GOVERNMENT CONTROL OF TRANSPORTATION CHARGES.—PART III.

II.—*The Right to Interfere.**

2. Public Subject Matter of Contract.

(b.) Contract of Public Service.

Transportation is the typical example of a public calling. The common law compelled those carriers "holding themselves out for hire to carry the goods of all persons indifferently," to substantiate this "holding out" and to accept the goods of any who offered. The charges of the carriers thus "common," in the legal sense, were a matter of judicial concern and *by law must be reasonable.* The argument which would confine the *right* to interfere to cases involving contracts of public service brings here a *post ergo propter*, and asserts that the regulation of the rates follows, because the public has a right to demand the service. But why, pray, has the public a "right to demand the service?"

Mr. Albert Stickney, in his book on "State Control of Commerce and Trade," makes a division of occupations into what he calls "public employments" and "private employments." The former including light, water, telegraph and telephone service, also that of grain elevators and stockyards,[1] in addition to the business of transportation, are legitimately the subjects of state control. The latter, which it is asserted are clearly distinct from those in which the service is essentially public, are among the rights of life, liberty and property guaranteed by the Fourteenth Amendment, and cannot be touched by the legislature. "As to private employments the growth of the law has been continuous to its present condition of virtually complete non-interference. As to common carriers, on the other hand, the state control is practically unrestricted, and is ample for the protection of all rights of the citizen. The growth in the one branch of the law has been from a

* Continued from March number.

[1] As to stockyards, see Cotting *v.* Stockyards Co., 79 Fed. 679 (1897).

condition of minute and annoying restriction to one of complete freedom. In the other, it has been from a condition of comparative freedom to one of complete and adequate supervision and control."[1]

In like manner, Mr. Justice Field says that it is not "within the competency of a state to fix the compensation which an individual may receive for the use of his own property, in his private business, and for his services in connection with it."[2]

From these words might be inferred a positive, determinable, and essential difference in kind between "public" and "private" occupations. An examination of the famous grain elevator cases may help us to an opinion as to the validity of the attempted distinction. *Munn* v. *Illinois*[3] was a case involving the constitutionality of a statute of Illinois which declared grain elevators to be public warehouses and prescribed the rates of storage. The opinion of the majority affirming the validity of the act declares (p. 131), "that, although, in 1874, there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them; and (that) the prices charged and received for storage were such 'as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year next ensuing such publication.' Thus it is apparent that all the elevating facilities through which these vast productions 'of seven or eight great states of the West' must pass on the way 'to four or five of the states on the sea shore' *may* be a 'virtual' monopoly.

"Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the inn-

[1] Page 88 of "Commerce and Trade." Mr. Stickney passes over the regulation of interest with the simple assertion that the reasons for that are historical. With submission, the opinion may be ventured that the reasons for the other sorts of regulation are also "historical."

[2] Dissenting opinion of Field, J., in Munn *v.* Illinois, 94 U. S. 113, 138 (1876).

[3] *Supra.*

keeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises 'a sort of public office,' these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very 'gateway of commerce,' and take toll from all who pass. Their business most certainly 'tends to a common charge,' and, therefore, according to Lord Hale, every such warehouseman 'ought to be under public regulation, viz.: that he . . . take but reasonable toll.' Certainly, if any business can be clothed 'with a public interest, and cease to be *juris privati* only,' this has been. *It may not be made so by the operation of the constitution of Illinois or this statute, but it is by the facts.*" (Last italics mine.)

It was supposed that this case was practically overruled by the Minnesota cases,[1] but later in *Budd* v. *New York*,[2] *Munn* v. *Illinois* was reaffirmed and emphasized. The majority opinion approved the language of the Court of Appeals of New York, from which the case had been brought to the Supreme Court, to the effect that the right of the legislature "to regulate the charges for services in connection with the use of property did not depend in every case upon the question whether there was a legal monopoly or whether special governmental privileges or protection had been bestowed; that there were elements of publicity in the business of elevating grain which peculiarly affected it with a public interest; that those elements were found in the nature and extent of the business, its relation to the commerce of the state and country *and the practical monopoly enjoyed by those engaged in it*" (italics mine).

Mr. Justice Blatchford, delivering the opinion of the court, said: "It is contended . . . that the business of the relators in handling grain was wholly private and not subject to regulation by law; and that they had received from the state no charter, no privileges, and no immunity, and stood before the law on a footing with the laborers they employed to shovel grain, and were no more subject to regulation than any

[1] 134 U. S.
[2] 143 U. S. 517 (1891)

other individual in the community. But these same facts existed in *Munn* v. *Illinois*. In that case, the parties offending were private individuals doing a *private business*, without any privilege or monopoly granted to them by the state. Not only is the business of elevating grain affected with a public interest, but the records show that it is an *actual monopoly*, besides being incident to the business of transportation and to that of a common carrier, and thus of a quasi-public character. The act is also constitutional as an exercise of the police power of the state."[1]

In *Brass* v. *Stoeser*,[2] Mr. Justice Brewer dissents "because the facts show . . . *no practical monopoly* to which a citizen is compelled to resort, and by means of which a tribute can be exacted from the community." The learned justice, desiring earnestly to find some barrier which can be placed by the courts in the way of "legislative assaults" upon property, having failed to establish the one of "legal monopoly,"[3] now takes his stand behind the "virtual monopoly" limitation apparently set up by the decisions in *Munn* v. *Illinois* and *Budd* v. *New York*. But the majority (a narrow one of five to four) refuse to admit that theory as the determining factor in those cases:[4] "Again, it is said, that the modes of carrying on the business of elevating and storing grain in North Dakota are not similar to those pursued in the Eastern cities; that the great elevators used in transhipping grain from the lakes to the railroads are essential; and that those who own them, if uncontrolled by law, could extort such charges as they pleased; and great stress is laid upon expressions used in our previous opinions, in which this business, as carried on at Chicago and Buffalo, is spoken of as a practical monopoly, to which shippers and owners of grain are compelled to resort. The surroundings in an agricultural state, where land is cheap in price and limitless in quantity, are thought to be widely different and to demand different regulations.

[1] It would be interesting to know just what this last sentence means.
[2] 153 U. S. 391, 409 (1894).
[3] See his dissenting opinion in Budd *v.* New York, *supra*.
[4] Brass *v.* Stoeser, *supra*, at p. 403.

"These arguments are disposed of, as we think, by the simple observation, already made, that the facts rehearsed *are matters for those who make, not for those who interpret the laws.* (Italics mine.) When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, *whether carried on by individuals or associations* (my italics), in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and under other circumstances. It may be conceded that that would not be wise legislation which provided the same regulations in every case, and overlooked differences in the facts that called for regulations. But, as we have no right to revise the wisdom or expediency of the law in question, so we would not be justified in imputing an improper exercise of discretion to the legislature of North Dakota. It may be true that, in the cases cited, the judges who expressed the conclusions of the court entered at some length into a defence of the propriety of the laws which they were considering, and that some of the reasons given for sustaining them went rather to their expediency than to their validity. *Such efforts, on the part of judges, to justify to citizens the ways of legislatures, are not without value, though they are liable to be met by the assertion of opposite views as to the practical wisdom of the law; and thus the real question at issue—namely, the power of the legislature to act at all—is obscured*" (italics mine). These views of the majority are quoted at length because of the evident tendency of the court to disregard any distinction between "public" and "private" employments, so far as regards the *right* of the legislature to interfere. With the policy of such interference the court rightly say they have nothing to do.

There seems little doubt of the correctness of this position of the Supreme Court. The words public and private are incapable of exact definition. When Mr. Justice Brewer asks, "If it (the government) may regulate the price of one service, which is not a public service, or the compensation for the use

of one kind of property which is not devoted to a public use, why may it not, with equal reason, regulate the price of all service and the compensation to be paid for the use of all property?"[1] he, of course, perpetrates a *petitio principii* in his condition. What would constitute a "dedication to public use" in one state of society, would not in another. The terms are all relative, and cannot be delimited with certainty. The statement so often made, in varying forms, that a "public use is very different from a public interest in the use," since "there is scarcely any property in whose use the public has no interest,"[2] asserts a difference only of degree.

3. Effect on Public Interests.

The "public interest," at the last analysis, is what makes the public character of the service. The exercise of the right of eminent domain is not the foundation of such character. The gift of that prerogative is the result of a common cause. Carriers were regulated when they were only wagoners and boatmen. Public franchise and eminent domain came later, as a means of exercising government control or of assisting a business in which the people at large were concerned. Also, as we have seen, the artificial personality of a corporation is of itself no reason for state interference with its business, nor is the legal grant of a special privilege. See how the simple "public interest" explanation clears up the vexed question of "legal" and "virtual" monopolies. It is doubtful whether, historically, there has ever been a class of "legal monopolies" which did not arise from a prior partial or complete monopoly of fact. Monopolies in commodities must have been enjoyed before governments were organized. An individual monopoly in salt, for instance, in savage times, would cause

[1] Budd *v.* New York, 143 U. S. 517, dissenting opinion, at p. 551 (1892). "Such an argument would be as strong and as conclusive against the exercise of the taxing power. For if the legislature may levy a tax upon property, they may absorb the entire property of the taxpayer. The same may be said of every power where there is an exercise of judgment." McLean, J., in Piqua Bank *v.* Knoop, 16 How. 369, 383 (1853).

[2] Mr. Justice Brewer's dissent in Budd *v.* New York, *supra*, at p. 549.

coercion of numbers—a "government regulation." A tribal monopoly would give rise (as a matter of fact has been the case) to intertribal wars, and, when the tribe grew into a nation, to national supervision. The virtual monopoly helps make the public interest, and that, in turn, is the reason for creating the legal monopoly—the most radical and thorough form of government control.

To be sure, this line of reasoning, like that which controverts the old distinction between *mala prohibita* and *mala in se*, removes a certain appearance of clearness and distinct limitation presented by some of the theories discussed. It is true, as Mr. Justice Brewer said, that no one can tell when his business will become of sufficient importance to the public to be impressed with a "public interest." "Public policy," which Mr. Bonney thinks is synonymous with common sense, may to-day stamp a business as "public" which yesterday was considered "private." That must be within the discretion of the legislature, and is or should be purely a matter of expediency, having regard to the average reached by a balancing of the good to be accomplished or the evil to be overcome by any particular piece of law-making, against the troubles and disadvantages incident to its enforcement. The "rights of man" should enter into the question only to furnish a very strong presumption against the *policy* of interference legislation, not at all against the enacting power.

The Supreme Court has recognized the force of considerations such as these, in three important cases: *Head* v. *Amoskeag Mfg. Co.*,[1] *Brass* v. *Stoeser*,[2] and *Holden* v *Hardy*;[3] and

[1] 113 U. S. 9 (1885). This case upheld a Massachusetts "Mill Act," which gave certain manufacturing companies a right to overflow the lands of others. The present decision, like that of Murdock *v.* Stickney, 8 Cush. 113 (1851), refuses to consider any theory of eminent domain as the basis of the statute. But many subsequent cases unite in considering such overflowing "a taking," which requires a prerogative right. See Randolph on Eminent Domain, pp. 387, 388; Lewis on Eminent Domain. §§ 182-3. The curious circle in which the reasoner is landed, by attempting to justify one prerogative of the state by another, is well illustrated in this matter of eminent domain. In the transportation cases the exercise by the railroads of the right referred to is adduced to furnish a reason for [illegible] rates. On the other hand, in the

in many other instances the view here contended for has been tacitly acknowledged. The American protective tariff system employs the greatest and most characteristic prerogative of government—that of taxation—to build up private business enterprises, because of the interest the public are supposed to have in manufactures. The other prerogative of eminent domain has been granted in aid of mills and factories, drainage (for commercial purposes), mining and lumbering.* And the "third prerogative," of the "police power" (which is generally used to embrace everything not covered by the first two, and sometimes to include them), has been used in regulation of so-called private affairs too numerous to mention. The widest difference of opinion may exist as to the wisdom of any given exercise of this prerogative, but much would be gained if questions of *power* should be left out of account. But if the legislature *can* do these things, why *may* it not? And then what of Bellamy, State Socialism, the "coming slavery?"

This suggestion of Mr. Justice Brewer, that it is only the courts that stand between our present society and a socialistic reorganization of it, is very interesting as showing the judicial estimate of the legislatures. The learned justice evidently considers that powers such as some of those reposed in the British Parliament would, if exercised by our own legislatures, "shake society to its foundation and destroy our civilization," as Messrs. Guthrie and Harrison said *arguendo* in the Illinois Inheritance Tax Case.† The real doubt behind all this is doubt of popular government. Too many people have sat at ease, despising the legislative authority, and relying on the courts for protection from it under the guarantees of the Constitu-

Mill cases, the grant of the eminent domain is frequently justified *by the previous state regulation of the charges!* See Lewis on Eminent Domain, § 178, *et seq.*

[2] *Supra.*

[3] 169 U. S. 366 (1898). This decided the business of mining to be subject to such a "public interest" as to justify state control of hours of labor therein.

* See Lewis's Em. Dom., chapter on "What is a Public Use," § 157, *et seq.*

† 170 U. S. 283 (1898).

tion. They seem to forget that the ultimate authority, rising superior to all constitutions, is the will of the people. If that directs, constitutions will be changed. It may not always be that the despised "Populists" will be confined to the legislatures, with conservative intelligence in the courts nullifying all their attempts to right what they believe to be wrongs. The final battle, after all, must be fought at the polls. The feeling with which the so-called "masses" regard the courts is well illustrated by the language attributed to a labor leader recently in this city. He said: "If the life to come should be like this life—if there should be trusts and corporations there—they would tear up all the avenues leading to the Throne, take the gold from the streets of the New Jerusalem to make a corruption fund, and, if God said 'Thou shalt not steal,' would immediately have it declared unconstitutional." Observe the expression "have it declared." That expresses the feeling exactly. The people who passed the laws are possessed with the idea that somehow they have been cheated out of them.

The Socialists, by whatever name called, are the outgrowth of conditions. If the conservative classes could learn that the only permanent guarantee of individual rights lies not in constitutions or in courts, but in the vigilance with which liberty must always be bought and maintained; if these classes should cease to occupy themselves merely in evading and attacking laws, and should make their influence felt upon legislation itself, then we should have the security enjoyed by our British cousins, who get along very well under maximum freight rate laws and graduated income and inheritance taxes, which are enforced without judicial question as to their reasonableness.

To the first inquiry, "Has a government the right to interfere in the contracts of its subjects?" no answer seems possible but "Yes!" All attempts to segregate common carriers and other occupations historically subject to state regulation, appear failures. The carrier is no more or less rightfully under government control than others, except in so far as he is more or less the object of the public interest. What gives the public that interest? No definite criterion can be laid

down. It is, or should be, a legislative and not a judicial question. Three of the reasons usually put forward were given in the preliminary diagram :

(a) Interference with Trade (including "Oppression of Third Persons"), or
(b) Creation of Monopoly, or
(c) Rise of Prices.

All of these may apply to carriers, but the last particularly. As Interstate Commerce Commissioner Knapp says,[1] "the thing the public is interested in, after all, is how much they have got to pay." The elegance of this expression might be improved, but its truth seems to be unimpeachable.

III.—*The Practicability of State Interference with Transportation Contracts.*

(a.) Early Legislation.

Carriers by common law were required to serve the public without discrimination and for a "reasonable compensation." The first specific legislation to enforce this seems to be 3 William and Mary, c. 12 (1691):[2] "*And whereas drivers, wagoners and other carriers, by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of trade;* be it therefore enacted . . . that the justices of the peace of every county and other place within the realm of *England*, or dominion of *Wales*, shall have power and authority, and are hereby enjoined and required, at their next respective quarter or general sessions after *Easter* day yearly, to assess and rate the prices of all land carriage of goods whatsoever, to be brought into any place or places within their respective jurisdictions, by any common wagoner or carrier, and the rates and assessments so made, to certify to the several mayors and other chief officers of each respective market town within the limits and jurisdictions of such justices of the peace, to be hung up in some publick place in every such market town, to which all persons

[1] Report Sixth Annual Convention of Railroad Commissioners, May, 1894, p. 24.

[2] 9 Stats. at Large, 154. Amended 21 Geo. II, c. 28 (1748).

may resort for their information; and that no such common wagoner or carrier shall take for carriage of such goods and merchandises above the rate and prices so set, upon pain to forfeit for every such offence, the sum of five pounds, to be levied by distress and sale of his and their goods by warrant of any two justices of the peace where such wagoner or carrier shall reside, in manner aforesaid, to the use of the party grieved."

This was part of "*an act for the repairing and amending the highways and for settling the rates of carriage of goods*," and is found in Chitty's Index of English Statutes, under the title "Highways." It was repealed in 1867 (and not in 1827, as is erroneously stated in the opinion of Waite, C. J., in *Chicago, Etc., R. Co.* v. *Iowa*) [1] by the "Statute Law Revision Act," [2] beginning: "Whereas . . . it is expedient that certain enactments . . . which may be regarded as spent, or have ceased to be in force otherwise than by express and specific repeal, or have, by lapse of time and change of circumstances, become unnecessary, should be expressly and specifically repealed," etc.

The Act 3 William and Mary, c. 12, was probably not in practical operation very long, if at all, in its application to carriage rates.[3] Waite, C. J., in the opinion above quoted, refers

[1] 94 U. S. 155, at p. 162 (1876).

[2] 30 & 31 Vic. c. 59 (1867), 107 Stats. at Large, 244, 250.

[3] Lord Kenyon said in ——— *v.* Jackson, 2 Peake's N. P. C., 185, 186 (1800), "There are acts of Parliament which authorized justices of the peace to fix the rates to be taken by carriers, and I have known instances of applications to the sessions for that purpose . . . ;" but no such instances have been recorded. Mr. Albert Stickney might just as easily draw his lesson from the failure of this law as from the failure of those of Edw. III and Eliz. He might just as easily conclude, regarding early English History only, that "all such legislation" has been "utterly fruitless," and that modern regulations of common carriers "are on the same line." (See first article of present series, December, 1898, number of this magazine, p. 730). On the contrary, he says (see State Control of Commerce and Trade, p. 8): "Such common carriers are virtually public servants, occupying and operating the people's highways. *For every reason, therefore, it becomes necessary that they should be subject to state control.*" (Italics mine.) It should seem that the history of this law "that failed," by Mr. Stickney's own arguments, is at least one reason

to this statute to prove *the power of regulation*, which, as he says, "is not lost by non-user." He seems to infer a power in the state legislature from that in Parliament, and says the fact that the statute lapsed through non-enforcement does not detract from the enacting power.

There appear to be no statutes in the United States fixing the compensation of common carriers prior to the era of railroad building. Then, however, numerous laws were passed, most of which provided, directly or indirectly, for official regulation of rates. One of the earliest statutes, and one that is typical of most of the laws passed at this time, is the New Hampshire Act of 1844, which says (Section 13) "the rates of toll for freight of passengers and merchandise, *when the net income of the stock shall exceed 10 per cent.*, shall be subject to alteration and revision by the *legislature*, according as they shall deem just and expedient." The Act of Vermont (Laws of 1849, No. 41) provided: "Every such corporation may establish, for their sole benefit, a toll upon all passengers and property conveyed or transported on their railroad, at such rates as may be determined by the directors of the corporation; and may from time to time regulate such conveyance and transportation, the weight of loads, and all other things in relation to the use of such road, as the directors shall determine. Provided, that the *Supreme Court* may, at any stated session holden in any county through which said road passes, on the application of ten freeholders of such county, and due notice thereof to the corporation, from time to time, as they shall deem expedient, alter or reduce such rates of toll, according to the provisions, if any, contained in the charters of such corporations; *but the said tolls shall not, without the consent of the corporation, be so reduced as to produce, with said profits, less than ten per centum per annum.* The laws of New York (Acts of 1850, Chapter 140) declared (Section 28) "but such com-

why carriers should not be "subject to state control." But Mr. Stickney has no reference to this statute in his book.

The Railway and Canal Traffic Act of 1888 (51 & 52 Vict., Chap 25) provides for the fixing of maximum freight rates by a "board of trade." But see *infra*.

pensation for any passenger and his ordinary baggage shall not exceed three cents per mile," and (Section 33) "the *legislature* may reduce or alter the rate of freight, fare, etc., on such railroads; *provided that the same shall not be reduced below a profit of ten per cent. per anuum, upon the capital actually expended, without the consent of the corporation, nor unless it shall have been ascertained that the net annual income of the corporation exceeds ten per cent. per annum on the capital actually expended.*" The Ohio Act of February 11, 1848, Section 12, contained the provision that "at any time after the expiration of ten years, from the time any such road may be put in operation, it shall be lawful for the *General Assembly* to prescribe the rates to be charged for the transportation of persons or property upon said road, should they be deemed too high, and may exercise the same power ten years thereafter; *provided that no reduction shall be made unless the net profits of the company, on an average for the previous ten years, shall amount to ten per centum per annum upon its capital, and then so as not to reduce the future probable profits below the said per centum.*" Pennsylvania (Act of February 19, 1849, Section 18) and Michigan[1] (Act of February 12, 1855, Sections 17 and 35) adopted the policy of legislative regulation, but without any limitation as respects the profits.

These early statutes are given thus fully, because their phraseology suggests all the intricacies of the problems now confronting us. Most of these statutes, in addition to the language given, contain express declarations of the common law rule, that the rate of compensation "shall be" or "must be" no more than is "just and reasonable." The questions for decision then, as now, were:

(1) What is a "reasonable rate?"

(2) Granting there is such a thing as a "reasonable rate," and that it can be theoretically defined, what practical

[1] An amendment to this act was adopted March 15, 1861, providing "that railroads in the upper Peninsula, having less than fifty consecutive miles of road in actual operation, are excepted from its provisions and allowed to charge different rates." This was on account of the mountainous surface of the Northern Peninsula.

means can be found for determining just rates in particular cases?

(3) Granting the means of decision, who shall employ them? Whose determination shall be final? The legislature's, the railroad commissioners', the state courts', or the United States courts'? Or shall the jury determine the matter in each case as a question of fact?

(4) Does the rate in question "deprive any person of property without due process of law," or "deny to any person" within the state "the equal protection of the laws?"

The fourth question by the cases has been made practically synonymous with the second, and, to a certain extent, involves all the others; but it has been placed last because it comes last in point of time. The most elaborate attempts to define a reasonable rate, and to discover the means for determining that character, have been made in cases involving the application of the Fourteenth Amendment. Opposition to government regulation *per se* seems scarcely to have been thought of at the outset. Such opposition appears to have arisen largely in consequence of the difficulties encountered in the attempts to enforce the state's prerogative with fairness to all parties concerned.

The first careful consideration of this question by the Supreme Court of the United States was in the so-called "Granger Cases,"[1] decided in 1876. The first of these cases, *Munn* v. *Illinois*, involving the fixing of grain elevator charges, has already been specifically discussed under another head. Waite, C. J., delivering the opinion of the court in *R.* v. *Iowa*, said: "Railroad companies are carriers for hire. They are incorporated as such and given extraordinary powers, in order that they may the better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest, and . . . subject to legislative control as to their rates of fare and freight, unless protected by their charters." Mr. Justice Field says, in *Attorney-General* v. *Old Col-*

[1] Munn *v.* Illinois, 94 U. S. 113; Chicago, B. & Q. R. Co. *v.* Iowa, *Ib.* 155; Peik *v.* R., *Ib.* 164; Chicago, Etc., R. *v.* Ackley, *Ib.* 179; Winona, Etc., R. *v.* Blake, *Ib.* 180; Stone *v.* Wisconsin, *Ib.* 181.

ony R. Company:[1] "Whatever difference of opinion there may have been among the justices of that court (the Supreme Court) concerning the tests which determine whether property is affected with a public interest, there is no doubt that the property of railroad corporations, which have been invested by the legislature with the right of eminent domain and are common carriers of persons or merchandise, is property 'devoted to a public use.'" . . . The justices of the Supreme Court of the United States *perhaps differ in opinion whether there can be any judicial interference with the rates for railroad transportation established by the legislature of a state on the ground that they are not reasonable* (italics mine), but they agree . . . that the legislature may establish rates, or reasonable rates, unless there is an express provision in the charter which forbids it.

This statement, as to difference of opinion in the Supreme Court, can no longer hold since March 7, 1898, when was decided the case of *Smyth* v. *Ames*,[2] commonly known as the Nebraska Freight Rate Case. I shall consider this case, with others previously decided, both in the United States and in England, in the next and last article of this series. The endeavor will be to find whether any new proposition of law was enunciated in this famous case, and to discover, if possible, the exact situation in which we are are now left in the United States as regards the subject of the present discussion.

Roy Wilson White.

(To be continued.)

[1] 160 Mass. 62, 86 (1893)
[2] 169 U. S. 466.