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Government Control

Charles Kerr
Fayette Circuit Court

Chief Justice Miller, in reversing the opinion of the lower court said: "Section 11 of the Criminal Code provides that a public offense for which the only punishment is a fines may be prosecuted by a penal action in the name of the Commonwealth. Under this section, the Commonwealth could have proceeded by a penal action. But the section is permissive in its terms, and does not exclude any other form of procedure that is authorized by law. Furthermore, section 9 of the Criminal Code provides as follows:

'All public offenses may be prosecuted by indictment, except:

'1. Offenses of public officers, where a different mode of procedure is prosecuted by law.

'2. Offenses exclusively within the jurisdiction of justices of the peace, or of police or city courts.

'3. Offenses arising in the militia, of which a military court has exclusive jurisdiction."

Under section 9, the Commonwealth may proceed by indictment, or under section 11, it may institute a penal action.

In State v. Carr, 6 Oregon, 134, the court said: "A proceeding by indictment is an action at law." Furthermore, it will be noticed that section 656 of the Kentucky Statutes does not require that the fine shall be recovered by a penal action, but merely that it is to recovered by action in the name of the Commonwealth. Judgment reversed.

GOVERNMENT CONTROL.

BY CHARLES KERR, JUDGE FAYETTE CIRCUIT COURT.

The established doctrine of charter contract, that is a valid and binding agreement between the state and corporation, the terms of which are the charter provisions, still obtains so far as that class of corporations which are strictly private is concerned, meaning thereby that class of corporations that exercise no public functions, as distinguished from that class denominated *quasi* public. Corporations which are wholly and essentially public, that is such political organizations as towns, counties, cities, and

the like, over which the sovereign power is supreme, corporations which are brought into being at the will alone of the Legislature, between which and the State no possible contract can exist, the power to control, regulate and amend is supreme, except where there are intervening third-party rights, acquired before the proposed change or regulation. The consideration of the subject of control by government then will be confined almost, if not entirely, to that new and interesting class which we designate "Public Service" Corporations, such, for example, as railroads, telegraph, telephone, electric railways, public roads, canals, bridges, &c.

The restricted powers of our Constitution, or at least the powers of our Constitution as interpreted by the supreme coordinate branch of the government, the judiciary, which confines public service improvements to private capital, although serving only the public, have made the interventions of the courts on behalf of the public they serve, a necessity. The early interpreters of our Constitution, although that instrument reserved to the States all the powers not expressly granted to the general government, were yet of opinion that the Constitution was broad enough to permit the construction and maintenance of certain classes of public service corporations by government aid, such as canals, postroads and the like, but the later interpreters, those which gave to that instrument a strict construction, thereby reserving as much power to the States as could be given by any sort of fair construction, soon went to the extreme limit of denying to the general government the right of aiding the construction or maintenance of any kind of internal improvements. Under the early interpreters, added, too, in part by the support of Mr. Jefferson, the most ultra of the opposition, public roads were surveyed by the government from Portland in Maine, to Pensacola in Florida; from Washington, the capital of the nation, to St. Louis, in Missouri; while the Chesapeake Canrl and, I believe, the Erie Canal, were actually constructed by the government (and not until the accursed question of slavery dominated all questions of constitutional construction, were these powers denied the general government, but now, with the ghost of slavery behind us, and) so that now with an age of all-absorbing commercialism upon us, those

holding, or pretending to hold to the faith of the strict constructionists, have altogether abandoned the notion that the general government cannot appropriate the public funds in aid of any sort or kind of internal improvement. On the other hand those who first favored such powers in the general government have now become the conservatives, denying any such rights to the government, and grudgingly admitting the right of supervision. Thus it will be seen, from the standpoint of the politician, there has been no consistent stand taken or maintained by either of the two great political parties, the right of supervision over that class of public improvements which has been the work of private capital, though public in character, having been, largely, the outgrowth of the courts, and not the legislatures.

The early notion that corporations were distinct, though ficticious persons, developed about the fourteenth century, was the outgrowth of canonical jurists. Cotemporary with this notion were the old statutes of mortmain, which forbade religious societies from holding lands without a royal license, which striction was gradually extended to municipal and other secular communities, since, as the old chronicle put it, these were "as perpetual as men of religion". From this class of corporations, thus chartered, grew the custom of holding all public corporations within the control of the sovereignty creating them. But with respect to all other corporations there has been a great contrariety of opinion, and the development of the principles which have gradually abridged the charter contract notion, and built up what is termed the reserved rights of control, and regulation on the idea that as between the company, created by the sovereign, and the public, which has delegated to the sovereign such powers as it possesses, the sovereign, or State, should be impartial, and protect alike each, the corporation and the public, from the encroachments of the other. A common carrier, for instance, serves only the public, why then it is argued should the State, to which the public looks for protection charter a company with powers sufficiently broad to enable it to become a creature of oppression, and there be, at the same time, no powers reserved by the government that would enable it to protect the public as against its own creature. Therefore, while the ownership of

property may be private, the use being public, the courts have conceived it to be their duty to protect the public against oppression by such companies, and at the same time to sustain in the sovereign power the right, by legislation, of supervision and revision. To epitomise:

> "Whenever any person pursues a public calling, and sustains such relations to the public that the people must of necessity deal with him, and are under a moral duress to submit to his terms and he is unrestrained by law, then, in order to prevent extortion and abuse of his position, the price he may charge for his services may be regulated by law."

This theory of control was not unknown to the English Courts. So far back as Lord Hale in his treatise De Jure Maris, he thus discusses the subject:

> "A right of franchise or privilege, that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way; because it doth in consequence tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation, viz., that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these he is finable."

And again in his "De Portibus Maris", he says:

> "A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may cranage, wharfage, housellage, pessage; for he doth no more than is lawful for any man to do, viz: makes the most of his own * * * If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the king, * * * or because there is no other wharf in that port, as it may fall out where a port is newly erected; in tnat case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., neither can they be inhanced to an

immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be juris privati only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a public interest."

Upon this point Lord Ellenborough also expressed the same views:

"There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms."

To the same effect is Le Blanc, J.;

"But though this be private property, yet the principle laid down by Lord Hale attaches upon it that when private property affected with a public interest it ceases to be *juris privati* only; and, in case of its dedication to such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable."

The principle expounder of this branch of the Common Law has been Lord Hale, from whom we have quoted, and of whom a learned American Judge once said:

"In England, even on rights of prerogative, they scan his words with as much care as if they had been found in Magna Charta; and the meaning once ascertained, they do not trouble themselves to search any further."

This principle has been followed largely in this country, and has been no better expressed by any American jurist than Chief Justice Waite in an early and the leading case on this subject, Munn vs. Ills. 104 U. S., 113; 24 L. ed., 77:

"When the people of the United Colonies separated from Great Britian, they changed the form, but not the substance, of their government. They retained for the

purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

"When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relation to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by wnich the whole people covenants 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 power upon the whole people to control rights which are purely and exclusively private. Thorne v. R. & B. Railroad Co., 27 Vt., 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic tuo ut alienum non laedas.* From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *License Cases,* 5 How., 583, '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.' Under these powers the government regulates the conduct of its citizens one towards another, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered,

accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property."

Discussing the general principle of legislative control, and distinguishing between those private regulations which are peculiarly the provinces of the courts, and those which come within the scope of legislative control. this same judge continues:

"Undoubtedly, in more private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

"But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process: but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one."

The trend of the later decisions, however, with the unprecedented growth and expansion of these institutions has been to regulate under the general police powers of the State or government, those powers being inalienable and reserved beyond impairment. Indeed a corporation can no longer be said to possess special rights and privileges so far as the operation of the police power of the government is concerned, these institutions, under the general welfare clause of every State Constitution, being treated as any private individual would be treated, any legislative act being intended for the common benefit of all, whether individuals or corporations.

Another specific right of control, too, is embraced in that clsss of offenses growing out of *ultra virus* acts on the part of the corporation, in that it has done some act not authorized by the law creating it, or not embraced in its charter; over such acts the right of control, both in the courts and legislatures is complete. But the doctrine of vested rights, taught by the famous Dartmouth case, has not been wholly eliminated, some traces of that famous case still remaining, but it must be admitted the modification has been radical, both under the doctrine of police power and reserved rights of the legislature. A recent author discussing this feature of recent decisions thus comments on this departure:

> "It has been held that the doctrine that a charter is a contract does not prevent the operation of the police power in so far as it is exercised to protect peace, safety, health and morals. The constitutions of several states (California, Mississippi, Missouri, Louisiana, Montana, Pennsylvania), express this principle in another form by providing that the police power shall never be so abridged as to permit corporations to conduct their business so as to infringe the rights of individuals or the general well-being of the state. A railroad company cannot therefore set up its charter to escape the operation of a law compelling it to adopt certain safeguards calculated to prevent accidents, and the charter right of an electric company to place its wires under the streets of a city is subject to reasonable municipal regulations as to the method of exercising that right; the charter of a lottery or a brewing company does not prevent subsequent legislation to suppress lotteries or the manufacture of intoxicating liquors. For as the government cannot

part with its power to guard against disorder, disease, or the corruption of morals, a contract purporting to do this is void ab initio, and it is possible to speak of the impairment of the obligation of a contract where the contract is illegal. Corporations are therefore fully subject to the operation of the police power in the narrower sense of the term, and must submit to such regulations and restraints as are called for by the safety, health, or morals of the community, notwithstanding any charter provisions. It has even been intimated by the United States Supreme Court that there is implied in the charter of every corporation the condition that the corporation shall be subject to such reasonable regulations in respect to the general conduct of its affairs as the legislature may from time to time prescribe, which do not materially interfere with the substantial enjoyment of the privileges the state has granted, and serve only to secure the ends for which the corporation was created."

To the same effect are the recent decisions of the Supreme Court, as was said in Pearsall vs. Great Northern Railroad, 161 U. S. 646, Sup. Ct. Rep. 705, 40 L. ed. 838.

"Nor does it follow, from the fact that the contract evidenced by the charter cannot be impaired, that the power of the legislature over such charter is wholly taken away, since statutes which operate only to regulate the the manner in which the franchises are to be exercised, and which do not interfere substantially with the enjoyment of the main object of the grant, are not open to the objections of impairing the contract.

"A familiar instance of this class of legislation is that enacted under what is known as the police power. In virtue of this the State may prescribe regulations contributing to the comfort, safety and health of passengers, the protection of the public at highway crossings or eleewhere, the security of owners of adjacent property, by requiring the track to be fenced, and such appliances to be annexed to the engines as shall prevent the communication of fire to neighboring buildings. Cooley Print. Const. Law, 321. This power, as was said by Mr. Justice Miller in the Slaughter-house cases, 16 Wall., 36, 62, is and must be, from its very nature, incapable of any very exact definition or limitation. 'Upon it depends the security of social order, the life and health of the citizen, the comfort of existence in a

thickly populated community, the enjoyment of private and social life, and the beneficial use of property.

And also in a similar case from Kentucky in L. & N. R. R. vs. Kentucky, 161 U. S., 677, 16 Sup. Ct. Rep. 714, 40 L. ed. 840:

> "Under its police power the people, in their sovereign capacity, or the legislature, as their representatives, may deal with the charter of a railway corporation, so far as is necessary for the protection of the lives, health and safety of its passengers or the public, or for the security of property or the conservation of the public interests, provided, of course, that no vested rights are thereby impaired. In other words, the legislature may not destroy vested rights, whether they are expressly prohibited from doing so or not, but otherwise may legislate with respect to corporations, whether expressly permitted to do so or not. While the police power has been most frequentiy exercised with respect to matters which concern the public health, safety or morals, we have frequently held that corporations engaged in a public service are subject to legislative control, so far as it becomes necessary for the protection of the public interests."

And also in the still more recent case of Hale vs. Henkel, 201 U. S. 43, 26 Sup. Ct. Rep. 370, 50 L. ed. 652:

> "Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose."

Thus it will be seen the famous Dartmouth College case has been so modified, so far as legitimate state control is concerned,

that the law has been left very much where it would have been left if there had been no Dartmouth College case, as was expressed by Justice Bradley in a dissenting opinion rendered in the Sinking Fund cases (91 U. S., 727.)

As a result of this development there is now little constitutional difference between corporations and individuals; and with respect to public service corporations the L. & N. case has clearly put them under the police control of the sovereignty creating them, or the sovereignty where they may see cause to do business.

The chief value of the Dartmouth College case lies in the principle that the fact of incorporation does not place the corporation or its property at the mercy of the government. The mischief of that case, which treated mere organization as a vested right, and gave to it privileges with respect to legislative control not exercised over individuals, has been gradually overcome by the process of adjudication. But whether the pendulum of governmental control may not swing to as great extreme on the one hand, as has the abuse of corporate privileges on the other is one of the serious problems of the hour.