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BUSINESS ENTERPRISE AND THE PUBLIC UTILITY’S DUTY TO SERVE WITHOUT DISCRIMINATION

By Gustavus H. Robinson *

INTRODUCTION

Single concrete applications of a doctrine may be examined by simply holding the particular instance up against the doctrine as a fixed, final, and wholly accepted thing, exercising the critical sense merely upon the application. But a series of instances leads the examiner to a feeling that the applications furnish a running critique of the doctrine itself. In discrimination the judicial job is ostensibly to mirror the instant circumstances against a definitive guiding idea. But much social policy is involved in the presuppositions and it is arguable that reflections upon them enter into the judicial thought.

Though public utility service nowadays means a large plant and an overhead for investment and for operation which is not only heavy but constant, the nondiscrimination theory largely seeks to standardize the service unit on the requirement of the smaller user. Consequently, it bars, in the utility field, the economic principle which, in “private” businesses carrying high overhead charge, decreases the unit charge to the buyer of more units. Underneath is the inarticulate major premise that there is a social or economic—or some like labelled—advantage in keeping up the competitive capacity of the little man by making the transportation factor in selling costs substantially equal upon the small-package basis.1

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1The only service units recognized in goods transportation are the car load and the less than carload rates. “Before the act to regulate commerce it was usual, first to give reduced rates to persons who shipped quantities of merchandise and, second, to charge a proportionately less rate for a carload than was asked for a shipment in less than a carload. After the act, lower rates to wholesale shippers were abandoned, (as) contrary to the act. The lesser proportional rate for a carload than for a less than carload was not prohibited. Thurber v. New York C. & H. R. R. Co., 3 I. C. C. 473, (1890) 2 I. C. C. 742. The theory embodied the assumption that a carload was the unit of shipment, and rested upon the differences which existed between the cost of service in the case of a carload shipment by one consignor to one consignee, and that occasioned by a shipment in one car of many packages by various consignors to various consignees.” White, C. J. in Interstate Commerce Commission v. D. L. & W R. Co., (1911) 220 U S. 235, 31 Sup. Ct. 392, 55 L. Ed. 458.

The train load as a unit is given no concession. In P S. Comm. v. State ex rel. Gt. Northern Ry. Co., (1922) 118 Wash. 629, 204 Pac. 791, 25 A. L. R. 186, the court said “The commission should not have considered
The economic principle stated benefits the big concern only in the use of its own plant. Out of its use of the utility's plant it may not so benefit, and keeping the little fellow going becomes thus a means of regulating big business.

That this solicitude for the smaller may put a premium on mere conservatism if bigness be due to progressive methods, and upon inefficiency, when bigness is due to efficiency and to genius in management, is one of the penalties society pays for its viewpoint. Occasionally a court's sense of these social economies operates to affect the decision. There are cases which countenance preference of the efficient. On the whole the judicial task is the fact that the timber company shipped by trainloads, thus tending to make the cost of transportation less to charge one furnishing trainload lots a less rate is unlawful, because it is in effect "allowing lower rates upon a condition which only a few shippers can comply with and, consequently is an injustice to those unable to ship the required quantity." Planters' Compress Co. v. Cleveland C. & St. L. R., (1905) 11 I. C. C. 402, 403 Providence Coal Co. v. Providence & W R., (1887) I. C. C. 363 Anaconda Copper Min. Co. v. Chicago & E. R., (1910) 19 I. C. C. 592; Burlington C. R. & N. R. Co. v. Northwestern Fuel Co., (C.C. Minn. 1887) 31 Fed. 632; Watkins, Shippers & Carriers, 3d. ed., sec. 159."


This non-application of the wholesale-retail principle has not been so rigorous as to utilities not selling transportation. See Silkman v. Water Commissioners, (1897) 152 N. Y. 327 46 N. E. 612, 37 A. L. R. 827 Walton v. Proutt, (1915) 117 Ark. 388, 174 S. W. 1152, L. R. A. 1915D 917 As between commercial and household users, it is more understandable than as between commercial users merely.

2J. J. Jackson in "The High Cost of Selling," New Republic July 25, 1928, points out how as respects highly competitive articles, particularly automobiles, the selling charges deprive the consumer of the benefit of the lower production costs. Utility sales are subject to no such selling costs as the products are by the utility hypothesis self-selling.

Mark Sullivan shows that the great activity in the public fight for non-discrimination coincided with the "trust busting" era see his "Our Times: America Finding Herself," Chapter 15. See also John Moody, "The Railroad Builders" (Chronicles of America) 1921, p. 230. In 1904 Bruce Wyman published a long article on "The Law of the Public Callings as a Solution of the Trust Problem," 17 Harv. L. Rev. 156, 217

4The duty to be efficient is imposed of course on the utility. "We must concede that it is not only the right but the duty of the public utility to discard inconvenient or obsolete apparatus and provide the best available." State v. Sunset Tel. & Tel. Co., (1915) 86 Wash. 309, 150 Pac. 427

And there are similar duties on the user of the utility. In Baltimore & O. R. R. Co. v. Pullman Service Comm., (1917) 81 W. Va. 457 94 S. E. 545, a preference in the type of cars allotted to mines which operated against those not owning tipples for loading was sustained.
difficult in the principle. Besides barring the wholesale-retail idea, the doctrine of equality treatment also bars business practices which are "good business" both in trade and in law outside the utility field. Yet there is a social interest in enterprise in business as itself a thing to be fostered, and undesirabilities in business need not now be fought by the use of the public utility law premises so much as previously, since government regulation has so largely entered into all forms of business. In addition to these considerations the task is no less difficult in practice than in principle and, indeed, without the commissions, mandated to deal with the fact situations as individual problems primarily it would be

"Their own lack of proper equipment is a just and reasonable ground of discrimination against them when conditions are such as to make an extension of equality of facilities to them highly injurious to others and restrictive of the efficiency of the carriers."

In Atchison, T. & S. F R. Co. v. United States, (1914) 232 U. S. 199, 34 Sup. St. 291, 58 L. Ed. 568, a dispute over precooling or icing enroute, the court said, "Neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay." The "dry ice" discoveries of the last year or two which tend to revolutionize car refrigeration methods may shortly make this last problem a real one.

In a recent article, "Administrative Commissions and the Administration of Justice" in (1928) 2 Univ. Cincinnati L. Rev. 1, H. L. Hevis at page 6 et seq., shows the amount of regulation of the "private" business. See also "Social Control of Business." J. M. Clark (1926) reviewed (1927) 13 St. Louis L. Rev. 33.

"Why is a Commission?" has been answered practically. Briefly it is because the legislature cannot do the job, and the job must be done. There are in this state approximately 450 gaslight and electric-light companies. They are located in nearly every portion of the state, which contains within its bounds not only cities varying in population from 10,000 to 4,000,000, but villages, agricultural or rural communities, and the wild forests of the Adirondacks. It is plain that no uniform rate of charges could be established that would be just or reasonable. Besides, the difference in the output of the several companies varying with the size of the communities they respectively supply as well as the difference in the cost of material to the various companies, dependent on their location with reference to the cost of transportation of coal, oil, and the like, would make a rate that was fair in one place unreasonable in another. Therefore, any close approximation to a reasonable tariff would require special rates to be prescribed for many different localities. To do this properly would involve an investigation into the particular facts in each case. There was a time in the history of this country when carriers and public-service corporations were so few that the legislature itself might have performed that labor but, by reason of the rapid growth of population and the great increase in the number of such corporations, it has become impracticable for the legislature to discharge that duty. Moreover, many rates may require alteration from time to time. That the most appropriate method (speaking from a practical, not necessarily constitutional, point of view) is the creation of a commission or body of experts to determine the particular rates, has been said several times in the opinions rendered by the Supreme Court of the United States in the various railroad-commission cases and in those of state courts. "It would be also impossible for the Legislature of this state to undertake intelligent regulation of utility corporations by the Legislature
impossible. Effective direct handling by courts of modern utility regulation is an unthinkable thing.

THE RECENT CASES

Although the general duty of a public utility to deal with its customers on a basis of equality is not now open to contest\(^7\) and the battle just now is on the duty to serve at reasonable rates,\(^8\) itself." Cullen C. J. in Trustees of Saratoga Springs v. Saratoga Gas. etc., Co., (1908) 191 N. Y. 123, 83 N. E. 693. To the same effect is Idaho Power and Light Co. v. Blomquist, (1914) 26 Ida. 222, 141 Pac. 1083.

Chief Justice Taft, in his response to the resolutions of the Bar in commemoration of Chief Justice White says:

"The Interstate Commerce Commission was authorized to exercise powers the conferring of which by Congress would have been perhaps, thought in the earlier years of the Republic to violate the rule that no legislative power can be delegated. But the inevitable progress and exigencies of government and the utter inability of Congress to give the time and attention indispensable to the exercise of these powers in detail force the modification of the rule. Similar necessity caused Congress to create other bodies with analogous relations to the existing legislative, executive, and judicial machinery of the federal government, and these in due course came under the examination of this court. Here was a new field of administrative law which needed a knowledge of government and an experienced understanding of our institutions safely to define and declare. The pioneer work of Chief Justice White in this field entitles him to the gratitude of his countrymen." 257 U. S. XXV-VI.

"The somewhat unprofitable debate as to whether the common law did or did not require service without discrimination is discussed pro and con in the cases of Sullivan v. Minneapolis & R. R. Rv., (1913) 121 Minn. 488, 142 N. W 3, 45 L. R. A. (N.S.) 612, and earlier in Interstate Comn. Comm. v. Baltimore & Ohio R. R., (1892) 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. They concluded that the weight of common law authority favored the duty. Modern public utility statutes impose it, under varying phraseology and under scrutiny as to details by administrative agencies, and the statutes are so far universal (only Delaware does not have one), that the duty is no longer debatable as a practical thing.

In Akron, Canton, etc., Ry. v. United States (New England Division Case), (1923) 261 U. S. 184, 43 Sup. Ct. 270, 67 L. Ed. 605, Brandeis, J. treats it as a thing established. "Transportation Act of 1920 introduced into the federal legislation a new railroad policy. Theretofore, the effort of Congress had been directed mainly at the prevention of abuses: particularly those arising from excessive or discriminatory rates. The 1920 Act sought to insure also adequate transportation service." See also Taft C. J. in The Wisconsin Passenger Fares Case, (1923) 257 U. S. 563, 42 Sup. Ct. 232, 66 L. Ed. 347 The Uniform Public Utilities Act tentatively adopted by the National Conference of Commissioners on Uniform State Laws in 1927 by section 6 bars "any unreasonable preference," the commission to determine "any question of fact arising."

\(^7\)In the now famous "biggest lawsuit in history" involving the valuation theory to be applied to the railroads, "Excess Income of St. Louis and O'Fallon Ry. Co.," (1927) 124 I. C. C. 1., Mr. Eastman C., concurring with the majority, says of the commission's job, p. 50, "In determining questions, knowledge of pertinent facts and an experience which makes possible to visualize the probable results of a particular public policy are quite as important as familiarity with the law books. It is an instance in which the law is influenced if not governed by the facts. When, there-
the discrimination case is far from a rarity. Vigilant enforcement is needed to make "law in action" of the law now in the books.

As it is, so subtly is the discriminatory situation brought about, and so fortified, frequently, by otherwise accepted commercial enterprise, that the solutions seem in many instances mere opportunism. The matter in hand often appears "settled" only in the sense that authority has spoken and consequently furnished a guide to which the contesting parties may now adapt their dealings.

One of the preliminary tasks in enforcing the obligations of a utility to its public is to delimit the extent of the duties. Often a controversial matter in itself, it complicates the discrimination cases because, under the utility acts, the customer may do some of the things which the law requires the utility to do, and make claim on the utility for payment. Obviously his investment in special equipment is actuated by the urge to secure a business advantage, and a strictly logical theory might bar either his doing these things, or his being paid for doing them. But no doubt there is sufficient economy in the present practice to justify it since it spurs to progress in methods. As it stands, however it

fore, the question relates to the constitutional limits of the public regulation of railroads, an intimate knowledge of railroads, of their relations with and their importance to the shipping and investing classes and to the public generally, and of their past history and future prospects becomes of the highest consequence. Such knowledge it is the peculiar duty of this commission to acquire. As to such matters it occupies a daily front seat upon the stage, while the Supreme Court of necessity is only an occasional visitor in the balcony.

"I cannot avoid the conclusion that the commission would be derelict in its duty in this case if it should neglect the illumination which is thrown upon the law by its own intimate knowledge of transportation affairs and problems."

He and the majority went so far in his theory as to take a view opposed to the "spot reproduction cost" of the Supreme Court in Indianapolis Water Co. v. McCardle, (1926) 272 U. S. 400, 47 Sup. Ct. 144, 71 L. Ed. 316. Hearing on the appeal from an affirmance of the Commission's results in (1928) 22 F (2d) 980, Distr. Ct. E. D. Mo. 1927 has been set by the Supreme Court for January 2, 1929.

See note 5 ante. The writer's "Reasonable Rates the Valuation War." 6 N. C. L. Rev. 243 is a purely expository article, which, however, collects the controversial literature.

9 N. Y. Cent. & H. R. R. v. Cent. Elec. Co., (1916) 219 N. Y 227 114 N. E. 115, 1 A. L. R. 1417. Cardozo J. "The decisive question must therefore be whether the switching done by the defendant within its plant between its storage tracks and the platforms of its mills is work which the plaintiff, (RR) was bound to do as part of transportation. To put it in another form the question is, where does transportation begin and end?"

10 The provisions of the Interstate Commerce Act are in section 15 (13)

11 See note 4 ante.
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is necessarily under close scrutiny in the interest of the nondiscrimination policy.\(^\text{12}\)

(a) ALLOWANCES TO UTILITY CUSTOM

One of the cases involving these allowances, which particularly invites reflection on the disadvantages to which the nondiscrimination theory may subject those who apply new efficiencies to old problems, is \textit{Alex Sprunt and Son v. United States}.\(^\text{13}\) Cotton which is collected at interior points where it is lightly compressed, goes to Houston, Texas, where, if it is for export, it is very tightly compressed. Cotton for local delivery in Houston moved at a rate of 80 cents. Cotton for export moved at 85 cents, "making a spread between domestic and export rates of 3.5 cents, thus difference representing cost of transferring cotton from the city compresses and warehouses back to the waterfront to shipside."

The uptown facilities could bring their cotton in at 80 cents, and, after compressing it, declare it for export, when the railroads would carry it to the port for an additional 3\(\frac{1}{2}\) cents. They usually preferred to dray their cotton to shipside, themselves. In either event, to get their cotton to shipside from the interior, would cost about 83.5 cents. The distance varied from one to five miles.

All the Houston compresses were back from the water until the Sprunts upset the equilibrium of advantage by "the erecting of large warehouses, with compresses, on the waterfront" and were able to deliver directly to shipside. Thus "These warehouses by using the domestic rate of 80 cents can get their cotton within reach of shipside 3\(\frac{1}{2}\) cents cheaper than the interior and uptown facilities."

At the latter's instance the Commerce Commission consequently declared the two-rate plan unduly preferential of the waterfront plants, and it set a single rate of 81 cents. But it spoiled the smooth symmetry of this arrangement by saying: "We see no reason for condemning a reasonable allowance for dray-


\(^{13}\)(D. C. Tex. 1927) 23 F (2d) 874.
ing from uptown such being a substitute for rail transportation,” and unpalatably for the waterside compresses, added

“But upon cotton delivered to shipside from and by water front warehouses the hand or electric trucking or movement by overhead trolley to that part known as the wharf, is not a substitute for rail transportation, but is an intraplant movement, just the same as the handling of cotton from the interior of an uptown warehouse to the railroad car or dray is an intraplant movement. No allowances may lawfully be made.”

This satisfied nobody. Shippers who had enjoyed an 80 cent rate joined carriers who had had an 85 cent figure in objecting to the 81 cent rate, and the Sprunts of course repelled the fateful label “intraplant.” Yet all failed in the effort to enjoin the enforcement of the order.

Sprunt’s argument that the order did not in fact establish a one rate plan, but a plurality of rates whereby the disadvantageously located were equalized with them gave the court much difficulty, but it reached the conclusion

“That if attention is fixed upon the movement by the carrier the difficulties of the case will disappear if the water front warehouses can have cotton delivered to their own plant facilities by which they can put the cotton to shipside it is no concern of theirs that an uptown warehouse gets its cotton to shipside at the same transportation cost. That the fact that the water front warehouses have spent money to get their sites, and made expenditures upon intraplant equipment is no matter to be considered in rates. In short, that they have contributed nothing to transportation as such in building where they did and in equipping their plants as they have.”

Does this provide an adequate answer to the Sprunts’ argument “that if such ruling stands, plaintiffs and those similarly situated had better sell out, move back from the water front, and thus put themselves in a position of equality with their uptown competitors?”

United States v Spencer Kellogg and Sons14 is another phase of the allowance problem. Elevator concerns located in Buffalo who received grain from Great Lakes vessels and loaded it upon cars, received for this under the rail carriers’ field rates, one cent per bushel and gave the consignees15 one-half cent. The business

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14(D.C.N.Y. 1926) 12 F (2d) 612.
15The elevator men had previously sued the carrier involved (Kellogg & Sons v. Delaware L. & W Co., (1922) 204 App. Div. 243, 197 N. Y S. 380) for the 1 cent per bushel, which the railroad company refused to pay because the Kellogg concern had agreed to pay the rebates here in question, contending that, if it did so, it would subject itself to punishment under the Elkins Act. Of this the court remarked “The civil
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purpose, of course, was to divert the grain stream so as to run through the particular elevator. This "split" is the device to rebate relied upon under the Elkins Act. Demurrers to the indictments were overruled in the district court where the elevator men "contended that (they) are not common carriers or agents of the railroads transporting the grain, or persons acting for them that they acted in their own interests, in giving refunds unconnected with any arrangement with the railroad carriers, and accordingly that the Elkins Act does not apply."

Said Hazel, D. J.

"The Elkins Act cannot thus be narrowly construed. It was not essential that the rebate should have been paid out of the rate or funds of the carriers or pursuant to a common understanding between them and the carriers. It makes no difference that defendants were not common carriers, or that they acted independently throughout in parting with their money to the shippers. The Elkins Act is not so impotent as to allow persons or corporations, aside from common carriers, to thwart (itself) by a device of any sort which results in a shipper paying less rate for the carriage than a lawful rate."

In affirming, the circuit court of appeals, second circuit, said: "The law was intended to reach (those) who contribute knowingly and understandingly to a rebate or concession by any manner or device, and the relation which the culprit bore to the liability imposed by that decision did not determine the criminal responsibility. The penalty is imposed here, not because it was acting for the carrier, but because it performed a service of transportation, and gave a rebate to its shipper or consignee from the compensation received for that part which it performed."

The New York court had expressed the opinion that there was no violation of the discrimination policy by the elevator men. But it based itself on section 2 of the Commerce Act which, the federal court pointed out, is narrower in scope than the Elkins Act.

"In Union Pacific R. R. v. Updike Grain Co., (1911) 222 U. S. 215, 32 Sup. Ct. 39, 56 L. Ed. 171, referred to," said the court, "it was held that a railroad may not pay an allowance to one shipper and refuse an allowance to another, when both shippers have rendered the same service to the railroad company. This authority does not aid plaintiff in error's present position. Nor does Interstate Commerce Commission v. Diffenbaugh, (1911) 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83, for there it was held that, when a shipper performs transportation service which it is the legal duty of the carrier to perform, it is entitled to reasonable compensation for the performance of that service. The
(b) Customers' Contracts with the Utility

Equality treatment in the allotment of equipment among applicants breeds, on the carrier side, much litigation, which runs basically to the question "Just how many cars should the carrier have?", and which remains a puzzle unsolved. Theoretically, perhaps, there should be no difficulty "A carrier is only required to have a car supply adequate to meet the normal demands of the trade." But what is "normal"? So long as the graph representing demands runs to peaks and sags a balancing of the interests involved would seem to place the numerical requirement at a figure represented by a line cutting across the graph below the highest peaks and above the lowest sags, and, though there is judicial pronouncement which draws the line through the peaks,

elevator owner, in that case, was the shipper, and it elevated its own grain. It differs in that material fact from the case at bar."

18Certiorari was denied, (1927), 275 U. S. 566, 48 Sup. Ct. 122.
19In Illinois Central R. R. v. River Rail Coal and Coke Co., (1912) 150 Ky. 489, 150 S. W 641, the Kentucky court states truly enough "If the slack as well as the busy months of the year are to be taken into consideration in estimating the equipment needed, the supply of cars might be wholly inadequate during the busy months, and yet there would be a large surplus during the slack months." But it then naively draws as a "normal" a line through the peaks of the graph "conceding that a carrier is only required to have a car supply adequate to meet the normal demands of the trade, this normal demand is not to be estimated by the number of cars needed when the normal demand is least, but by the number needed when the normal demand is the heaviest, in respect to a commodity such as coal, the normal demand for which is practically the same during six or eight months in each year. And while the number needed in each of these busy months may be taken into consideration in estimating the number needed to supply the demand during all these months, the number needed to supply the demand during the spring and summer months is entitled to little consideration in determining what number of cars is needed to supply the normal demand."

20The straphanger of the urban rush hour, the commuter, the movement of coal, of wheat, etc., are the problems. The fluidity resulting from nationwide operation enables the Pullman Company to shift equipment north to south and vice versa according to seasonal traffic and the efforts of the car interchange association effectuate a somewhat similar result. Since the "rush hour" concerns not only cars but track capacity, "a seat for every passenger" seems impossible. One solution offered is to take the rush out of the hour by the stagger system—i. e., spreading the traffic over a wider time area. Recent surveys of urban automobile traffic recommend this. An intelligent cooperation by the traveling public with the utilities is too much to be hoped for so long as urban politicians make their most effective politics out of attacking local transportation companies.

21See note 19.
the elaborate provisions which regulation makes for car distribution invite the assertion that the balance indicated is more or less the working compromise. Consequently the occasions when the demand and supply graphs do not coincide present invitations to the shipper to do something for himself.

Freest freedom of contract being until lately part of our inbred thinking, he naturally sought by making arrangement with the utility as he would with any other seller to secure a special claim upon the carrier. But to this the nondiscrimination doctrine interposes a most resolute veto. Under prevailing views it operates to withdraw utility service and utility rates from the field of contract.

Notwithstanding the prevalent authority, South Carolina, in a recent three to two decision, Strock v. Southern Ry. yielded to the business argument and supported a contract whereby a logging concern was to have placed at "Station Fifty-eight" each Monday, from May to October, two cars for loading with lumber which the shipper cut nearby during the week and piled up in the railroad yard. The complaint simply recited that the logs

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22"This obligation includes the obvious duty to keep for use such rolling stock as the requirements of ordinary business make necessary, but not the duty to keep extra rolling stock to meet extraordinary or unprecedented requirements." Cathron J. in Strock v. Southern Ry., (1927) 143 S. C. 207, 140 S. E. 470. The phrase "extraordinary or unprecedented," though part of the judicial jargon of car shortage, furnishes no real help in the situations, however, where the seasonal or diurnal peak is constant and foreseeable.

The Interstate Commerce Act sec. 1 par. 12 recognizes the car shortages as a condition to be met. It requires the carrier to make distribution of coal cars on mine ratings, under the supervision of the Commerce Commission, and the latter, by paragraph 15, is empowered to make emergency distribution.

23Roscoe Pound discusses this in various writings. See his article, "Liberty of Contract" 18 Yale L. J. 454 and his books, "Spirit of the Common Law" p. 28, and "Introduction to a Philosophy of Law." p. 265.

24The broad purpose of the Commerce Act was to compel the establishment of reasonable rates and their uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper," says Lurton J. in Chicago and Alton R. R. v. Kirby, (1912) 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033. "The price (of service) is no longer a matter of private contract between the parties the rate by law established and not the acts or contracts of the parties must control." Pollock, D. J. in Atchison T. S. F R. Co. v. Kinkade, (D.C. Kans. 1916) 203 Fed. 165. See a note on the free contract doctrine, versus utility service in 41 Harv. L. Rev. 1069. A late discussion is by J. R. Anthony in 6 Texas L. Rev. 265, "The attitude of the Supreme Court toward Liberty of Contract." 285.

25(1927) 142 S. C. 207, 140 S. E. 470 noted, 41 Harv. L. Rev. 1069. There is nothing in the case to indicate that there was any car shortage, it is true.
were going "to market"—which the court promptly assumed was in South Carolina. 27

Reading the South Carolina Act the court said, per Carter J., "I do not think such a contract could be construed 'to allow or receive any rebate, drawback or other advantage', neither does the contract give a preference to the particular shipper, nor does it discriminate against others.”

Developing the business argument, he continued

"The recognition of the right of a shipper to make (the) contract is but the recognition of an orderly way of transaction of business. It enables the owner of property to know when to engage laborers for the purpose of assembling his property for shipment, and further enables him not only to make contracts with laborers in a businesslike manner, but it enables him to make contracts with parties at a distance for the sale and delivery with some degree of certainty. Take this right away and you, to a great extent, deprive the shipper of a market and thereby indirectly destroy his property, discourage the production of property, and paralyze business. Such a right certainly does no injury to the common carrier, but, on the other hand, it enables the carrier to better plan to serve the public, build up business, and thereby increase its revenue. In what way does

29 The railroad so bunched the cars that the shipper’s force could not load them in time to avoid demurrage charges, making his costs higher than those of his competitors, and, he said, "thus discriminating against (him), and at the same time cheating him and defrauding him out of the amount of the demurrage." The demurrage was $26.00. Apparently the shipments went on through the season. The whole transaction seems modest enough financially speaking; but ad damnum was set at $10,000.

27 If the haul was intrastate the theory of the railroad’s demurrer was that the "contract" violated the state statutes barring "preferences, discrimination and undue advantages;” if interstate the road stood on the Federal rules and decisions.

Said the court "I concede, under the authority of Davis v. Cornwell, (1924) 264 U. S. 560, 44 Sup. Ct. 410, 68 L. Ed. 848, that a shipper cannot recover damages caused by the common carrier failing to furnish cars at a specified time and place if the shipper relies solely on an express contract with the common carrier to furnish cars at a specified time and place for an interstate shipment. Davis v. Cornwell, supra, does not preclude the shipper from recovering where the shipment is interstate commerce, if there is a lack of due diligence and it would be competent, further, to prove the contract for the purpose of showing that the carrier had received notice that the shipper desired cars at the time and place named or as evidence that the common carrier had not made reasonable effort to supply the cars, it being the obligation of the common carrier, implied in the tariff, to use diligence to provide, upon reasonable notice, cars for loading at the time desired, as set forth under the foregoing mentioned decision.”

He thus confines the effect of the illegality to judicial non-assistance toward the enforcement of the contract. In his view the illegality does not deprive the shipper of judicial assistance upon the transaction generally. See however the writer’s "The filed rate policy,” in 77 U. of Pa. L. Rev. 213, 222.
such a right discriminate against the public? All shippers have the same right to contract for cars, they are all on an equal footing, and such a right and system simply enables the common carrier to handle its business in an orderly way."

Thus the immediate business interests involved turn the case. It illustrates how sharply they are sacrificed under the federal view which gives the "contract" no standing in court.

Concerning a filed rate policy the opinion says nothing, dealing with the case under local legislation which corresponds to section 3 of the Interstate Commerce Act. The later federal cases, it is true, discuss chiefly the filed rate policy contained in section 6. But it is not arguable that the national decisions base merely on that section. In Chicago and Alton R. R. v. Kirby after quoting both, the court says "for breach of such a contract relief will be denied because its allowance without such publication (in the tariff) is a violation of the act. It is also illegal because it is an undue advantage."

It is an "undue advantage," however, only if the shipper profits under it. Where he does not get what he arranged for

28Two judges took the view that whether interstate or intrastate commerce was involved the contracts offended the applicable laws. The note in 41 Harv. L. Rev. 1069, considers the decision questionable if a state matter, wrong if an interstate.

In Kansas the rule of the federal courts was applied to the local statute in Mollahan v. Atchison, T. S. F R., (1916) 97 Kan. 51, 154 Pac. 248, L. R. A. 1918A 175, noted in 14 Mich. L. Rev. 416.

29If the policy of the state does allow a shipper an assurance of car quantum it would seem that the assured service should be specifically provided for in the tariff.

30This is true in Davis v. Cornwell where the invalidity of the "contract" threw the shipper plaintiff out of court; and also true in Chesapeake & Ohio Rv. v. Westinghouse, etc., Co., (1926) 270 U. S. 260, 46 Sup. Ct. 220, 70 L. Ed. 576, where it threw the carrier out.

31It denied damages for the breach of a special contract for expedited service to a junction point at which Kirby's horses were to be put on a horse special of a connecting road at a set date. There was no tariff covering this, and Kirby paid only the rate filed for non-assured connection.

In Copper River Packing Co. v. Alaska S. S. Co., (C.C.A. 9th Cir. 1927) 22 F (2d) 12, federal authority however sustained an arrangement for ship space which was entirely similar as a business provision on the shipper's part to that of the logging concern in the South Carolina case, except in so far as the vagueness of the provisions which the circumstances necessarily impelled may put it in a more favorable light.

Since the Southern is a large interstate carrier it was argued that therefore car distribution was a federal and not a state matter. This point the court did not discuss at all. Intrastate appropriation of equipment may easily upset the balances in favor of interstate traffic which the policy of the 1920 act has been consistently building up.

This jealous guardianship of the railroads as a single agency for nation-wide service is developed by the author in "Interacting Areas of Regulatory Authority in Public Utilities," 76 U. Pa. L. Rev. 394.
and gets no damages for not getting it the nondiscrimination policy is completely vindicated, so far as the civil side is concerned. But what if the customer has actually received the advantage "contracted" for and the carrier is in court seeking payment for it?

In *Chesapeake and Ohio Ry. Co. v. Westinghouse-Kerr Co.*, the railway was unable to "spot" cars of material consigned to a building concern. "To remedy the condition the engine and crew were assigned to the exclusive use of its traffic, payment to be made therefor as prescribed in the contract." When the carrier sued to recover over $13,000 "for the use of the engine and crew rented," the court said, per Brandeis J.

"abnormal conditions may relieve a carrier from liability for failure to perform the usual transportation services, but they do not justify an extra charge for performing them. The carrier is here seeking compensation in excess of the tariff rate for having performed a service covered by the tariff. This is expressly prohibited by the Interstate Commerce Act sec. 6. A contract to pay this additional amount is both without consideration and illegal. To so insure performance to a shipper was an undue preference. Hence the contract would be equally void for illegality on this ground."

Recovery was denied.

Thus the customer not only got what was a preference whether or not he paid for it, but he does not pay for the advantage he got. The case presented such a dilemma as mechanical jurisprudence breeds. The filed rate theory, which is a distinct contribution to easy administration in a mechanical way of the nondiscrimination policy, sometimes makes "John Doe suffer for the good of the Commonwealth," from the blunders of the utility in quoting figures in reliance on which he irrevocably concludes business dealings which his later required payment of the filed rate turns into loss. The *Westinghouse-Kerr Case* maintains the symmetry of its mechanical application at the expense of the policy it was designed to vindicate. Surely the end should be more important than the means to the end.

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33Obviously, no quantum meruit claim would be entertained if the objection is not merely to recovery on the contract but to a recovery in excess of the tariff.
34Davis v. Cornwell, (1924) 264 U. S. 560, 44 Sup. Ct. 410, 68 L. Ed. 848.
35See the writers, "The filed rate theory a phase of mechanical jurisprudence," as cited in note 27.
36The cases are cited in the article mentioned in note 35.
It would more accurately comport with the objective of the law to confine judicial blindness to the contract to cases where nothing has been accomplished under it. In instances like the present the same ultimate end would be better served in most cases by enforcing the contract as made and rigorously applying the criminal provisions against the violations of the nondiscrimination doctrine. The "most cases" is added because of the possibility that the large sized seeker of preference might, in buying it, find it worth while simply to add his own and the carrier's fines to the purchase cost. "Good business" constantly wars with the inarticulate major premise.

(c) Private Car Ownership as a Business Policy

Accepting, however, that the business man is barred from taking self protective measures to cover his car requirements by "contract," and since the distribution is obviously not to be entrusted to the carrier, the same public interest that blocks them out of the field drives the regulatory authority into it. As in other instances where society denies self-help, it must cover the situation by its own direct action. Consequently, as Mr. Justice Brandeis remarked in Lambert Run Coal Co. v. Baltimore and Ohio R. R. Co.:

"The distribution of coal cars in times of car shortage has received much attention. Definite rules for distribution were promulgated by the [Commerce] Commission, and they remained in force for many years. Among these was the so-called assigned car rule declared by the Commission in Railroad Commission v. Hocking Valley Ry. Co., 12 I. C. C. 398, and Traer v. Chicago and Alton R. R. Co., (1910) 215 U. S. 452, 30 Sup. Ct. 155," 54 L. Ed. 280.

Recently the subject was called up again in so far as car allotment is affected by car ownership. Good business, no doubt,
impels those especially dependent upon transportation to invest in cars, but the value of the investment is lessened by the application of the nondiscrimination rule in *The Assigned Car Cases (United States v Berwind-White Coal & Mining Co., and nine others)* in which the court reversed a district court of three judges.

The district court had upset a rule of the Commission which Mr. Justice Brandeis describes as follows:

"The operation may be illustrated by the following example: Assume that there are in the district 10 mines each with the rating, or capacity, of 20 cars a day, and that of the 200 cars needed to fill the district's requirements only 100 cars are available on a particular day, and that of the 100 only 85 are owned by the railroad, the remaining 15 being owned by mine A. Under the rule, the share of each mine would be ten cars. Mine A would be permitted to have placed its own cars, but only 10 of them. If, on the other hand, 95 of the 100 cars had been owned by the carrier, and only 5 by mine A, there would be placed at its mine, in addition to its own 5 cars, 5 of the carrier's so-called system cars."

"The order here assailed differs from the Hocking Valley-Traer rule (supra) in two respects. Under the Hocking Valley-Traer rule the carrier was permitted to place at a mine all the

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39 (1927) 274 U. S. 564, 47 Sup. Ct. 727, 71 L. Ed. 1204. It explained that the term 'assigned cars' is used in contradistinction to system cars. By assigned cars are meant those placed for use at a specified mine for a particular shipper. By system cars are meant those, from time to time on the line, which are being kept available for use at any mine for any shipper. Assigned cars are of two classes. One class of assigned cars consists of private cars. These are cars owned (or leased) by some shipper (or subject to the control of a particular person not a rail carrier) who delivers them to the railroad for placement at designated mines for loading and transportation as desired by the owner of the cars. Assigned cars of the other class are called railroad fuel cars. These consist wholly of cars owned (or leased) by some carrier, which, instead of being left, like system cars, for use indiscriminately in carrying coal from any mine for any consignor to any consignee, are assigned to a particular mine to carry coal to be used as fuel by a particular carrier."


41 Soothingly—if paradoxically—he adds "The rule does not divert the surplus of cars owned by one shipper to use by another. It merely puts a restriction upon the use of the private car by limiting the number of the so-called assigned cars which may be placed at a particular mine at a particular time. The owner may use the surplus elsewhere or he may lease the surplus cars to the carrier or to another shipper. The operation of the rule upon assigned railroad fuel cars is precisely similar. The limitation is imposed in order to improve the service and to prevent any mine (including one operated by a railroad) from securing at the particular time, more than its ratable share of the aggregate available coal transportation facilities." Would the owner be allowed not to lease his cars so that they would stand idle when cars were needed? Or would he not be required to turn them into the car pool?
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cars (whether private or railway fuel cars) which had been assigned to it, even if the number assigned exceeded its pro rata of all available cars. The prohibition formerly imposed was merely upon placing at a mine any system cars, if it had its full quota from assigned cars. Under the rule here assailed, the carrier is prohibited from placing at a mine more cars than its pro rata, even if all sought to be placed are assigned private cars or railway fuel cars. Moreover, the rule here assailed is a uniform rule governing all carriers without regard to their particular circumstances, whereas the Hocking Valley-Traer Cases prescribed a practice for the individual carrier after it had been found, upon specific inquiry, that the carrier had been guilty of undue discrimination.”

“All of the plaintiffs attack the rule on the ground that it is inherently unreasonable. Some that the rule involves a taking of property without due process of law. The private car owners urge specifically that the rule is an arbitrary interference with the use of their own property. The railroads urge especially that the rule is an illegal interference with their right to manage their own affairs.”

But the court by Brandeis, J., held nevertheless


“The main question is whether Congress has vested in the Commission authority to prohibit a use of assigned cars by a general rule. The legislation to be construed is paragraphs

42“Four of the suits were brought by private car owners. They illustrate different conditions under which, or different purposes for which, private cars are so used. The plaintiffs in No. 709 are coal merchants who operate mines. The plaintiffs in No. 710 are integrated concerns, which operate mines solely in order to supply coal to their manufacturing plants. The plaintiffs in No. 711 are by-product coke concerns, which do not operate any mine. The plaintiff in No. 712 is a public utility, which does not operate any mine. In each case the cars owned were acquired, and are used, solely in order to assure transportation of an indispensable supply of coal. The number of coal cars used on the railroads of the United States is estimated as between 900,000 and 950,000. Of these about 29,000 are private cars.
10 to 17, added to section 1 of the Interstate Commerce Act by the Transportation Act, 1920,"
of which number 12 was mainly involved.43 The railroads contended that it prescribed a rule complete in itself and that the Hocking Valley-Traer rule, read as a limitation of the Interstate Commerce Commission's power. The Commission argued for "administrative discretion as to how the cars be assigned" and the court agreed.44

The decision indicates to what lengths the nondiscrimination idea affects property. As in the Spencer Kellogg Case the property here is not that of the carrier at all. It was dedicated to use which was part of a general utility business,—transportation—but it was not "dedicated to a public use" in the sense of Munn v. Illinois.45 Does the decision mean that the utility customer who supplies himself with equipment "devotes" it so that its use may be regulated on the same principles as is property "devoted" by the utility? Many shippers own, and, under the allowances stated, use equipment for the doing of things which it is the carrier's duty to do. If they are grain elevators as in the Spencer Kellogg Case,46 they are already public enterprises under the Munn Case and their service rates are regulatable on that score. In the Sprunt Case,47 the equipment was held not to be

43The provisions of the Commerce Act sec. 1 (12) et seq., in substance, are "It shall be the duty of every carrier by railroad to make just and reasonable distribution of cars among the coal mines served by it to apply just and reasonable ratings and to count each and every car furnished to or used by any mine against the mine. " The commission may establish reasonable rules, regulations, and practices with respect to car service."

The fifth suit, No. 606, is brought by owners of railroad fuel cars including many of the leading bituminous coal carriers of the United States. Railroad fuel cars are divided according to ownership, into foreign fuel cars, that is, those which belong to, and are used for the fuel supply of, a carrier other than the one on whose lines the mine is located, and home line or system fuel cars, that is, those which are owned by and are used to supply fuel to, the carrier on whose lines the mine is located. Railroad fuel cars are further classified according to the ownership, use, and character of the mine to which they are assigned that is, whether the cars are used wholly in connection with a mine not owned by such carrier, but whose whole output is contracted for by it, or whether the mine at which the cars are to be placed is a "commercial" one—that is, a mine which supplies coal also to the general public. About 28 per cent. of all bituminous coal mined is consumed by railroads. The number of the railroads to which the prescribed rule applies is 3,073. Of these, all except the 35 plaintiffs in No. 606 have acquiesced in the order."

44The case is noted 7 Boston Univ. L. Rev. 300.
45(1876) 94 U. S. 113, 24 L. Ed. 77
46Ante, p. 110 et seq.
47Ante, p. 109, 110.
used in a service which the utility was bound to furnish, but in
the cases where it is so used—as was the drayage equipment of
the uptown compresses—it is in fact so far "devoted" that the
rates are set through the device of the Commission's setting the
allowances. But this does not limit the uptown compresses in
their own use of their own drays. Is it conceivable that if some of
the compresses were short of drays that the others could be ordered
not to use their full equipment, or to apportion some of theirs to
the deficiency? Does the present case go to that?

If in fact there are cars at a time when cars are needed,
it is clear economy to put them to use. That they will not be put
to use is scarcely thinkable. Rental will, of course, be paid for
the use, but the owner's interest is in his use rather than in the rental
for its use by another. The decision is a potential curb on private
car owning.

(d) The Government in Business and Its Rates
In favor of charity and in favor of government; the nondis-

crimination doctrine has been stretched—from the business view-
point it seems illogically enough. After judicial decisions which
defeated the protests of other users thereby made to contribute
unwilling doles, the matter has become imbedded in statutory
permissions, both state and federal, allowing the utilities to make
the deductions, and attacks upon these statutes, based on constitu-
tional prohibitions against class legislation, have been unavail-
ing. The recipients of the favors give nothing to the utility in
return, and the permissions whether judicial or statutory are
based upon the ever vague "public policy" basis. The federal
government jealously guards its interests from the effects of the
general idea when it is applied in favor of a state but it, itself,
 enjoys special consideration in many ways.

48 In New York Telephone Co. v. Siegel Cooper Co., (1911) 202 N.
Y. 502, 96 N. E. 109, 36 L. R. A. (N.S.) 560, the charity and city discount
of 25 per cent was held to be within the "exception (which) permits
a reduction where special facts make it reasonable and just." The
reason was that the exception was from time out of mind. It was here
a voluntary concession by the utility to the municipality in which it
operated and which regulated it in various ways.

49 See St. Louis, S. W. R. Co. v. State, (1924) 113 Tex. 570, 261 S.

50 In Nashville Chattanooga and St. L. Ry. v. Tennessee, (1923)
262 U. S. 318, 43 Sup. Ct. 583, 67 L. Ed. 999, the Supreme Court dealt
with sec. 22 of the Interstate Commerce Act: "Nothing in this act shall
prevent (service) free or at reduced rates for the United States, state or
municipal governments, or for charitable purposes." The state utilities
commission had denied increases on road materials for public high-
Though, unlike the cases above, the origin of its now preferential treatment is a prior quid pro quo granted by the United States, its arrangements with the land grant railroads for favors in the transportation of its munitions and property furnish some recent decisions on the topic of governmental preference of the general public.

In *Louisville and Nashville R. R. v. United States* the government claimed the party rate tariff in the first place, and also that the land grant reductions be applied to it. The court sustained the claim in full, Sutherland J. saying:

"It is not disputed that in virtue of valid acts of Congress appellant's land grant aided lines were bound to carry officers and men of the army and navy at a rate, in the words of the law, 'not to exceed fifty per centum of the compensation for such government transportation as shall at that time be charged to and paid by private parties to any such company for like and similar transportation' That the party rates, being open to private parties, were open to the government, with a deduction of 50 per cent, under this express provision of the statute, does not admit of doubt."


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52 The well known Interstate Commerce Commission v. Baltimore and Ohio R. R., (1892) 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699, established in 1892 that under the permissions of sec. 22 a railroad violated no prohibitions in allowing party rates. Later cases compelled continuance of this recognition of the wholesale-transaction-less-unit-cost idea, Penna. R. R. v. Towers, (1917) 245 U. S. 6, 38 Sup. Ct. 2, 62 L. Ed. 117 as to commuters, but United States v. N. Y. Cent. R. R., (1923) 263 U. S. 603, 44 Sup. Ct. 212, 68 L. Ed. 470, put a check on it in a case in which the Commerce Commission had read as mandatory a provision added by Congress for interchangeable mileage coupons while the court read it as merely an authority to the commission to order such rates on appropriate fact findings.

In Georgia P. S. Comm. v. Atlantic, etc., Ry., (Ga. 1927) 139 S. E. 725, where the commuter rates already in force were at a loss, the order for commutation rates to new points was upset as violating due process, though the Towers case had made it clear that while commuter rates might not perhaps be ordered in the first place the commissions could order new ones after the road began them. A note in 14 Va. L. Rev. 225 considers that the losses in the Georgia case distinguish it from the federal decisions.

53 In Northern Pacific Ry. Co. v. United States, (D.C. Minn. 1927) 22 F. (2d) 858, the railroad carried troops, from St. Paul to Seattle on travel orders indicating the shortest route. It had a longer route which included a greater land grant mileage, and the question was whether the land grant rate should be claimed as per the higher percentage of
A suit for government rates on telegrams brings out the depths of entanglement in which the public preferentials, whether gratis on public policy grounds or on a paid-in-full-for-all-time-to-come basis, may involve a utility. The case of United States Shipping Board Corporation v. Western Union came up on certiorari after a victory by the Telegraph Company. Saying, per Brandeis J., that the question was one of statutory construction, the court went on to defeat the utility by its own prior liberality and to hold it to a figure which is only fifty per cent of the rate to other users of the telegraph.

"Continuously since June 8, 1867, the Western Union has extended the right not only to each of the great Executive Departments presided over by a member of the Cabinet (and to the several bureaus, divisions, and officers thereof), but also to the judicial and the legislative branches, to the government of the District of Columbia, and to the following corporations existing at the time of the passage of the Post Roads Act."

the land grant mileage on the longer route, or as per the percentage on the route actually traveled. The court denied the government's claim though it appeared that for forty years its payments had been on the basis most favoring it.


"By Post Roads Act July 24, 1866, ch. 230, 14 Stat. 221, Rev. Stat. secs. 5263-5266 (47 U.S.C.A. secs. 1-3, 6, Comp. St. secs. 1072-1075), the United States offered privileges of great value to any telegraph company which should elect to accept its provisions. In return, it required, by section 2 of the act (now 47 U.S.C.A. sec. 3 Comp. St. sec. 10075) that telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the postmaster general. (At the time) they were fixed for domestic telegrams substantially at 40 per cent. of the commercial rate, and for cablegrams at 50 per cent."

New departments of the government are constantly added is there any time when the utility may cry "enough?"

The court said: "It is urged that, if the Fleet Corporation is granted the government rate, it may likewise be claimed by every instrumentality of the government. Instrumentalities like the national banks or the federal reserve banks, in which there are private interests, are not departments of the government. They are private corporations in which the government has an interest. The Fleet Corporation is entitled to the government rate, not because it is an instrumentality of the government, but because it is a department of the United States within the meaning of the Post Roads Act. In respect to messages sent, on the government's business, no distinction can properly be made between those of the Shipping Board and those of the Fleet Corporation."
"The extension was made as a matter of course. The government rate was applied to all messages sent on official business of the government and chargeable to any of the departments named, whatever the nature of its organization, whatever its functions, and whatever the character of the official business. In extending priority and the lower rates, no distinction has ever been made between messages sent to persons within the several departments and those outside."

This last illustrates the weight of the burden in each department the list of the departments makes an appalling total load.

The formidable expansion of government activity with corresponding increase of service unpaid for at current rate challenges sympathy both for the Western Union Company and for the rest of us, who, as telegraph users, are thus mulcted an invisible tax of no little size, and if the decision means, as it seems to mean, that the Western Union has permanently placed its head in the lion's mouth, it will pay as government activities rise an utterly undefinable price for the "privilege of great value" given by the United States so long since.

The users of the special rate as listed by the court now include "The Smithsonian Institution, the National Home for Disabled Volunteers, Civil Service Commission, Interstate Commerce Commission, Bureau of American Republics (now the Pan-American Union), Panama Canal, Federal Reserve Board, Federal Trade Commission, Inter-American High Commission, United States Section, Bureau of Efficiency, United States Shipping Board, United States Employees Compensation Commission, United States Tariff Commission, Federal Board for Vocational Education, Alien Property Custodian, United States Railroad Administration, War Finance Corporation, United States Interdepartmental Social Hygiene Board, Railroad Labor Board, Federal Power Commission, General Accounting Office, Veterans Bureau. "So far as appears by the record, there has been no denial of the government rate at any time to any department, office, or division of the government as organized, except that to the Fleet Corporation here in question."

The privileges were: The right to construct, maintain and operate lines of telegraph through and over any portion of the public domain, over any of the military or post roads, or navigable streams, of the United States and to take necessary stone, timber, etc. from the public lands.

When the principle of this Mottley Case was urged by the Western Union, that "since Act June 18, 1910 which broadened the scope of the Act to Regulate Commerce so as to include telegraph companies, telegraph rates are no longer a matter of contract they they have the force of law and that any deviation from the lawful rate would involve an undue preference to the government and an unjust
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When a private person gives a lump consideration in return for future service to be performed without further charge, the transaction breaks down in the face of the requirements of the nondiscrimination doctrine, and current rates must be paid for the service as given. This is settled federal doctrine. The policy would seem to be applicable to utility service to whomsoever rendered, not only on grounds of equality treatment but of keeping track of the financial structure of the utility. A way out would be to allow the Western Union to settle now, on some agreed basis, for the prior privileges as was done in the cases concerning the private persons.

(e) Geographic Advantage and the Non-Discrimination Doctrine

In its war against discrimination regulatory authority has been called upon not only to combat human elements embodied in the traditions of free contractual powers and in the business instinct, but business advantage embodied in geography as well. That mere distance settles comparative charges the long and short haul provisions of modern statutes have denied. Mechanical jurisprudence has not gone so far. A recent writer after noting the “liberalizing influences” in the present federal acts, says, “that even in its original form the federal regulation made provision for situations in which the strict prohibition against a 'greater compensation for a shorter distance than for a longer distance' would not apply.” By section 4 of the Commerce Act the Commission is specifically empowered to permit a lesser charge for a longer haul though it may not permit a charge which is not reasonably compensatory for the service performed. Section 3 discrimination against its competitors, the private shipping concerns, the court simply answered. “It may be doubted whether the prescribed rule requiring equality of treatment would ever be violated by giving to the government preferential rates. Compare Nashville, Chattanooga & St. Louis Ry. v. Tennessee, (1923) 262 U. S. 318, 43 Sup. Ct. 583, 67 L. Ed. 999. But it is a sufficient answer to say that it clearly was not the intention of Congress by the act of 1910 to abrogate or modify the scope or affect the application of the Post Roads Act.”

In N. Y. Cent. & H. R. R. v. Gray, (1916) 239 U. S. 583, 36 Sup. Ct. 176, 60 L. Ed. 451, the railroad not only refused the latter transportation in return for which Gray in 1900 (prior to the statute of the Mottley Case) had made a map of the road at an agreed price but refused him the price less transportation already had. The fact that the consideration had a price fixed no doubt made the decision in Gray's favor easier.

Chas. E. Cullen “The Long and Short Haul in Missouri,” 13 St. Louis L. Rev. 13. The earlier part deals with the public psychology back of the federal Act and its modifications.
bars the giving of undue or unreasonable preference or advantage to "any particular locality", and section 13, paragraph 4, proscribes discrimination against interstate commerce in favor of intrastate. Thus are laid at the commission's feet problems which may and recently have involved it in infinite intricacies.

Challenged by the handicaps or advantages of geography, regulation has met its task in various ways. In Sprunt and Son v. United States, it did so by juggling shipper's allowances under an ostensibly uniform rate—by a system of legalized rebating as it were.

In Cincinnati Northern Ry. Co. v. Public Utilities Commission of Ohio, Judge Kincade remarked in interpreting a state act "very similar to the Interstate Commerce Act covering rates for long and short hauls."

"The case presents an attempt to place a quarry forty-two miles from market on an equal footing with two other quarries, one thirteen miles and the other eighteen miles from the same market, and to do this without doing any injustice to any one. The mere statement of such a proposition furnishes its own answer, and the answer is that it cannot be accomplished. The reason why agricultural land located near a large market, which will take and consume the products of the soil, is more valuable than is land of equal quality, but located farther away from the market, is because it is easier, quicker, and less expensive to deliver the product of the land located closer to the market. The same thing is true with mineral products.

"Neither the Public Utilities Commission nor the courts can place all property on a common basis, regardless of location, and accomplish substantial justice in doing so."

Yet though earlier federal authority was mindful of this, Congress in 1925 in the Hoch-Smith Resolution declared that the Interstate Commerce Commission's "true policy in adjusting freight rates" is to consider the conditions which at the given time prevail in our several industries that the commission investigate to determine how far existing rates impose undue burdens to give undue advantage as between the various parts of the country and the various classes of traffic and adjust them to a proper development as a whole."

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63(D.C. Tex. 1927) 23 F (2d) 874.
64(Ohio 1927) 158 N. E. 506.
65In Ashland Fire Brick Case, (1911) 22 I. C. C. 115, and in Interstate Commerce Commission v. Diffenbaugh, (1911) 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83, the commission and the court agreed that Congress had not sought to equalize economic advantages or marketing conditions.
66January 30, 1925.
The attempt to follow the Resolution has brought to a head the notable Lake Cargo Coal Rate Controversy. The Southern coal producing field which was producing coal on nonunion conditions in Kentucky, West Virginia, etc., was absorbing a trade which on geographical grounds "belonged" to the nearer Northern producers. The matter has several times been before the Commission whose latest order, dated February 21, 1928, denying to the Southern carriers permission to make a twenty cent per ton reduction, has been enjoined by a statutory district court at the instance of the coal mines of the Southern field in *Anchor Coal Co. v. United States.* And thus the old differential under which the Northern fields were being forced out of the market is restored.

The long and complicated prior history of the controversy which the court reviews shows that the Commission had acted in accordance with what it considered its duty under the resolution. The Commission itself stated that

"At the time of the original hearings the coal-mining industry in Ohio and Pennsylvania was in a comparatively prosperous condition. Since then 12,000 to 15,000 miners have left the Ohio mines, there has been a large increase in the number of vacant houses in the mining communities, and merchants have large amounts of unpaid accounts upon their books. In the Pittsburgh district miners have been given help in getting transportation to the southern fields, from 1921 to 1925 the number of employees engaged in coal mining decreased 20 per cent., while employees in other industries increased 40 per cent, and the coal business is in a depressed condition. It does not appear that all this is due solely to the rate adjustment, but if that adjustment is improper it is our duty to correct it so far as possible, and we must give consideration to the conditions existing in the industry under the provisions of the Hoch-Smith resolution."

To this the court replied

"But it must be manifest that increasing the differential to meet such a situation is not regulation of rates, but regulation of industrial conditions under the guise of regulating rates. It means nothing more nor less than that, because one community is able to produce coal more cheaply than another, and thereby get a large share of the business which has been going to the other, even though paying a considerable differential in freight, the Commission is placing upon it a handicap by increasing the

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67The advantage of the Northern fields is stated in miles as in the ratio of one to two. Their distance from the Lake ports is 200, that of the Southern fields is 400 miles.

68(D.C.W Va. 1928) 25 F (2d) 462.

69(1925) 101 I. C. C. 513.
differential in rates and thereby equalizing the advantage which it has in a low cost of production. It is in essence a regulation of industrial conditions through manipulation of rates," and it held that Congress neither meant to nor could empower the Commission so to do.

The Hoch-Smith Resolution is of vast interest as a possible foretaste of new policies in positive control of business conditions by public utility regulation. How any such attempt may be practically effectuated is the nub of the situation. The particular difficulty recalls the ancient query in catdom "who will bell the cat?" The idea invites sectional political warfare upon any government agency to which the task of control may be assigned and in the actual situation the Interstate Commerce Commission was so far made a target that its prestige has been injured. Yet the dissatisfaction with the present rate structure of the railroads viewed as a national system, which was manifested in the debates upon the resolution, calls for an impartial and scientific study of the relation of geography to rates, and the Hoch-Smith essay is, perhaps, a beginning.

When Commissioner Cox's term ran out after he had voted favorably to the southern field, Pennsylvania opposed his reappointment and moved to replace him with a Pittsburger, whose name the president did in fact submit. This appointment the senators from the Southern coal states blocked. Two commissioners, Esch and Aitchison, as it was asserted, "switched" their votes during the Lake Coal Rate Controversy. The Southern coal states who charged that they did so in fear of the powers in the northern field therefore lay in wait for Esch at the expiry of his term. His renomination by the president gave them their opportunity. The Committee on Interstate Commerce voted against him and the Senate confirmed the rejection.

Senator Neely of West Virginia who led the fight declared that the rejection "is very emphatic warning that the Senate will not tolerate packing in favor of Pennsylvania, or any other section in favor of any particular interest in the country." The newspapers say that another member has announced that he will not accept reappointment. Thus the Commission is cast into the arena of sectional politics and there terrorized.

The writer has more fully set out the history of the Hoch-Smith Resolution and the Commission's tribulations with respect to it in an article to be published during the 1928-29 school year.