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Conclusion

If the aims of Congress in its current social legislation are to be adequately effectuated, even further access to information may be required. The census power has been suggested as a constitutional basis for collecting data not obtainable otherwise, as where the matter concerned is in the exclusive jurisdiction of the states.⁶⁹ The war power has been used effectively in the past for the accomplishment of the same purpose.⁷⁰

Although private persons are protected by the courts from unreasonable demands for information, they must primarily rely on the forbearance and discretion of the investigating body. Recent studies show that administrative bodies are not abusing their power.⁷¹ The present administrative agencies have had the voluntary cooperation of the persons affected in the accumulation of information.⁷² Moreover, some of them are now able to make decisions and rules as occasion arises on the basis of information which has already been compiled.⁷³ As a result, there is little use of compulsory process.⁷⁴

LEONARD E. MARTIN.

DELEGATION OF POWERS TO PRIVATE GROUPS IN MISSOURI

I. INTRODUCTION

The constitutionality of the delegation of public powers to private groups and citizens is an important subject today, partly because it often becomes necessary for the state to draft the services of qualified individuals or groups to participate in the exercise of public functions, and partly because these groups ask for the power to govern themselves. This results from the limited ability of officials to give adequate attention to all mat-

69. See *United States v. Moriarity* (C. C. A. 2, 1901) 106 Fed. 886, 891; *Rush, Expansion of Federal Supervision of Securities through the Inquisitorial Census Powers of Congress—A Suggestion* (1937) 36 Mich. L. Rev. 409.

70. See *United States v. Mulligan* (D. C. N. D. N. Y. 1920) 268 Fed. 893; *Colclough, Security Exchange Commission's Power of Search* (1935) 3 Geo. Wash. L. Rev. 356.

71. See Attorney General's Committee on Administrative Procedure, *Final Report* (1941) cc. 3 and 7. Cf. *Note, Legislative Investigations* (1941) 9 I. J. A. Bul. 73.

72. *Ibid.*

73. *Id.* at 113.

74. See Attorney General's Committee on Administrative Procedure, *Final Report* (1941) 414.

ters demanding the state's regulation.¹ Delegation of power frequently has been made to administrative boards or officers equipped to handle special, complex problems.² Today, however, by reason of the increasing scope and complexity of regulatory powers, the delegation of public powers to private citizens or groups is increasing. The Federal Government, without resorting to the bestowal of legal regulatory power upon private groups, in the National Industrial Recovery Act conferred upon industrial and business groups the function of proposing codes of fair competition which the President was authorized to promulgate after hearings, with or without modification.³ The preparation of these codes of fair competition was in the hands of committees of industrial and business representatives; the early drafts of the codes were prepared by these committees; and in practical working effect their members were the only ones who understood the intricacies and subtleties of the codes and the motives behind them.⁴ Although the National Industrial Recovery Act was declared unconstitutional upon other grounds,⁵ the device of industrial committees consisting of private persons has been perpetuated in later legislation. The Fair Labor Standards Act of 1938⁶ provides for industry committees including an equal number of representatives of the public, the employees, and the employers. These committees recommend to the Administrator of the Wage and Hour Division "the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry." The Bituminous Coal Act of 1937⁷ provides for twenty-three district boards made up of code members who are to propose minimum prices.

Writers have forecast that with the growth of organized groups in the professional and business fields, there will be an extended use of these bodies in public administration. It has been argued that unofficial bodies have always given consultant service to the state and that there is reason to believe that they can now wisely exercise limited public power.⁸ It has also been

1. See Note (1932) 32 Col. L. Rev. 80, 4 S. E. C. L. 536.

2. See Note (1925) Current Legislation 25 Col. L. Rev. 359; Cheadle, *The Delegation of Legislative Functions* (1918) 27 Yale L. J. 893; Freund, *Administrative Powers Over Persons and Property* (1928), ch. III.

3. (1933) 48 Stat. 195, c. 90, 15 U. S. C. A. secs. 701-712.

4. See Lyon, *The National Recovery Administration* (1935) c. V.

5. *Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495.

6. (1938) 52 Stat. 1060, c. 676, (1940 Supp.) 29 U. S. C. A. secs. 201-219.

7. (1937) 50 Stat. 72, c. 127, 15 U. S. C. A. secs. 828-851. See Jaffee, *Law Making by Private Groups* (1937) 51 Harv. L. Rev. 201.

8. Chamberlain, *Democratic Control of Administration* (1927) 13 A. B. A. J. 186, 4 S. E. C. L. 1460.

argued that, with the changing character of the social structure, the courts would not in this connection give strict construction to the maxim: *delegata potestas non potest delegari*.⁹ This note examines the problems of the delegability of public functions to private persons and corporations in Missouri.¹⁰

There are a number of relevant provisions in the Constitution of Missouri and the Federal Constitution that bear upon this problem. The sections in the Constitution of Missouri are: (1) "The General Assembly shall not pass any local or special law: * * *—(26) Granting to any corporation, association or individual any special or exclusive right, privilege or immunity, or to any corporation, association or individual the right to lay down a railroad track";¹¹ (2) "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class or subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general law";¹² (3) "The appointment of all officers not otherwise directed by this Constitution shall be made in such manner as may be prescribed by law";¹³ and (4) "The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted."¹⁴ In the Federal Constitution the due process clause of the XIVth Amendment is relevant. It provides, *inter alia*: "* * * nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The following sections are concerned with the delegation of power to private groups in the nominating and appointing of public officers, the making of rules by private institutions, the restricting of land use, the protesting of changes in zoning ordinances, the enforcing of laws, the creating and enlarging of franchises and the exercising of eminent domain.

9. Note (1924) 37 Harv. L. Rev. 1118; Note (1924) 10 Cornell L. J. 58.

10. The public powers discussed herein include those delegated by municipal ordinances as well as those delegated by state statutes.

11. Mo. Const. (1875) Art. IV, sec. 53 (26).

12. Mo. Const. (1875) Art. X, sec. 3.

13. Mo. Const. (1875) Art. XIV, sec. 9.

14. Mo. Const. (1875) Art. III.

II. FILLING PUBLIC OFFICE

1. *Nominating*

One of the public functions that is frequently conferred upon private groups, the delegation of which is usually upheld, is the power to nominate to public office. In most instances, the nominating power is given to one or several private groups which have a special interest in the proper filling of the offices for which they suggest nominees. The treatment of this problem by the Missouri Supreme Court, in the more recent cases, puts Missouri with the minority of states which stand firm against such delegation.¹⁵

When the question of the delegability of the nominating power was before the Missouri Supreme Court for the first time, that Court upheld the delegation. The State Barbers' Act of 1899, applicable to all cities of more than 50,000 population, required the governor to appoint a three-man Board of Barber Examiners, one to be chosen from those recommended by the Missouri State Barbers' Protective Association, one from those recommended by the Boss Barbers' Protective Association, and one from those recommended by the Journeymen Barbers' Union.¹⁶ In an action of *habeas corpus* to test the legality of the imprisonment of the petitioner for practicing as a barber without a license from the Board, the petitioner contended that the act was unconstitutional because (1) the statutory method of appointment interfered with the separation of powers between the executive and legislative branches in that it constituted a partial exercise of the appointing power by the legislature, and (2) the act failed actually to prescribe a method of appointment as required by the Missouri Constitution, since it would fail to operate if the unions refused to nominate. In *Ex parte Lucas*¹⁷ the act was held constitutional, on the ground that the Constitution of Missouri left the *manner* of appointing officers entirely to the legislature and hence no constitutional powers of the Governor were infringed. The legislature, by merely providing the manner and form and stating the conditions precedent to the appointment of the board, did as it was authorized to do.¹⁸ The court said further that the Governor alone could raise any constitutional objection on this score.

Later, however, in *State ex inf. Hadley v. Washburn*,¹⁹ the

15. Note (1932) 32 Col. L. Rev. 80, 89, 4 S. E. C. L. 536, 546.

16. Mo. Laws of 1899, 44.

17. (1901) 160 Mo. 218, 61 S. W. 218.

18. Mo. Const. (1875) Art. XIV, sec. 9.

19. (1902) 167 Mo. 680, 67 S. W. 592.

Lucas case²⁰ was distinguished. The legislature had provided for boards of three election commissioners in cities having more than 100,000 inhabitants, to be appointed by the Governor. The act required that one member of the commission belong to "the leading party politically opposed" to that to which the other two members belonged. The minority member was to be chosen from a list of three men named by the city central committee of that party.²¹ In a *quo warranto* proceeding to test the right of a minority member to his office, it appeared that the Governor had disregarded the nominations of the city central committee and appointed the defendant. The foregoing provision of the act was held unconstitutional as a special law granting to an association an exclusive right, privilege, or immunity²² and the right of the respondent to the office was confirmed. The Court said further that the legislature had not merely prescribed the method of appointment as authorized by the Constitution but had so limited the Governor as in effect to exercise a large share of the appointing function itself. The barber case²³ was distinguished upon the ground that the legislature there did not confer a "right, privilege or immunity" upon one organization that it did not confer upon all, since there were no other organizations of barbers existing in the state.

The efforts of the court to distinguish the *Lucas* case in *State ex inf. Hadley v. Washburn* may be criticized. The line of distinction drawn on the right-privilege-immunity point was thin and unrealistic, because it was obvious that other associations of barbers might come into existence at any time. The *Washburn* decision may also be criticised for its treatment of the legislature's power to determine the method of making appointments. The Court there said that although the constitutional provision authorizes the legislature to prescribe the manner in which appointments should be made, it does not authorize the appointment itself to be made by the legislature; for "To provide by law the manner in which an appointment shall be made is one thing, to make the appointment is another; the one is in its nature legislative, the other is essentially executive. The constitution authorizes the legislature to do the one, but not the other."²⁴ But the statutory provisions in the two cases are so

20. Ex parte Lucas (1901) 160 Mo. 218, 61 S. W. 218.

21. Mo. Laws of 1899, 197.

22. Mo. Const. (1875) Art. IV, sec. 53 (26).

23. Ex parte Lucas (1901) 160 Mo. 218, 61 S. W. 218.

24. State ex inf. Hadley v. Washburn (1902) 167 Mo. 680, 67 S. W. 592, 595.

much alike that there is no apparent reason for saying that one infringes upon the Governor's power of appointment while the other does not.

The sounder view was expressed by the court in the *Lucas* case. Nevertheless, the *Washburn* case was followed in *State ex rel. Harvey v. Wright*.²⁵

The Non Partisan Court Plan adopted by an amendment to the Constitution of Missouri at the general election of November, 1940,²⁶ includes a delegation of power to members of the bar, who nominate the lawyers on "The Appellate Judicial Commission" and "The _____ Circuit Judicial Commission[s]"²⁷ of the state. The Appellate Judicial Commission, which fills vacancies on the Supreme Court and Courts of Appeals, is a seven-man commission composed of the Chief Justice of the Supreme Court of Missouri, one lawyer from each Court of Appeals District, elected by the lawyers in that district, and one layman from each Court of Appeals District, appointed by the Governor. Each Circuit Judicial Commission is a five-man commission composed of the presiding Judge of the Court of Appeals of the Judicial Circuit, two lawyers elected by the lawyers in that circuit, and two laymen residents of that circuit appointed by the Governor. When the Governor fills a vacancy on the Supreme Court, the Courts of Appeals, or the Circuit and Probate Courts of the City of St. Louis and Jackson County, he appoints as judge one of the three persons nominated and submitted to him by the appropriate non-partisan judicial commission. It is relevant to note, however, that lawyers constitute an occupational group whose members are officers of the court.

The drafters of the statute providing for the creation and appointment of the Board of Pharmacy used a device which leaves the Governor free to make his own appointments, while putting considerable pressure on him, nevertheless, to follow the recommendations of an interested private group. This statute authorizes the Missouri Pharmaceutical Association to submit

25. (1913) 251 Mo. 325, 158 S. W. 823.

26. This amendment was submitted by initiative petition and adopted at the general election, November 5, 1940, Thomas' Cumulated Annotated Supplement to R. S. Mo. 1939 (1941) 9. The full text is also printed in (1940) 11 Mo. B. J. 43.

27. Circuit Judicial Commissions are to be established for each judicial circuit which is subject to the provisions of the amendment. The amendment specifically applies to the circuit and probate courts within the City of St. Louis and Jackson County. Provision is also made whereby a majority of qualified voters of any judicial circuit may elect to have judges of courts of record, except county courts, appointed in the manner provided by this amendment.

a list of five pharmacists each year, from which the Governor may appoint one to the State Board of Pharmacy. But the Governor is empowered to select his appointee either from the list submitted by the Association, "or from others."²⁸

2. *Appointing*

In addition to the above instances of the nominating power, there are two examples of the appointing power vested in private institutions which perform services of public benefit. As no cases have arisen on these examples, their provisions are set out without any comment upon their constitutionality.

The first example concerns the vesting of the appointing power in humane societies. The statute provides that in cities of the first class where there is a humane society:

* * * it shall be the duty of the board of police commissioners of such city to appoint one or more special officers, to be recommended by such society, whose term of office and wages shall be that of a regular policeman. * * *²⁹

Thus, these private associations have public officers, paid from public funds, wearing uniforms designed by these societies, and exercising public powers, placed at their disposal for the more effective prevention of cruelty to children and animals.

The second example is found in the membership of the Missouri State Anatomical Board which consists of the

heads of departments of anatomy, professors and associate professors of anatomy at the educational institutions of the State * * * in which said educational institutions human anatomy is investigated or taught * * *.³⁰

In this instance, it seems that the legislature, primarily wanting professors to fill public offices, was content to let the educational institutions make the appointments. Nevertheless, it might be argued that this appointing power is not consciously exercised by the educational institutions, since they very probably would not, in selecting men for their chairs, be moved by the realization that they were at the same time filling a position on the state board.

III. RULE MAKING POWER

1. *By Private Institutions*

The instances of the delegation of the rule making power to private institutions are few. In two instances, in Missouri,

28 R. S. Mo. (1939) sec. 10010.

29. R. S. Mo. (1939) sec. 6498. For an interesting case on the delegation of the law enforcement power to a humane society, see *Nicchia v. People of New York* (1920) 254 U. S. 228.

30. R. S. Mo. (1939) sec. 9998.

state boards are directed by statute to adopt rules promulgated by national professional groups. The dental board is bound, in part, by the standards of one of these private associations; a clause in the statute provides that the qualifications for approval of a dental college by the Missouri Dental Board “* * * shall in nowise be less than the standard required by the American Association of Dental Schools.”³¹ The State Board of Health may issue a license to practice medicine in Missouri to one who has a certificate from the National Board of Medical Examiners of the United States, chartered under the laws of the District of Columbia.³² The National Board of Medical Examiners, although made up of state officials, is not itself an official body.

A third instance concerns a private professional institution. In 1897 the legislature enacted that osteopathy “as taught and practiced by the American school of osteopathy of Kirksville, Missouri, is hereby declared not to be the practice of medicine and surgery in the meaning of article I, ch. 59 and not subject to provisions of said article.”³³ Osteopaths are separately licensed. In *State v. Carlstrom*,³⁴ a criminal charge was brought against the defendant, a licensed osteopath, for practicing medicine without a license because he issued a prescription. The defendant filed a verified plea in abatement to the effect that the American School of Osteopathy taught the use of medicine and prescriptions in the osteopathic treatment of certain diseases and that the defendant in writing this prescription was following the teachings of the American School of Osteopathy. The state demurred to the plea, but the trial court overruled the demurrer on the ground that the state had admitted the legal sufficiency of the facts pleaded by the defendant. On appeal, the state contended that the clause “as taught and practiced by the American School of Osteopathy” was valid only because it referred to the methods of teaching and practicing osteopathy as they existed at the time of the statute’s enactment and, hence, did not confer the power to make later changes upon the American School. But the Appellate Court, taking the same view as the trial court, said:

The plea in abatement alleged that the system of osteopathy teaches and uses, and has always taught and used as a part of its system, the particular drugs mentioned in the information, and the demurrer admits it, so what was the trial court to do but to sustain the plea in abatement?³⁵

31. R. S. Mo. (1939) sec. 10086.

32. R. S. Mo. (1939) sec. 9983.

33. R. S. Mo. (1939) sec. 10042.

34. (1930) 224 Mo. App. 439, 28 S. W. (2d) 691.

35. *State v. Carlstrom* (1930) 224 Mo. App. 439, 28 S. W. (2d) 691, 696.

Thus the court sidestepped the issue of whether the legislature could validly confer rule making power upon the American School of Osteopathy. If the court should say today, in passing upon this point, that the scope of the practicing of osteopathy was to be determined by the most recent pronouncements of the American School, it would thereby recognize a continuing rule making power vested in a private institution.

A fourth instance of delegation of rule making power is found in an act of 1895 providing that insurance companies doing business in Missouri should agree upon a uniform form of fire insurance policy for use in the state, which form should be approved by the state insurance commissioner.³⁶

After sidestepping the issue in an early case,³⁷ the court, in the case of *Nalley v. Home Insurance Company*,³⁸ held the statute unconstitutional because the power of the insurance companies and the commissioner to prepare any forms of policy they pleased was legislative and hence not delegable. In this way, although the scope of delegation, rather than delegation to private companies, was the principal issue, an important instance of actual bestowal of authority upon private companies was defeated.³⁹

2. *Waiver of Land Restrictions*

It is within the usual police power of the state to restrict the use of land. City ordinances prohibit specified uses of land in the interest of the public peace, health, morals, or safety; but many of these ordinances permit a waiver of restrictions upon the consent of a designated proportion of the nearby property owners.⁴⁰ This type of consent provision has usually been sustained upon the ground that it is necessary to guard against harm to the value of neighboring land.⁴¹ The Missouri courts, however, have disagreed.

An ordinance of the City of St. Louis, which provided that specified businesses could not be located on any city block in the city without the written consent of the owners of one-half of

36. R. S. Mo. (1909) sec. 7030. The present fire insurance statute is R. S. Mo. (1939) sec. 5940.

37. *Business Men's League v. Waddill* (1898) 143 Mo. 495, 45 S. W. 262.

38. (1913) 250 Mo. 452, 157 S. W. 769.

39. See Patterson, *The Insurance Commissioner in the United States* (1927) sec. 18(2), 248-258, reprinted from Patterson, *Administrative Control of Insurance Policy Forms* (1925) 25 Col. L. Rev. 253, 257-266.

40. See McBain, *Law Making by Property Owners* (1921) 36 Pol. Sci. Q. 617, 4 S. E. C. L. 518.

41. The leading "consent" cases, *Cusack Co. v. Chicago* (1917) 242 U. S. 526, *Eubank v. Richmond* (1912) 226 U. S. 137, and *Seattle Title Trust Co. v. Roberge* (1928) 278 U. S. 116 are discussed by Jaffee, *Law Making by Private Groups* (1937) 51 Harv. L. Rev. 201, 226-228.

the ground on the block, was held invalid⁴² as a delegation to property owners of the power of the city to regulate the location of businesses, thus giving rise to the possibility of discrimination. This case reversed an earlier decision holding the ordinance valid as a proper exercise of the police power with respect to health.⁴³ Some time thereafter an ordinance of the City of Poplar Bluff, to the effect that no wooden building could be erected within the fire limits of the town without the consent of all the property owners in the block, was held invalid⁴⁴ on the grounds that the ordinance was in violation of the statute authorizing the council of a third class city to establish fire limits by ordinance; that since the legislature could not pass any local or special law granting a right, privilege, or immunity to any person, the legislature could not give a city the right to do so; and that the terms of the ordinance amounted to a delegation of the legislative power of a city to the property owners of the city block. But an ordinance of the City of St. Louis that no hack or cab drivers could be licensed to have their stands on streets without the written consent of the abutting property owners was held constitutional upon the ground that it merely afforded the abutting owners a means of protecting their rights of ingress and egress.⁴⁵ There was no discussion of the possible delegation of legislative powers to the property owners.

Under the former dramshop law, it was mandatory upon the county court or other authority to grant licenses in cities of more than 2,000 population when a proper petition, signed by two thirds of the assessed taxpaying citizens in the block where the dramshop was to be located, was presented.⁴⁶ The validity of the statute was not challenged.⁴⁷

3. *Zoning Laws*

Under the state zoning enabling act,⁴⁸ all incorporated towns, cities, and villages may enact zoning ordinances to establish comprehensive regulation of the use of land.⁴⁹ Under the act, if

42. *City of St. Louis v. Russell* (1893) 116 Mo. 248, 22 S. W. 470 (livery stable); accord: *City of St. Louis v. Howard* (1893) 119 Mo. 41, 24 S. W. 770 (slaughter house).

43. *State ex rel. Russell v. Beattie* (1884) 16 Mo. App. 131.

44. *Hays v. City of Poplar Bluff* (1915) 263 Mo. 516, 173 S. W. 676.

45. *McFall v. City of St. Louis* (1911) 232 Mo. 716, 135 S. W. 51.

46. R. S. Mo. (1899) sec. 2997. This statute was repealed in 1931, Mo. Laws of 1931, 266.

47. At the present time, an applicant for a liquor license must meet the requirements of the Liquor Control Act, R. S. Mo. (1939) sec. 4874 et seq.

48. R. S. Mo. (1939) sec. 7412 et seq.

49. R. S. Mo. (1939) sec. 7412.

an ordinance has gone into effect, and if a later proposed change in any regulation, restriction, or boundary produces a protest against the change signed by 10 per cent. of the property owners affected by the change or located within 186 feet of the land involved, it is provided that "such amendment shall not become effective except by the favorable vote of three-fourths of all members of the legislative body of the municipality."⁵⁰ As a practical matter, the protest by 10 per cent. of the property owners confers a limited veto power upon them.

Under this act, a Kansas City ordinance was adopted, dividing the city into seven use districts. No specific provision had been made for the location of charitable institutions. The plaintiff association, wishing to locate a home for the aged in a residential district, in a residence bequeathed to it, had its application granted by the board of zoning appeals; but after a protest of 10 per cent. of the property owners the plaintiff received only a bare majority vote of the city's Common Council and not the three-fourths required by the statute. In the federal district court, the plaintiff urged that the alleged delegation of legislative authority to the property owners violated the United States Constitution, but the court held that the "fact that the legislative body may heed the voice of protest is not a delegation of legislative authority."⁵¹ The court further said that such a provision merely affected "the enforcement of laws and ordinances." In the circuit court of appeals, the case was reversed and remanded upon other grounds.⁵²

IV. LAW ENFORCEMENT

The rights of private persons to arrest in order to prevent the commission of a felony and, at times, to kill a person in the act of committing a felony do not depend upon the delegation of these powers by the legislature.⁵³ Statutes may, however, encourage the cooperation of private individuals in the enforcement of criminal laws. As an example, under a former act making it a misdemeanor to fail to ring the bell on a railroad engine at least 80 rods from an intersection and to keep it ringing,⁵⁴ an informer who induced a successful prosecution received one-half

50. R. S. Mo. (1939) sec. 7416.

51. *Women's Kansas City St. Andrew Soc. v. Kansas City, Mo.* (D. C. W. D. Mo. 1931) 54 Fed. (2d) 1071.

52. *Women's Kansas City St. Andrew Soc. v. Kansas City, Mo.* (C. C. A. 8, 1932) 58 Fed. (2d) 593.

53. 1 Wharton's *Criminal Law* (12th Ed. 1932) 512, sec. 383.

54. R. S. Mo. (1879) sec. 806.

of the \$20.00 penalty.⁵⁵ Another method of permitting the use of public power, rather than bringing about cooperation, is to give to a private association the power to maintain officers with the authority to apprehend and arrest lawbreakers. This device was used in the special charter incorporating the Union Cemetery Association of Kansas City, which provided for the appointment of a bailiff who was authorized to make arrests and take offenders before the officer or tribunal having cognizance of specified offenses mentioned in the other sections of the charter. His appointment was to be confirmed by the County Court of Jackson County.⁵⁶

V. ENLARGING OR CREATING A FRANCHISE

The era of special legislative enactments for the creation of private corporations has been terminated by state constitutional provisions which prohibit the granting of such special charters.⁵⁷ The Missouri Constitution has contained such a prohibition since 1865.⁵⁸ In a prior instance, when the legislature created the Missouri Petroleum Company by special charter,⁵⁹ the company was given the power, *inter alia*, to market special stock which formed no part of the general stock of the company. The holders of such special stock were permitted to become a distinct corporation. In this manner, the Missouri Zinc Company was organized. In an action on some notes signed by the zinc company and its president, the plaintiff holder alleged that since the zinc company was not a legally organized corporation, it was a partnership and therefore Richards, who signed the notes as its president, was liable as a partner. Without discussing what would be an unlawful delegation of the legislative power to grant a franchise, the Court held that the zinc company was legally organized and that the power of the Missouri Petroleum Company to market and issue this special stock was not such a delegation of

55. See *State ex rel. Clay Co. v. Wabash St. L. & P. Ry. Co.* (1886) 89 Mo. 562, 1 S. W. 130; *State ex rel. Cass County v. Mo. Pac. Ry. Co.* (1899) 149 Mo. 104, 50 S. W. 278.

56. This provision in their special charter was mentioned in *Union Cemetery Ass'n v. Kansas City* (1913) 252 Mo. 466, 161 S. W. 261. It is of interest today to note that the Model Sabotage Prevention Act provides that "any person employed as watchman, guard, or in a supervisory capacity" on the fenced-in grounds of a business engaged in the production, storage, or transportation of defense materials may stop any person, interrogate him, and "arrest such person without warrant" for unlawful entry on property. Werner, *The Model Sabotage Prevention Act* (1941) 54 Harv. L. Rev. 602.

57. See Frey, *Cases and Statutes on Business Associations* (1935) p. 54.

58. Mo. Const. (1875) Art. XII, sec. 2.

59. Mo. Sess. Laws of 1865, 268.

legislative power as would invalidate the formation of the Missouri Zinc Company and thus turn it into a partnership.⁶⁰ It would seem that the power to form new corporations is clearly legislative, however, and should not be placed in private hands without official supervision.

A similar question arose in a recent decision involving a statute which provided that not less than three nor more than seven qualified electors could become a corporate body as state highway toll bridge trustees by filing articles of agreement with the Secretary of State.⁶¹ Such a body was declared to be an agency of the state, with power to erect a toll bridge and issue tax-free revenue bonds to meet the cost of construction. After the indebtedness was paid off, the bridge was to be free and title was to vest in the state. In an action of mandamus to compel the Secretary of State to file articles of agreement tendered by the relators under this act, the act was declared unconstitutional (1) as an attempted delegation to private citizens of the power to create a public agency and (2) as an attempted exemption of private property from taxation.⁶²

VI. EMINENT DOMAIN

Eminent domain raises no particular constitutional problems when private corporations, organized and incorporated by a special charter⁶³ or under general statutes,⁶⁴ or foreign corporations⁶⁵ exercise the power, if the private property is taken for a public use and if a proper remedy is provided for property owners to obtain compensation.⁶⁶ But at the same time, it should be recognized that the invocation of the statutory procedure of eminent domain is a benefit—a right, privilege, or immunity—a property right that other people or groups cannot get from the state.

60. *Granby Mining & Smelting Co. v. Richards* (1888) 95 Mo. 106, 8 S. W. 246.

61. Mo. Sess. Laws of 1935, 337, Mo. St. Ann. 1929 (1940 Supp.) 6786, secs. 7914d-7914g.

62. The bridge from a property tax and the interest on the bonds from a state income tax. *State ex rel. Jones v. Brown* (1936) 338 Mo. 448, 92 S. W. (2d) 718.

63. *North Missouri Ry. Co. v. Gott* (1857) 25 Mo. 540; *Cape Girardeau and Scott County Macadamized Road Co. v. Dennis* (1878) 67 Mo. 438.

64. *American Telephone & Telegraph Co. of Missouri v. St. Louis I. M. & S. Ry. Co.* (1907) 202 Mo. 656, 101 S. W. 576, *State ex rel. Greffet v. Williams* (1910) 227 Mo. 32, 127 S. W. 52.

65. *Southern Ill. & Mo. Bridge Co. v. Stone* (1903) 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301.

66. *Chicago B. & Q. Ry. Co. v. McCooley* (1917) 273 Mo. 29, 200 S. W. 59, *Walther v. Warner* (1857) 25 Mo. 277.

VII. CONCLUSION

Notwithstanding the dearth of litigation in Missouri on the question of delegation of powers to private groups, one might hazard the generalization that such delegation is not currently favored in this state. The courts have definitely disapproved delegation in the nominating of public officers, in the standardizing of the form of fire insurance policies, in the waiver of land restrictions, and in the forming of toll bridge corporations. In several cases, the issue of delegation was present, but the decisions were placed on other grounds. Thus, no definite conclusion is possible concerning the statutory definition of osteopathy and concerning delegation of the power to property owners to protest changes in zoning ordinances. In the majority of instances when there has been statutory delegation, there has been no litigation. Constitutional change has in one instance, that of the Non-partisan Court Plan, created a delegation of power to private groups; while in another instance, that of the abolition of private incorporation, it has eliminated such delegation. With the exception of the *Lucas* case, which was greatly weakened by the *Washburn* case, the courts have not actually approved a delegation of power to private groups. It is believed that a more realistic recognition of the contributions specialized private groups could make to governmental functioning, and of the value derived from democratically permitting limited groups, as in the zoning and land restriction instances, to decide questions concerning their interests, when only those interests are affected, would lead to a wider acceptance of the delegation of powers to private groups.

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