States.

We find, then, a general prejudice, judicial and lay, against the power to enact laws regulating contracts. The attempt to bring any specific statute within the "police power," which courts allow still resides in legislative bodies, to a greater or less degree according to the potency assigned in this or that locality to declarations of rights, and Fourteenth Amendments, entails most often a complete examination of the policy of the proposed law. In no other way can most courts determine the victory in the battle of Police Power against Natural Rights.

In the labored effort to find justifications for permitting the law-making branch of the government to do here, what it does in every other county of the globe, without judicial dispute, and as far as concerns the question of power, without the necessity of justification, many "speculative, if not fanciful reasons have been assigned."<sup>2</sup> These reasons, the speculative and fanciful, as well as the solid and substantial, are in a measure susceptible of classification. The rough outline given in the first article of this series will here be followed.<sup>3</sup>

<sup>1</sup> See *Ritchie v. Peo.*, 155 Ills. 98, 115 (1895), where Magruder, J., says of *Comm. v. Mfg. Co.*, 120 Mass. 385 ( ), "The decision referred to was evidently made in view of the large discretion so [*i. e.*, in the constitution] vested in the legislative branch of the government." See, also, Stimson's "Handbook of the Labor Laws of the United States," p. 6.

<sup>2</sup> *Peo. v. Budd*, 117 N. Y. 1, 25 (1889), Andrews, J.

<sup>3</sup> See the December (1898) number of this magazine.

B. Reasons that have been Advanced for Bringing any Specific "Interference" with Contracts within the "Police Power of the State," Granting an Implied Prohibition of such Legislation in General.

1. Public Character of Parties to Contract.

(a). Artificial Persons.

(b). Persons under Special Governmental Favor.

Transportation, interference with which is the principal subject of the present investigation, in modern times is chiefly carried on by corporations, and by corporations enjoying privileges, such as that of eminent domain, which would seem to render them peculiarly liable to state control. Transportation companies, then, would come under both of the sub-heads given above, and if the reasons thereby indicated are justified, if they are not "speculative and fanciful," inquiry as to governmental power over transportation contracts need go no farther.

(a). *Artificial Persons.*

First, as to the artificial character of the corporate personality. Since the Dartmouth College case all charters are granted subject to alteration, amendment or repeal. If a charter, as originally issued, expressly or impliedly allows the corporation to make such contracts in the course of its business as it may choose, does the reserved right to alter and amend of itself justify the state in taking from its creature the management of the business for which it was created? The idea that it does, seems to the writer the result of that metaphysical, strained conception of a corporation as *an actual personality*—to be sure, "invisible, intangible" and to be found "only in contemplation of law"—but still so real as to take from the consciences of its members all moral responsibility for its actions on the one hand, and on the other hand to suffer every sort of restriction, attack and deprivation, as though it were some strange enemy of the people—some sky-dropping Martian, or, rather, some too-cleverly fashioned Frankenstein—to be slain. If the government has no right to interfere with an individual, it certainly has no such right in case of a partnership, or a limited partnership, or a

joint stock company. Why is it different with the corporation, between which and the joint stock company in most cases only an arbitrary distinction of name exists? "Behind the artificial body created by the legislature stand the corporators, natural persons, who have united their means to accomplish an object beyond their individual resources, and who are as much entitled, under the guaranties of the Constitution, to be secured in the possession and use of their property thus held as before they had associated themselves together.<sup>1</sup>

Support has been given this theory, however, not only by numerous loose expressions in the transportation cases, but more specifically in at least one case in the Supreme Court of the United States,<sup>2</sup> a case involving governmental regulation of water rates. Waite, C. J., said (p. 352), "The Spring Valley Company is an artificial being, created by and under the authority of the legislature of California, . . . and, consequently, this company was, from the moment of its creation, subject to the legislative power of alteration, and, if deemed expedient, of absolute extinguishment as a corporate body . . . (p. 355). The question here is . . . between the state and one of its corporations as to what corporate privileges have been granted. The power to amend corporate charters is, no doubt, one that bad men may abuse, but when the amendments are within the scope of the power, the courts cannot interfere with the discretion of the legislatures that have been invested with the authority to make them." This language, doubtless, was applicable to the peculiar circumstances of that case, though it is noteworthy that the interference of the state was justified also on the ground of "public interest." But other cases, notably those dealing with laws regulating contracts of employment, have pushed the theory to its utmost.

In this line of cases stress is laid on the fact that no powers of contract or powers of any kind belong to the corporation

<sup>1</sup> Field, J., dissenting, in *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 371 (1884).

<sup>2</sup> *Spring Valley Water Works v. Schottler*, *supra*.

until conferred upon it by the state; that also, under the right of repeal, all capacities of every sort may be at once withdrawn, with or without reason assigned. How much more, it is urged, ought the state to have the power to *modify* those privileges which it alone has granted, and which it alone may take away.<sup>1</sup> But these cases have been disapproved by the latest expression of judicial opinion on the subject. The Supreme Court of Massachusetts,<sup>2</sup> when asked, "Is it within the constitutional power of the legislature to extend the application of the present law, relative to the weekly payment of wages by corporations, to private individuals and partnerships . . . ?" replied: "We know of no reason, derived from the Constitution of the Commonwealth or of the United States, why there must be a distinction made in respect to such legislation between corporations and persons engaged in manufacturing when both do the same kind of business." The court points out that the statutes in question *do not purport* to be passed for the purpose of restricting the *corporate powers* of corporations.

The apparent paradox in the statement that the state may arbitrarily, if you please, bring a corporation into being, and likewise deprive it of being, as it may not an individual—while yet the corporation, *during its life*, has substantially the same property and contract rights as the individuals who compose

<sup>1</sup> Mr. Justice Brewer, dissenting, in *Budd v. New York*, 143 U. S. 517, 552 (1892), says: "I believe . . . that government can prescribe compensation only when it grants a special privilege, as *in the creation of a corporation* (italics mine), etc." *Braceville Coal Co. v. Peo.*, 147 Ill. 66 (1893), pronounced unconstitutional an "interference" law applying to certain enumerated corporations, in part because the constitution of Illinois forbids amendment of corporate charters by special laws. *Shaffer v. Mining Co.*, 55 Md. 74 (1874), held valid a "Truck Act" relating to corporations, while expressing the strongest reprobation of any such restriction of individual employers. *State v. Browne & Sharpe Mfg. Co.*, 18 R. I. 11, 23 Atl. 246 (1892); *Leep v. R.*, 58 Ark. 407, 25 S. W. 75 (1894); *Hann v. State*, 54 Pac. (Kan.) 130 (1898), *accord*. The distinction receives some countenance also in *State v. Peel Splint Co.*, 36 W. Va. 802 (1892). Other cases almost universally have treated all employers, whether corporations or individuals, as alike subject to, or free from, such state regulation.

<sup>2</sup> Opinion of the Justices, 163 Mass. 589 (1895).

it—is explained very well by Mr. Henry Winslow Williams.<sup>1</sup> The divesting of the corporation of control over its contracts, while it is “still an existing person and recognized as such in the law,” Mr. Williams shows clearly, would operate to restrict the rights of the incorporators precisely to that extent. On the contrary, a withdrawal of the charter would leave the incorporators free to act in their individual capacity with respect to the property and business formerly controlled by them in the corporate name. In short, we are brought to the conclusion with which this section began, that partnerships, joint stock associations and corporations stand, in substance and reality, on the same footing.

(b). *Persons Under Special Governmental Favor.*

Under the second sub-head come the “legal monopoly” theory propounded by Mr. Justice Field in his famous dissent in *Munn v. Illinois*, and by Mr. Justice Brewer in his equally well-known opinion in *Budd v. New York*, and the “enjoyment of public franchise” explanations of legal control of railway rates.

The principle here indicated is sometimes expressed as follows: “Where peculiar privileges are granted by the state, peculiar responsibilities supervene, and special regulations may be imposed.”<sup>2</sup>

What are these “peculiar privileges?”

They may consist in the monopoly of something before open to competition. In this case the philosopher of individualism should make his objection before the later stage of mere regulation is reached. Grant the monopoly, and slighter control certainly follows, as the greater includes the less. Mr. Justice Brewer says:

“It is suggested that there is a monopoly, and that that

<sup>1</sup>See Mr. Williams' able article, “An Inquiry into the Nature and Law of Corporations,” 38 AM. LAW REG. (N. S.); p. 72, *et seq.*, February, 1899. The statement in the text, of course, does not have reference to cases in which special reservations of state control have been made in the original grant. Then the regulation is a part of the contract, and is exactly what was bargained for by the natural persons “behind the corporation.”

<sup>2</sup>State v. Speel Splint Coal Co., 36 W. Va. 802, 811 (1892).

justifies legislative interference. There are two kinds of monopoly; one of law, the other of fact. *The one exists where exclusive privileges are granted. Such a monopoly, the law which creates alone can break; and being the creation of law justifies legislative control*" (italics mine).<sup>1</sup> Apparently it does not occur to the learned justice that any inconsistency is involved in the defence of regulation by monopoly, of partial control by absolute control. But this argument supposes first a monopoly, a legal monopoly. How do you get that monopoly? Without doubt by a species of "interference" compared with which "regulation" is mild indeed. Would the situation in *Budd v. New York* have been aided had the legislature first declared the elevator business a monopoly, and *then* proceeded to specify the rates of compensation? This question seems to be answered in the asking. If a business in its nature is incapable of government regulation, it is also incapable of being rendered a monopoly by governmental action. The "legal monopoly" theory, then, appears to be a mere truism, or else it is without meaning, as applied to actual cases.<sup>2</sup>

The government may favor corporations of a certain class by giving them privileges beyond those usually bestowed. Thus a mining corporation may have added to it the right to lay out towns, to run a railroad or line of steamers, or to engage in manufacturing. Such privileges have been held in some cases to give the legislature control over the beneficiaries to a degree beyond that over persons or corporations not so favored.<sup>3</sup> If the right to interfere was reserved by the state as a condition of the additional grant, certainly it would be a part of the contract, and its exercise can become no cause of complaint to the corporators. But in any other case,

<sup>1</sup> *Budd v. New York*, dissenting opinion, 143 U. S. 517, 550 (1892).

<sup>2</sup> It would seem that *Allnut v. Inglis*, 12 East, 527 (1810), the case of the London wharfingers, which the dissenting justices in the various grain elevator cases have declared to be no precedent for regulation, because of the legal monopoly there involved, is really a precedent, if for anything, not only for what was alleged, but even for more than anything now contemplated in this country.

<sup>3</sup> See the West Virginia cases, *supra*.

the same objections would seem to apply here, as to the theory based on the original bestowal of corporate privileges. Besides, to continue the mining illustration, a regulation such as the eight-hour law upheld in *Holden v. Hardy*,<sup>1</sup> or a "Screen Act,"<sup>2</sup> which should be valid as to mines owned by specially favored corporations, but invalid as to mines owned by ordinary corporations or by individuals, would be absurd in its inefficiency.

Again the "special privileges" may consist in the grant of a "public franchise" or license for carrying on a business necessarily involving the exercise of some prerogative of the state, as eminent domain, or the use of the public highways on land or water. A discussion of this topic will run almost indistinguishably into that on the second sub-head of the second section, viz.: the "Contract of Public Service." An employment carried on under a public franchise will of necessity be a "public" employment, and an employment recognized as public will for that reason require for its license a "public" franchise. Each is the cause and each the result of the other. The "eminent domain" branch of the state prerogative is perhaps the one really noteworthy in this connection. Just the weight which should be attached to it must be determined by an historical view of the legal control of common carriers, to inquire whether this regulation was exercised before or after the prerogative of eminent domain commonly "subsisted in the hands of a subject." This will involve the further inquiry whether all matters of business now considered public in the legal sense, were not so at the start in the "virtual" or actual sense only, first affecting people generally in their private capacity, and then as a result drawing down the attention of the nation; and whether grants of powers like eminent domain, and regulations limiting the right

<sup>1</sup> 169 U. S. 366 (1897), *Brown*, J.

<sup>2</sup> Like the one pronounced void in *Commonwealth v. Brown*, 8 Pa. Super. 339, affirming 6 D. R. 773 (1898). The opinion of Rice, P. J., is remarkable for the failure to notice the recent decisions upholding legislation of the kind before the court. The earlier West Virginia and Massachusetts cases are treated at length, but the later decisions practically overruling the others are entirely ignored.

of contract, instead of being in the relation of cause and effect, may not rest on a common basis, *i. e.*, the public interest in the business. And it may be suggested that possibly the habit of mind which seeks explanations such as those here treated, may be that which "reads its fundamental ideas . . . back into history."<sup>1</sup> The discussion under the "Contract of Public Service" will include the matters here touched upon.

## 2. Public Subject Matter of Contract.

### (a). Sale of Public Commodity.

Certain species of property have been considered not capable of complete private ownership, but to belong to the people in general, or the state. Among these are wild animals and things of a similar nature. In *Geer v. State of Connecticut*,<sup>2</sup> Mr. Justice White, quoting from Pothier,<sup>3</sup> classes among *res communes* air, water which runs in rivers, the sea and its shores, and animals *feræ naturæ*, and shows that property in wild beasts is regarded as common or in the state over all the continent of Europe. Blackstone<sup>4</sup> also classes wild animals with air, light and water as peculiarly subject to governmental authority. In the case cited it was held (Harlan and Field, JJ., dissenting, and Brewer and Peckham, JJ., taking no part in the decision), that ownership of game within the limits of a state, so far as it is capable of ownership, is in the state for the benefit of all its people in common, and that the police power authorizes a state to forbid the killing of game to be transported beyond its limits. A similar decision was *Lawton v. Steele*,<sup>5</sup> Fuller, C. J., Brewer and Field, JJ., dissenting. In *McCready v. Virginia*,<sup>6</sup> the power of the State

<sup>1</sup> See article by Dr. Wm. Draper Lewis, 36 Am. L. Reg. (N. S.) p. 4, January, 1897.

<sup>2</sup> 161 U. S. 519, 16 S. C. 600 (1896).

<sup>3</sup> *Pothier Traité du Droit de Propriété, No. 21*. See also Code Napoleon (Articles 714, 715).

<sup>4</sup> 2 Bl. Com. 14, 394, 410.

<sup>5</sup> 152 U. S. 133, 14 Sup. Ct. 499 (1894). The statute in question, which was decided constitutional, declared nets, etc., used in violation of game laws public nuisances, which the official game protectors were authorized to destroy.

<sup>6</sup> 94 U. S. 395 (1876).

of Virginia to restrict the planting of oysters was upheld. In *Commonwealth v. Gilbert*<sup>1</sup> a statute imposed a penalty on every person who "sells or offers or exposes for sale, or has in his possession a trout," except alive, during the close season. This statute was decided to apply constitutionally to trout artificially propagated and maintained. In *Gentile v. State*,<sup>2</sup> a statute was decided to be constitutional which forbade the taking of any fish in any way for two years, even by an owner of the lake or stream. So, in *People v. Bridges*,<sup>3</sup> an anti-seine law was held to include within its prohibition a lake wholly upon lands of a private owner and unconnected with other waters except with a small, unnavigable stream, and that only at flood time.<sup>4</sup>

*People's Gas. Co. v. Tyner*,<sup>5</sup> following the Pennsylvania case of *Westmoreland, Etc., Gas Co. v. DeWitt*,<sup>6</sup> classes water, oil and gas as minerals *feræ naturæ* subject to the same public control as wild animals.<sup>7</sup> Accordingly, in the recent Indiana case of *Townsend v. State*,<sup>8</sup> it was decided that an act punishing the wasteful burning of natural gas in flambeau lights does not deprive the owner of property without due process of law, nor does it violate the rights of "life, liberty and the pursuit of happiness."<sup>9</sup> The Supreme Courts of both Indiana

<sup>1</sup> 160 Mass. 157, 35 N. E. 454 (1893).

<sup>2</sup> 29 Ind. 409, at 415 (1868).

<sup>3</sup> 142 Ills. 30, 16 L. R. A. 684 (1892).

<sup>4</sup> On game and game laws see 8 Am. & Eng. Ency. Law, 1024, *et seq.* Domestic animals cannot be controlled in the same manner, of course, since there is no public ownership. See *City of Helena v. Dwyer* (Ark.), 39 L. R. A. 266 (1897), a case in which an ordinance forbidding the sale of fresh pork between June 1st and October 1st was held void as violating the inalienable right of man to procure food.

<sup>5</sup> 131 Ind. 277, at 281, 282 (1892).

<sup>6</sup> 130 Pa. 235, 18 Atl. 724 (1889).

<sup>7</sup> The reasons for classing gas and oil among the *res communes* appear to be as strong as those placing water there. The same fugitive character marks all, and it seems that if the hydro-carbon fluids had been known in the days of Pothier and Blackstone, their classification would have been extended to include them.

<sup>8</sup> 147 Ind. 624, 47 N. E. 19 (1897), McCabe, J.

<sup>9</sup> This marks another successful attempt of the Indiana legislature to control the use of natural gas. *State v. Gas Co.*, 120 Ind. 575, 22 N. E.

and Pennsylvania thus contend that the ownership of gas and oil in their natural condition, as well as that of wild animals, is in the state, which accordingly can make such regulations concerning them as it sees fit. If these decisions be sound it would appear that the state may prescribe the exact manner in which the owners shall use the gas and oil they have drawn from their own land, or fix arbitrarily the prices at which these articles shall be sold, or even prohibit absolutely their use in any form. This ought to furnish a short and easy way with the Standard Oil Company. It would seem from these decisions that the company is making its millions a month from the sale of a commodity which in its natural condition really belongs to the state.

Land itself, in its "wild" and unimproved state, has never been considered capable of complete private ownership in England. That fact has been used to explain the Irish Land Acts, which violate what in this country would be called the vested property and contract rights of the landlords. The villainous system of "rack-renting," which we have heard attacked so eloquently here and which, in our sympathy for the wrongs of Ireland, we have come to believe the very essence of evil, is nothing in the world but "freedom of contract," applied to the land. Here the advocates of land nationalization or rent confiscation have not yet succeeded in influencing legislation.

Those who favor the nationalization of railroads and other transportation systems, as being what are called "natural monopolies" and, therefore, rightfully the property of all instead of the few, if successful in their schemes would render unnecessary any discussion such as the present. That which

778 (1889), declared unconstitutional a law prohibiting the piping of natural gas to any point without the state. This law (which was passed because of the projected piping of gas from the Indiana districts to Chicago) was said not to be a legitimate exercise of police power, but an attempt to regulate interstate commerce. But *Jamieson v. Oil Co.*, 128 Ind. 555, 28 N. E. 76 (1891), Olds, J., dissenting, held constitutional an act prohibiting a pressure of more than 300 pounds to the inch, which was designed to accomplish indirectly, the same end as that to which the former statute was directed.

belongs to the state, certainly the state could control, and the traffic in transportation facilities would then be the "sale of a public commodity." The countries of continental Europe have quite generally acquired the property in their railroads and street-car lines. Switzerland has just within a few months voted for state purchase of its railroads.

This consummation, to be dreaded or desired, is a possibility of interest as the pole which has as its opposite entire non-intervention, a policy contended for by many individualists in the United States, but never actually adopted anywhere. We in America have sought for fifty years a halting-place between these extremes. For half a century we have had little or no state or municipal ownership and apparently little demand for it. But an agitation seems to have begun, in Chicago particularly, for city ownership of street railways. The effect of this lies in the future. Just now the discussion under this sub-head that is chiefly pertinent to the present inquiry, relates to the early common law regulation of wharfingers, as bearing on the vexed question of "virtual" monopolies, already referred to.<sup>1</sup>

The treatise *De Portibus Maris*, of Lord Hale, cited in pretty nearly all the cases dealing with government regulation of contract, asserts that the charges of "public" wharves must be reasonable, "because they are the wharves only licensed by the Queen, or because there is no other wharf in that port." The italicized words have aroused great controversy. The individualists have given an explanation which is pronounced "fanciful" by Andrews, J., of the New York Court

<sup>1</sup> It is hard to understand why so much has been said of the common law rules on this particular topic. Everybody knows that contemporaneously with the writing of Lord Hale's treatise, there prevailed all kinds of government interference with all kinds of things; and also that little time was wasted by the "practical" men who shaped legislation, in elaborating this or that theoretic justification of their action. It is not to be supposed that the statutory enactments alone were mediæval and that the judge-made common law, which in its sacred purity descended to us and furnished the rule by which to measure the grants and reservations of power in our written constitutions, is entirely susceptible of explanation on modern American theories.

of Appeals,<sup>1</sup> but which has the high support of the late Justice Cooley: “. . . The title to the soil under navigable water in England is in the Crown, and . . . wharves can only be erected by express or implied license, and can only be made available by making use of this *public property in the soil* (italics mine.) If, then, by public permission, one is making use of the public property, and he claims to be the only one with whom the public can deal in respect to the use of that property, it seems entirely reasonable to say that his business is affected with a public interest which requires him to deal with the public on reasonable terms”<sup>2</sup>—or, as it might be expressed, he is selling a privilege (wharfage) *which belongs to the state*. There are two objections to this argument: (1) It ignores the fact that the property of the Crown in the soil under navigable water was only presumptive, and might be rebutted by evidence of grant, express or implied; and the further fact that no difference is made in the books, as to the necessity of reasonable charge, between wharves erected on private and those on public soil. The same was true of ferries. “No man could set up a ferry, *although he owned the soil and landing places on both sides of the stream*, without a charter from the King, or a prescription, time out of mind. The franchise to establish ferries was a royal prerogative” which . . . “was vested in the King, as a means by which a business, in which the whole community were interested, could be regulated.”<sup>3</sup>

(2) It gives the statement of Lord Hale, viz., that private property “affected with a public interest *ceases to be juris privati* only,” a restricted meaning no hint of which is found in *De Portibus Maris*, or in contemporary reports and treatises. This acceptance of the decision, qualified by supplemental or different reasons therefor, comes dangerously near treating the words of the jurist “as the utterances of

<sup>1</sup> *Peo. v. Budd*, 117 N. Y. 1, 25 (1889).

<sup>2</sup> Cooley's *Constitutional Limitations*, p. 738.

<sup>3</sup> Andrews, J., in *Peo. v. Budd*, *supra*, at p. 17.

Balaam's ass—absolutely true, but not proceeding from any conscious intelligence.”

On the whole, it may safely be said that government ownership of the article or privilege sold is of very little present bearing, theoretic or practical, on the control of transportation charges in the United States.

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(To be continued.)