

## COMMISSIONS AND COURTS.

### *I. The Nature of Public Utilities and their Relation to the Public.*

The term Public Utility is applied to that class of corporations which serves the public under some privilege or franchise conferred by the State. Since the State can alone enfranchise them, the State may regulate and control their affairs. Formerly such regulations as were deemed necessary were embodied in the charters by which the companies were created, or in general laws or special enactments under which they were incorporated, but it became clear that no legislative body could properly control the various operations in which the public are concerned. The sessions of a legislature are necessarily brief, and its will is expressed in general laws, which cannot in the nature of things cover special instances requiring remedy. On the other hand the courts have the power to correct certain abuses and see that the public is adequately served; a court can declare a rate unreasonable, or a preference an unreasonable discrimination, or a service inadequate, but a court cannot make a new rate, or prescribe the method by which the company can best serve the public. Its order settles one controversy, involving one company and one patron. It cannot make rules to govern all companies, because it is a court and not a legislative body. To obviate these difficulties, resort was had some years ago to Public Utility Commissions, created by law and clothed with a power to regulate and control public utilities which neither the legislatures or the courts were able to exercise.

### *II. The Commission Scheme.*

A commission is a small body of appointed officials giving its whole time to the establishment of just relations between public utilities and their patrons. In recognition of the fact that many of the details of business management are in some way reflected in the rates and service furnished the public, the commissions were given power to establish maximum rates, standards of quality, uniform methods of book-keeping, to regulate the issue of stock, bonds, and notes, to approve or disapprove the construction of new plants or the extension of old ones, to decide whether monopoly or competition be best in any given community; in fact to supervise every business detail which directly or indirectly affects the relations between public utilities and their patrons. It may as

a body decide controversies involving rates or standards, or upon its own initiative, make investigations and issue general orders affecting the whole class of public utilities investigated.

### III. *Constitutional Objections to the Scheme.*

This, briefly, is the commission scheme. In putting it into effect, some interesting constitutional questions have arisen. As has just been pointed out, one function of a commission is to make general rules and regulations governing all utilities of a certain class; for instance, it may make a rule requiring all gas companies in the State to supply gas of a certain standard. This appears to be a *legislative* act, and immediately the question arose whether the legislature could delegate its powers to such a body. One of the early cases upon this point was *Chicago & Northwestern R. Co. vs. Dey*, 1 L. R. A. 744, decided in 1888. The Iowa legislature conferred upon the railroad commission of that State authority to make and put in effect a schedule of rates for railroad transportation within the State. The Chicago & Northwestern brought a suit to enjoin the enforcement of the rates established by the commission under authority of that act, claiming that such an act unconstitutionally delegated legislative powers to the commission. It was held that there was no delegation of legislative powers. The legislature had declared that rates should be reasonable. In fixing a maximum rate, beyond which it would be unreasonable to charge, the commission was only seeing that a law already established was *enforced*. In other words, its functions were *administrative* and not *legislative*. This may seem at first a rather technical solution but, upon investigation, it seems difficult to draw any clear line between what, in general, is a legislative act and what is mere administration. Many rules of conduct are made by the administrative departments of any large city. The Park Department may keep one off the grass at certain seasons; it may make rules governing the hours when the public may use public swimming pools; it may establish picnic grounds in certain parts of the park and exclude picnics from others. The Street Department may close a street and prevent the public using it until repairs are made. The police may make traffic rules for the safety of the public. These are all rules of conduct, but legislatures cannot make laws providing for all these details. The administrative departments must be left a certain discretion in order to perform their duties. In making the above rules the departments are *administering the law* and not acting in a *legislative capacity*. From these examples it is easy

to see how many instances arise in which the two functions are nearly indistinguishable.

There is a broader way of viewing the whole question. The legislature is entrusted with the responsibility of correcting abuses, preventing unjust discriminations and excessive charges by public utilities. It has power to do or cause to be done everything in any manner and by any means, not in violation of some constitutional provision, which is requisite to the complete and effectual accomplishment of this purpose. The constitution should be so interpreted, as not to render impotent and inoperative, but to preserve and make effective, the sovereign power of the state to remedy and correct these conditions. It is true that the legislature cannot delegate the right to enact a law, but when powerless to make rules and regulations to fit every case and to prevent every abuse, it becomes proper for the legislature, having passed a general law to accomplish its public purposes, to leave to designated public officials, within definite limitations, authority to make the necessary rules and regulations for the complete operation and enforcement of the general law. Two recent cases hold that the duty of such officials is administrative and not legislative.<sup>1</sup> In the first case the commission passed a demurrage rule with respect to freight in carload lots; in the second case the commission made certain rules establishing a uniform system of bookkeeping for interstate carriers. In both cases it was held that, in making the rules, the commission was acting within the limitations prescribed by the general law and was simply doing what the legislature could not do itself, that is, seeing that the law was effectively administered.

Besides making rules and regulations, a commission has to determine the facts upon which the general law operates. A statute may provide that no railroad shall discriminate in rates between shippers given the same service. To determine in any given case whether the statute has been complied with, the commission must determine a great number of facts. What appears at first to be discrimination may be legal and proper, because of unusual traffic conditions. To understand these conditions and determine the facts in any particular case, hearings are necessary, witnesses must be heard, and papers produced.

Immediately the question arises as to whether the commission is not usurping the functions of the judiciary. In other words,

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<sup>1</sup>State vs. Atlantic Coast Line, 32 L. R. A. (NS) 639; Interstate Commerce Commission vs. Goodrich Tire Co., 224 U. S. 194.

is not a body which holds hearings to decide controversies, to determine questions of fact, and which is given power to subpoena witnesses and order the production of books and papers,—is not such a body acting as a court? This theory has been advanced in a number of cases, in States whose constitutions provide that the powers of government shall be divided into three departments, the legislative, executive, and judicial, and declare that no person charged with the exercise of powers properly belonging to one, shall exercise any functions appertaining to either of the others. The theory is plausible, but is refuted by the cases. The legislature could have appointed a committee of its members to do just what the commissions are doing, and it could have held hearings and heard witnesses and yet nobody would think of attacking such action on the ground that the legislature was trying to act as a court. As the U. S. Supreme Court has said in a recent case, it is the nature of the final act which determines the nature of the previous inquiry.<sup>2</sup> To make laws necessitates a knowledge of facts and conditions, and it would be destroying or crippling the whole usefulness of a legislature to say that it could not investigate before it made laws. It being impractical for the legislature itself to make the investigation, it has appointed as its instrument, for that purpose, a commission of experts. In the last analysis the objection that a body created by the legislature cannot exercise judicial functions is not of vital importance. As has been said in a recent case: "The division of governmental powers into executive, legislative and judicial, while of great importance in the creation or organization of a state and from the viewpoint of institutional law, is not an exact classification. *No such exact delimitation of governmental powers is possible.*"<sup>3</sup>

So far, then, we have shown that the legislature may create a commission of experts and give to it the power to supervise and control public utility organizations, being guided by, and its powers limited by, the general law establishing the commission. Such a commission may make rates, determine controversies, hear evidence and subpoena witnesses, and this may be done without violating the constitutional principles against delegation of the law-making power, or taking over that of interpretation, or the general principle that no person charged with the exercise of powers belonging

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<sup>2</sup>L. & N. Ry. Co. vs. Ky. Ry. Commission, 231 U. S. 298; Ky. Bridge Co. vs. L. & N. Ry. Co., 37 Fed. 567; Neb. Tel. Co. vs. State, 55 Neb. 627.

<sup>3</sup>State, ex rel Oregon Ry. & Nav. Co. vs. Ry. Commission, 52 Wash. 17.

to one department of government, shall exercise any functions appertaining to the others.

There was a crying need for proper regulation of public utilities. General laws had been tried and had failed. They did not fit all the cases, and laws could not be framed that did. Furthermore, such laws were not self-executing. They could be disobeyed and the courts were not an adequate protection to the public. By establishing commissions of experts that end could be accomplished and the legislature could perform its duties to the public. Courts did not look with favor on technical doctrines which stood in the way of accomplishing a great good. Moreover, there is no inherent vice either in a legislature delegating its authority, or in an instrument of one department exercising functions of another department. There is at least one State which has openly clothed its railroad commission with legislative, judicial and executive powers, and whose courts have held that this was perfectly consistent with its constitution. Its courts recognize that the administration of government would be wholly impractical if the maxim that the three departments of government should be separate and distinct, "were strictly, literally, and unyieldingly applied in every possible situation." This was held in *Nor. & P. Belt Line R. Co. vs. Commission*, 103 Va. 294. It has also been held that when a State constitution sees fit to unite legislative and judicial powers in one body, there is nothing to hinder so far as the constitution of the United States is concerned.<sup>4</sup>

#### *IV. Relation of Commissions to the Courts.*

We have been dealing with questions that have arisen with regard to the validity of the commission scheme, generally. But what we are mainly concerned with is the relation of these commissions to those under their jurisdiction and to the courts. What restraints are there upon a commission's powers? Which of its rules must be obeyed? What orders are final? Are its findings of fact conclusive? When can an order be appealed from to the courts? What is the nature of the appeal and what questions can be raised on appeal? In answering any of these questions two considerations must be constantly kept in mind: First, a commission is primarily an administrative body; second, it must obey the law of the land.

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<sup>4</sup>Prentis vs. Atlantic Coast Line, 211 U. S. 210.

A. *Commission is an Administrative Body.*

Because it is an administrative body and composed of men expert in handling utility problems, its orders ordinarily ought not to be interfered with by the courts, and ought not to be set aside save with the greatest reluctance. As most of the courts put it, when the *wisdom* or *expediency* of an order of a commission and *not the power to make it*, is at issue, the finding of the commission must be conclusive. To decide otherwise would be to destroy the usefulness of the commission because, if its finding is not conclusive every question of policy would ultimately have to be thrashed out in the courts, and the case before the commission would be in the nature of a preliminary hearing only; which is obviously far from the intent of the legislatures. The United States Supreme Court has taken this position flatly with respect to the Interstate Commerce Commission. Certain grain dealers of Atlanta complained before the Interstate Commerce Commission, of an alleged discrimination by the L. & N. R. R. against them in favor of the grain dealers in Nashville. A reshipping privilege was granted in Nashville and refused in Atlanta. The railroad attempted to justify the practice on the ground that there was water competition at Nashville and none at Atlanta. After a hearing the Commission decided in favor of the Atlanta merchants, that the practice was an unreasonable preference to Nashville in violation of the Interstate Commerce Act, and entered an order accordingly. In a suit brought by the railroad to enjoin the order, the Commerce Court decided that the practice was of long standing and was justified by water competition at Nashville, and therefore issued the injunction. In reversing the decision of the Commerce Court, the Supreme Court held that the Commerce Court had no right to substitute its judgment as to the existence of a preference for that of the Commission; that the very purpose for which the Commission was created, was to bring into existence a body, which from its peculiar character, would be most fitted to decide whether, from the facts disputed or undisputed in a given case, preference or discrimination existed.<sup>5</sup>

But in some States, Missouri among them, the section of the public utilities acts, providing for a review in the courts, almost

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<sup>5</sup>U. S. vs. L. & N. Ry., 231 U. S. 314; Interstate Commerce Commission vs. Ill. Central, 215 U. S. 452; Interstate Commerce Commission vs. Union Pa. Ry., 222 U. S. 541; Hocking Valley Ry. Co. vs. Public Utility Commission, Ohio Supreme Court, 1915.

seems to nullify this principle. For instance, Section 111 of the Missouri Act provides: "the applicant may apply to the Circuit Court \* \* \* for a writ of review for the purpose of having the *reasonableness* or lawfulness of the original order inquired into or determined. \* \* \* Suits \* \* \* shall be tried and determined as *suits in equity*." How is this section to be construed? If it means that every order of a commission can be reviewed in the courts and set aside if the court *disagrees* with the commission, even when the disagreement is only on a question of policy, then Sec. 111 has to a great extent nullified the usefulness of our Commission. If no question is final, then the courts alone will shape every policy in regard to public utility questions. A recent Missouri case on this subject construes Sec. 111 of our public utilities act, to mean that, when an order is reviewed in the courts, they will consider the evidence sent up *de novo* as a court of equity, and give to the findings of the commission such weight and consideration *as they may deem them entitled to* under the law and the evidence.<sup>6</sup> The facts in the case were these: The commission upon complaint and after a full hearing ordered two railroads to construct a connecting or interchange track. In the commission's opinion the evidence on the traffic conditions justified the expenditure that compliance with the order would have entailed on the roads. The Supreme Court, upon a writ of review, considered the matter upon the evidence sent up, came to the opposite conclusion and reversed the commission's action. The case was decided correctly for the evidence plainly failed to show that enough traffic would go over the connection to justify the expense of constructing it. There was practically *no evidence at all* upon this question, and the testimony of certain experts was mere conjecture. Now it is plain that a commission cannot make an order involving a great expense *without evidence* of public demand or necessity, or upon evidence *wholly conjectural*. To do so would violate the "due process" clause of the constitution. It is upon this principle alone the case should have been decided. But one of the points raised in the argument was that the findings of the commission are final and conclusive upon the courts. It was in answer to this contention that the Supreme Court construed Sec. 111 to give it the right to review the evidence and try the case *de novo*, as upon an appeal from a chancellor's decree. The proper answer to the argument and the answer, in

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<sup>6</sup>C. B. & Q. Ry. vs. Public Service Commission, P. U. R. 1916 (B) 367.

the writer's opinion that the Court should have made, is that, when a constitutional right is alleged to have been invaded, the Court will review all the findings of a commission because a consideration of all the evidence is necessary to determine whether the right has been invaded. As an example of the unsoundness of the "trial *de novo*" theory, consider the following case: Suppose our commission should undertake an investigation into the water rate situation in Saint Louis, and should find that the practice of allowing a manufacturer a lower rate than anyone else using the same quantity of water, was unjust and discriminatory; and that upon such finding it should make an order fixing the same rate for manufacturers and all others using the same quantity of water. If the manufacturer appealed to the courts, could they go into the whole matter, and, if in their opinion the lower rate to manufacturers was proper, reverse the commission and vacate the order? It cannot be held so, upon any sound interpretation of our Act. The legislature has deferred such questions to the *discretion* of the commission, with which the courts cannot interfere.

A most interesting and anomalous situation arises when it is a *negative* order that is appealed from; in other words, when the commission's *refusal to act* is complained of; not a case where the commission has refused to consider legal evidence, for in that case clearly the courts can direct them to hear the evidence and make a new finding; but when, upon all the evidence offered, the commission dismisses the complaint or application. For instance, an electric company is incorporated to do business in Kansas City and obtains a franchise from that City to use its streets for that purpose. The Company applies to the commission for the certificate of public convenience and necessity required before a new company may enter a territory already served. After a hearing the commission is of the opinion that the established company in Kansas City is adequately serving the citizens of that City and that it would be an economic waste to allow another company to enter the field. An order therefore is made denying the application. A writ of review is taken to the courts. Suppose the courts should disagree with the commission upon the question of allowing a new company to come in. What would be the effect of reversing the commission? The court can't issue the certificate. It can't remand the case with directions to issue the certificate for that would be equivalent to doing it itself.<sup>7</sup> The court cannot exercise the

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<sup>7</sup>Public Service Co. vs. Public Utility Board, 84 N. J. L. 463; Brooklyn Union Gas Co. vs. N. Y., 188 N. Y. 334.

*discretion* which the legislature has entrusted to the commission; moreover, to do so would be exercising not a judicial but an administrative function. If a shipper complained to the commission of an extortionate rate and his complaint were dismissed, the same situation would be reached. Even if the court found the rate to be too high in its opinion, still it could not fix a lower rate or order the commission to do so, because rate making is legislative and a court has no legislative powers. The practical effect is that where, upon the merits of the case after hearing all the evidence, the commission finds complainant is entitled to no relief and refuses to act, its finding is conclusive and the courts can give no relief.

There are certain preliminary questions upon which the validity of a commission's order does not depend, which cannot be raised in the courts, and upon which the commission's finding is final. For instance, take a case of extortionate rates. A shipper complains that a railroad's rates are too high. A commission, before establishing a new rate, must be convinced that the existing rate is too high, and hears evidence to establish that fact. It then has to determine what the new rate ought to be. A good many utilities have erroneously taken the view that whether their existing rates were too high or not, is a question for the courts, as well as the reasonableness of the new rate established by the commission. Their error is evident when it is remembered the lawfulness of the commission's *order*, is the only question with which the courts are concerned. Railroad attorneys have even gone so far as to claim that while a road is charging reasonable rates it is within its constitutional rights; that before a commission can have jurisdiction to fix a new rate the existing rate must be shown to be unreasonable; and that upon this question the railroad is entitled to a *judicial* hearing in the courts. This view however, has been flatly condemned by Justice Hughes in the Louisville and Nashville case, 231 U. S. 298.

#### B. *Commissions are Governed by Three Principles of Law.*

(1). A Commission Is Subject to The Same Constitutional Limitations As The Legislature Creating It.

The fact, then, that we are dealing with an administrative body created by the legislature is one reason for the peculiar relationship between these commissions and our courts. To completely understand this relationship three general principles of law applying to commissions must be mastered. First, commissions are subject to

the same constitutional limitations as the legislatures creating them; they cannot deprive anyone of life, liberty, or property without due process of law, nor deny to anyone the equal protection of the law. For example, we have the common case of confiscatory rates. A confiscatory rate is one which does not yield a fair return upon the reasonable value of the property being used to serve the public. What is a fair return and what the reasonable value of the property upon which the return is to be based, must become questions for the court, in order that it may determine whether the constitutional right has been infringed. Realizing however that upon such questions as valuation and return a commission created to deal with just such problems is better qualified to form an opinion, the courts will set aside an order fixing rates alleged to be confiscatory only upon a clear showing of that fact. Where a rate has been fixed by the commission but never put into effect, courts are very unwilling to enjoin them until the new rates are given a fair trial by continuing the business with these rates in force; especially where the evidence shows a narrow line of division between possible confiscation and proper regulation and the division depends upon variant opinions as to value and as to results in the future from operation under such rates.<sup>8</sup> Whenever a clear showing is made that a rate is confiscatory, however, whether it is a rate to be put into effect or one under which the utility has operated, the courts do not hesitate to enjoin or set aside the order fixing such rate.

Commissions are given power to order construction of additions to the plants of utilities, involving often very great expense. They may compel a street railway to make an extension of its track or a railroad to build an interchange track connecting it with another road and this power is sometimes abused. If conditions in a particular case fail to justify the expense to the utility, its property rights are infringed and it can resort to the courts to protect them. In a very recent case this principle was applied. The Great Northern R. R. had established stock scales in some of its stock yards, altho under no obligation to do so. A village in which no scales had been installed complained to the state commission on the ground of an unjust discrimination. The commission ordered the road to establish a six-ton stock scale at the village in question. To comply with this order meant a considerable expense to the road, which appealed to the courts to protect its rights. The case went to the

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<sup>8</sup>Wilcox vs. Consolidated Gas Co., 212 U. S. 191.

Supreme Court of the United States where it was decided that such an order deprived the road of property without due process of law, because the road was not even given a chance to remove its scales in the other towns and so end the discrimination.<sup>9</sup> A commission cannot *manage* the utilities it was created to *regulate*, nor can it impose on the road a duty which was no part of its original undertaking. As Justice Hughes has said, "Broad as is the power of regulation the State does not enjoy the freedom of an owner. The public interest cannot be invoked as a justification for demand which pass the limits of reasonable protection, and seek to impose upon the carrier and its property burdens that are not incident to its engagement."<sup>10</sup>

(2). Has Only the Powers Given to It by Statute.

The second principle of law is that a commission, deriving its powers only from statute, can do what the law creating it permits and nothing else. The courts then must keep the commission within the act, and any question involving the extent of the commission's powers under the act or the interpretation of any terms of the act, must be finally settled in the courts. For instance the Interstate Commerce Commission Act provides for a complaint to the Commission when an interstate railroad refuses to establish a switch connection with another line. Not a shipper, but a local *railroad* brought a complaint asking for such a switch connection. The question was whether the Act gave such a road any right to complain. The commission acting on the theory that it did, ordered the interstate road to make the connection. But in suit brought to enjoin the order the Supreme Court of the United States differently construed the Act, decided the Act gave no such right, and granted the injunction.<sup>11</sup> In another case the commission set aside a new schedule of rates put in force by a railroad, and ordered the restoration of the old rates. It based its action not on the power to condemn unjust and unreasonable rates and fix reasonable ones, but upon the assumption that it had the right to protect certain lumber interests from the consequences of a change in rates. This the court held it had no right to do, the statutes giving it no right to interfere on such grounds.<sup>12</sup>

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<sup>9</sup>Great Northern vs. Minn., 238 U. S. 340.

<sup>10</sup>Northern Pa. Ry. Co. vs. North Dakota, U. S. S. C. 1914.

<sup>11</sup>Interstate Commerce Commission vs. D. L. & W. Coal Co., 216 U. S. 531.

<sup>12</sup>Southern Pa. Ry. Co. vs. Interstate Commerce Commission, 219 U. S. 433.

All questions of jurisdiction are pure questions of law for the courts to determine and a decision of the commission as to its own jurisdiction has very little weight. Whenever, therefore, a commission attempts to interfere in a matter over which it has no jurisdiction, the courts will declare its action illegal and void. If a case is improperly dismissed on the theory of want of jurisdiction, the courts will remand the case with directions to hear and determine the case on the merits.

(3). A Commission's Powers Being Delegated, It Must Exercise Them in a Reasonable Way.

Commissions were established for a public purpose. They were created to do what neither the legislature nor the courts were competent to do, to establish just relations between public utilities and the public they serve. Their powers were *delegated* to them by the legislature *in trust* to be used for the *public good*. It is a well recognized rule of law that while courts may not interfere with the legitimate use of a delegated legislative power, they may interfere to prevent its abuse. Whenever, therefore, it is evident that an order of a commission is the result of fraud or of whim or caprice merely, imposing a burden upon the company to which it is applicable, without any corresponding benefit to the community which the company serves, the courts will interfere for the company's protection. A commission has power to order a street railway to change its route when public convenience and necessity demand it. If, however, a commission should order a track to be removed from certain streets and it could be shown to the court that the removal was clearly ordered in the interest of certain property owners and not because the public interest demanded the change, the court would set aside the order as unreasonable and arbitrary. There is no place in our form of government for a small body of appointed officers with arbitrary powers. Such a body can be given a very wide discretion and courts will not interfere with a just exercise of that discretion, but they will jealously guard against its abuse in the form of capricious or arbitrary action. This principle has long been applied to all acts of municipal assemblies.<sup>13</sup> All city ordinances, as they are based on an exercise of delegated legislative authority, must be reasonable. Although it may not have been stated in quite this way in the cases, this principle has been applied by the

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<sup>13</sup>St. L. vs. Weber, 44 Mo. 547; Corrigan vs. Gage, 68 Mo. 541; Skinker vs. Heman, 148 Mo. 349; St. L. vs. the Theatre Co., 202 Mo. 690.

courts to commissions. It must be what Justice Lamar meant when, in explaining the position of the Interstate Commerce Commission, he said, "an order regular on its face may be set aside if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance and not the shadow, determines the validity of the exercise of the power."<sup>14</sup>

#### *V. Conclusion.*

A commission, then, is primarily an administrative body charged with the duty of supervising and controlling the operations of public service corporations. In order, however, that it may discharge its functions it is compelled to summon witnesses, to hear evidence, to decide controversies, and establish rules of conduct and must therefore exercise powers which are essentially judicial and legislative. The courts recognizing the need for the exercise of all these functions, and realizing that it is impossible in any event to draw a clear line between what is legislative, what judicial and what merely administrative, have allowed the commissions a wider latitude than, under the constitutions of the states, they allow to the departments of the government proper.

The courts will not substitute their own judgment for that of the commission when a mere exercise of discretion is involved and because they think a different conclusion might have been arrived at. Neither will a court act for the commission. If they declare a rule of the commission illegal, they cannot make a new one, for to do so is beyond the judicial power. They cannot legislate. A commission's powers however, are limited by certain principles of law, which the courts do enforce. It cannot violate the constitution by taking property without due process of law. It can do what the act creating it permits and nothing else. Its powers are delegated, therefore it must use them reasonably and in the interest of the public, and not capriciously or arbitrarily.

J. S. LIONBERGER.

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<sup>14</sup>Interstate Commerce Commission vs. Union Pa. Ry. Co., 222 U. S. 541; Interstate Commerce Commission vs. Ill. Central, 215 U. S. 452.

