THE UNITED STATES SUPREME COURT AND RATE REGULATION.*

THE DIFFERENCE BETWEEN RATE REGULATION BY THE LEGISLATURE AND BY A SUBORDINATE BODY.

No one can doubt that one of the prime duties of a legislature today is the regulation of a business which is "affected by a public interest." Neither can one doubt that the legislature can delegate this power to a subordinate body to do the detail work after it has provided the broad rules for its guidance. The question then arises whether there is any difference in the substantial effect or in the procedure when the rate regulation is conducted directly by the legislature and when it is conducted indirectly by a subordinate body.

This question has arisen in two forms. It arose first in the determination of the power of the judiciary to review the action of the regulating body in regard to the confiscatory nature of the rates prescribed. The history of the early doubt of the judicial power to review prescribed rates is well known.

In *Chicago, Milwaukee and St. Paul Railroad Company v. Minnesota,* an act which provided that the rates established by a commission should be conclusive, was held unconstitutional as depriving the company of its right to a judicial investigation of the confiscatory nature of the rates. Later in *Budd v. New York, N.

*Continued from the December issue, 64 University of Pennsylvania Law Review, 151.

1 German Alliance Insurance Co. v. Ike Lewis, 233 U. S. 389 (1914), where, by a divided court, it was held that the state could regulate the rates of fire insurance.


3 Munn v. Ill., 94 U. S. 113 (1876). For a thorough discussion of the development of the doctrine of judicial review in rate regulation, see the excellent work of Professor H. S. Smalley: Railroad Rate Control, *Publications of the American Economic Ass'n.* May, 1906.

4 134 U. S. 418 (1890).

(270)
York, the legislature directly determined what were to be the maximum rates charged by elevators. In the attempt to distinguish the former case, Mr. Justice Blatchford said:

"What was said in the opinion in 134 U. S. as to the question of reasonableness of the rate of charge being one for judicial investigation, had no reference to a case where the rates are prescribed directly by the legislature."

Although this may be considered obiter, for in the last part of the opinion the Justice states that "the records do not show that the charges fixed by the statutes were unreasonable," and hence no reason for judicial review, nevertheless, it is plain that the Court thought that there was a radical difference between rates fixed by the legislature and those fixed by a commission.

But whatever may have been the reason for making this distinction, it has long been discarded. In Reagan v. Farmers' Loan and Trust Company, the Court refused to acknowledge it and treated both methods of rate making as being subject to the same limitation. And in Smyth v. Ames, the rates prescribed by the legislature directly were reviewed and enjoined as confiscatory.

The same doubt as to the difference between direct regulation by the legislature, and indirect by a commission, arose again in the determination of whether notice and opportunity to be heard must be afforded the utility before the fixation of the rates in order to constitute "due process of law."

No one would think of attacking rates promulgated directly by the legislature on the ground that there was neither notice nor an opportunity to be heard afforded the utility, after what was said by Mr. Justice Brown in Chesapeake and Potomac Telephone Company v. Manning. In this case Congress had regulated the rates of telephone service in the District of Columbia without giving the utility notice of it. It was held proper because, "it is well settled that the courts always presume that

*143 U. S. 517 (1892).
*154 U. S. 362 (1893).
*169 U. S. 466 (1896).
*186 U. S. 238, 244, 245 (1902).
the legislature acts advisedly and with full knowledge of the situation. Such knowledge can be acquired in other ways than by the formal investigation of a committee, and courts cannot argue how the legislature obtained its knowledge. They must accept its action as that of a body having full power to act, and only acting when it has acquired sufficient information to justify its action.”

It might be argued that if notice and opportunity to be heard is not required of the legislature, then it is hard to see how it could be constitutionally required of a body, whose completed act “derives its authority from the legislature and must be regarded as an exercise of the legislative power.” 9 The commission can acquire information in other ways than by a formal investigation. If the information gained by the commission or city council is not sufficient to support the rates declared, this can be shown before the master on the hearing of the bill to enjoin the enforcement. If the rates prescribed by a commission or council are considered prima facie reasonable the same as those which are determined by the legislature itself, why should the procedure in the one differ from the other? As the utility can always have its day in court before the rates can be enforced, it would not seem to be unwarranted to deny it a hearing before the body which promulgates the rates? 10

Be that as it may, it is clear that where there is involved before a body created by the legislature a question of the deprivation of life, liberty or property, due process of law requires a notice and hearing. Although it has been said that proceedings before a commission for the fixation of rates are legislative in their nature, 11 yet the line of demarcation between legislative

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9 Knoxville v. Water Co., 212 U. S. 1, 8 (1909).
10 This was the idea of Miller, J., in his concurring opinion in Milwaukee & St. Paul R. R. v. Minn., supra, note 4, at page 460: “I do not think that it was necessary to the validity of the action of the commission that previous notice should have been given to all common carriers interested in the rates to be established, nor to any particular one of them, any more than it would have been necessary, which I think it is not, for the legislature to have given such notice, if it had established such rates by legislative enactment.” In the dissenting opinion of three other justices this idea is also prevalent. See also, note 34, infra.
and administrative functions is not always clear and they merge into each other. On the whole, the action of a commission resembles more the exercise of the so-called administrative function, for "it does not involve the power to make laws, or to interpret and apply them, but to aid in carrying the laws into effect." Hence the commission is like any other administrative body in whom discretion is reposed, and cannot issue a fiat which involves the deprivation of property without a hearing. This was ruled in *Chicago, Milwaukee and St. Paul Railroad v. Minnesota*, where Mr. Justice Blatchford said, in holding a state statute creating a commission invalid:

"No hearing is provided for, no summons or notice to the company before the commission had found what it is to find, and declared what it is to declare, no opportunity for the company to introduce witnesses before the commission; in fact, nothing which has the semblance of due process of law."

The notice and hearing which are required of judicial tribunals are not required of commissions, any more than the strict rules of evidence and examination which bind the courts govern the commissions. Nevertheless, the general features of a hearing must be present. The language used by the Court in *Interstate Commerce Commission v. Louisville and Nashville Railroad* is especially helpful in pointing out the essentials. Upon complaint the commission investigated certain rates and after a hearing ordered the railroads to reduce the rates. The railroads appealed to the courts for an injunction and one of the questions was the sufficiency of the evidence upon which the order was based. The commission argued that under section twelve of the Commerce Act, it was required to obtain in-

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12 Chicago, etc., Rwy. v. Dey, 35 Fed. 866, 874 (1888).
14 *Supra*, note 4, at page 457.
15 See I. C. v. Baird, 194 U. S. 25, 44 (1904); Cincinnati Rwy. v. I. C. C., 205 U. S. 142, 149 (1907). See also note 10, supra.
17 36 U. S. Statutes at Large, 551 (part 1).
formation necessary to enable it to perform the duties and carry out the objects for which it was created, and as it has been given legislative power to make rates it can act, as could Congress, on such information. Hence its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. This was answered by Mr. Justice Lamar:

"But such a construction would nullify the right to a hearing—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute. The information gathered under Section 12 may be used as basis for instituting prosecutions for violation of the law, and for many other purposes, but is not available, as such, in cases where the party is entitled to a hearing. The Commission is an administrative body, and even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevails in suits between private parties. But the more liberal the practice in admitting testimony, the more imperative the obligations to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given an opportunity to cross-examine witnesses, to inspect documents and to offer evidence as explanation or rebuttal. In no other way can a party maintain its rights or make its defence. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the commission had before it extraneous, unknown, but presumptively sufficient, information to support the finding."

It is true that the Commerce Act did actually provide for a hearing, but it is submitted that the Court who used language such as has been quoted, could not possibly rule that a state act which created a commission and did not provide for a hearing is constitutional. The very idea is abhorrent to the due process provision.19

18 I. C. C. v. Baird, supra, note 15, was cited for this proposition.
19 In U. S. et al., v. B. & O. et al., 226 U. S. 14 (1912), the conclusion reached by the commission was based upon their own investigation rather than the testimony of witnesses. The Court did not actually decide the point, but used this language: "It would be a very strong proposition to say that
In the regulation of rates by municipalities, the law does not seem to be so exacting as to the form of notice and the method of hearing.

"Independently of a right to regulate and control rates to be charged for public service reserved as a grant of a franchise or right to use the city streets, a city or other municipality has no power to regulate the rates to be charged by water, lighting or other public service corporations in the absence of express or plain legislative authority to do so." Therefore the power to fix reasonable rates must be conferred on the municipality the same as it is conferred on a commission. But the method of conferring the power in the two cases is radically different. In the case of a commission created by the legislature, the legislature declares what the rates are to be, i.e., the rates are to be reasonable, and the commission is to apply the rule of law to the

\[\text{the parties were bound in the higher courts by a finding based on specific investigations made in the case without notice to them. . . . . Such an investigation is quite different from a view by a jury taken with notice and subject to the order of a court. . . . .} \]

\[\text{McGehee: Due Process of Law (1906), p. 319, states that due process of law "requires in such cases hearing and notice." In connection with this see, Village of Saratoga Springs v. Saratoga Gas, Electric Light, etc., Co., 191 N. Y. 123 (1908). Act of 1905, Ch. 737, creating a commission provided by §15, that upon written complaint being made, the commission shall investigate the cause of the complaint and may by its agents and inspectors inspect the works, system, plants and books of the company. It was objected that this permitted an order to be made not only upon the evidence produced at the public hearing but on ex parte statements of the officer, agents of the commission of which the utility may have no knowledge and to controvert which no opportunity is afforded. But it was held that this did not invalidate the statutes for when it was construed along with the other provisions of the act, it is clear that "the investigation and report of agents and inspectors are to follow the filing of any complaint and to precede or to be made during the public hearing." It does not permit the commission to base any order upon such statements, for "no corporation could make its defence until it was clearly notified of what was charged against it, and the proof to support such charge was given." See also the recent case of Central of Ga. Rwy. v. Ga. R. R. Comm., 215 Fed. 421 (1914), where it was ruled that due process demanded notice and hearing in a proceeding before the commission. In this opinion, the court, relying upon Wadley So. Rwy. v. State, 137 Ga. 497; 73 S. E. 741 (1912), intimated that although the law creating the commission was silent on the question of notice and hearing, yet a rule of the commission requiring notice and hearing would satisfy the due process requirement. This does not seem to be sound, for it conflicts with the rule that notice and hearing must be given as a matter of right and not of grace. It is none the less a matter of grace although the rule of the commission requires notice and hearing, for the rules are at the mercy of the commission and can be readily abrogated.}

\[\text{Dillon: Municipal Corporations (1911), 5th Ed., Vol. III, §1325.} \]
facts of each case and determine whether the rate is reasonable. While in the typical case of conferring the power upon the municipality, whether by the state constitution, or by act of the legislature, there is no declaration that the rates shall be reasonable, but the power to regulate the rates is conferred upon the municipality.

The constitution of the State of California after declaring that the use of all water for sale, rental or distribution is a public use, and subject to regulation, provided that the rates should be fixed by the legislative body of the town or county, by an ordinance to be passed in February. An act was passed in pursuance of this provision stating that the rates shall be fixed at a regular or special session during the month of February. There was no other provision requiring notice to be given the utility which was to have its rates regulated. By an ordinance passed in February the rates of the utility were fixed. In San Diego Land Company v. National City, the utility brought a bill in the federal court to enjoin rates fixed by a board under these provisions. One of the objections made by it was that neither the constitution nor the act provided for the proper notice and hearing and Chicago, Milwaukee and St. Paul Railway v. Minnesota was urged as controlling this case.

The Supreme Court, however, said that that case could not be an authority unless the constitution and statutes of California, as construed by the state court, authorized the fixation of rates "arbitrarily without investigation, and without permitting the corporations or persons affected thereby to make any showing as to rates to be exacted, or to be heard at any time, or in any way upon the subject." Mr. Justice Harlan then

22 See State ex rel. v. Cincinnati Gas Light & Coke Co., 18 Ohio, 262 (1868).
23 Art. 14, §1.
24 Act March 7, 1881, C. 52, §1.
25 174 U. S. 739 (1899).
26 Supra, note 4.
27 Supra, note 25, at page 749.
proceeded to review two California decisions which had considered the provisions of the constitution and act. These cases had ruled that the constitution was self-executing and as it did not require notice to be given, none need be, but that this did not authorize the board to fix rates without a proper investigation and without the exercise of proper judgment and discretion.

In continuing the Justice remarked:

"Was the appellant entitled to formal notice as to the precise day upon which the water rates would be fixed by ordinance? We think not. The constitution itself was notice of the fact that ordinances or resolutions fixing rates would be passed annually in the month of February. . . ."

It is submitted that a statute creating a state public service commission would not be constitutional if the provision for the notice of the time when rates was to be fixed were no more definite than that in the California constitution and statutes. Due process of law requires more than such an informal notice from administrative bodies.

There was another provision in the act, which made it the duty of the board to obtain annually from the utility, at least thirty days prior to the middle of January, a detailed statement, showing the names of the water rate payers, amount paid by each, and all revenue and expenditures. This the Court thought was an appropriate provision for a hearing:

"The defendant's board could not have refused to receive the statement referred to in the statute or to have duly considered it and given it proper weight in determining rates. If the state, by its constitution or laws, had forbidden the city or its board to receive and consider any statement or showing made by the appellant touching the subject of rates, a different question would have arisen."

Again, it is submitted, that such a provision for a hearing before an administrative body, would not satisfy the due process

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Spring Valley Water Works v. San Francisco, 82 Cal. 286, 315 (1890); San Diego Water Co. v. San Diego, 118 Cal. 556 (1897).

In San Diego Water Co. v. San Diego, supra, note 28, an ordinance fixing the rates was set aside as arbitrary because the board had held a secret session and obtained evidence which the utility had no chance to contradict or explain, nor to cross-examine the witnesses.

Supra, note 24, § 2.
requirement. It does not conform to the nature of a hearing which the Court in the Louisville and Nashville Railroad case,\(^3\) said was necessary for a commission to grant. It makes no difference that the utility was in fact given notice of the very day upon which the hearing was to be had, and was given an opportunity to present its case in full, examine and cross-examine. It is well settled that if the statute itself does not provide for notice and hearing, it is not material that as a matter of grace or favor, they may have been given.\(^3\)

In *Home Telephone Company v. Los Angeles*,\(^3\) the city charter provided for the fixation of rates in February, and the rendering of a complete statement by the telephone company of its receipts, expenditures and property employed in business. The company attacked the ordinance fixing the rates upon the ground that the charter under whose authority they were enacted, did not provide for notice and hearing before action. Mr. Justice Moody, said:

"But rate regulation is purely a legislative function and, even when exercised by a subordinate body upon which it is conferred, the notice and hearing essential in judicial proceedings and for peculiar reasons in some form of taxation (see *Londoner v. Denver*, 210 U. S. 373) would not seem to be indispensable."

However, he concludes this portion of the opinion by saying that if notice and opportunity to be heard are indispensable, "which, we do not decide," the charter provided for sufficient notice and opportunity to be heard.\(^3\)

\(^{21}\) *Supra*, note 16.


\(^{23}\) 211 U. S. 265 (1908).

\(^{34}\) In *Cumberland Tel. Co. v. Louisville*, 187 Fed. 637 (1911), the city by ordinance regulated telephone rates. Judge Evans said (page 641): "Of course the city was not bound by any law or constitutional provision to make any inquiry before enacting the ordinance, but where it is known that it did not do so in respect to a matter so important and intricate as the one involved, the weight of any presumption in favor of its action is lessened." Here the idea is that the ordinance is not void, but a penalty for such procedure will be enforced in not giving the due presumption to the validity of the ordinance. This point was not touched upon in the reversal by the Supreme Court. See 225 U. S. 430.
An objection which has been urged against the regulation of rates by city councils is that the tribunal is not impartial; that as the council is dependent upon the favor of the voter, they will necessarily reduce all rates and increase the service; that it practically amounts to a situation where a judge is acting in his own case. This objection has not received any favorable comment from the Court inasmuch as the same argument could be urged against the fixation of rates by the legislature or commission.35

But a situation will arise some day in those states where the people can adopt legislation by the initiative procedure. If the citizens of a municipality could enact by direct vote an ordinance regulating the rates of a utility, would such an ordinance be void on the principle that the judge is acting in a case in which he is vitally interested? Such a question was raised in Home Telephone Company v. Los Angeles.36 The city charter contained a provision that upon a petition of fifteen per cent of the voters any ordinance proposed must be submitted to the people and may be by them adopted. It was argued that the power of rate regulation might be, in this manner, exercised directly by the electorate at large. Of this Mr. Justice Moody said:

"It may well be doubted whether such a result was contemplated by the legislature. There are certainly grave objections to the exercise of such a power, requiring a careful and minute investigation of facts and figures, by a general body of the people, however intel-

35 Spring Valley Water Works v. Scholler, 110 U. S. 347 (1883); Home Telephone Co. v. Los Angeles, supra, note 33. In Des Moines Gas Co. v. Des Moines, 199 Fed. 204 (1912), Judge Smith McPherson in commenting upon the method adopted by councils in passing the ordinance regulating the value of the gas utility said: "The ordinance was adopted within a few minutes from its introduction. Quite likely it had been considered by the members in their individual capacities. But in open session it received but little consideration, and without the presence of any one for the gas company. And every member voting to reduce the earnings had a direct personal and moneyed interest in thus reducing the votes. If a judge were to so act, his acts would be absolutely void, because of the long time maxim, 'No man can be judge in his own case.'" But the Supreme Court paid no attention to this, holding: "We may premise that the public authority is presumed to have acted fairly." Des Moines Gas Co. v. Des Moines, U. S. Adv. Ops., 1914, page 811 at 814 (June, 1915).

36 Supra, note 33.
ligent and right-minded. But the ordinance was not adopted in this manner in this case; and it will be time enough for the courts of the states and the United States to consider, when that is done, whether the objections only go to the expediency of such a method of regulation, or reach deeper and affect its constitutionality."

Thus there are the three rules as to the necessity of notice and hearing in rate regulation:

1. When the power is exercised by the legislature directly, neither notice nor an opportunity to be heard need be given.

2. When the power is conferred by the state upon an administrative body to determine whether a rate is reasonable, due process of law requires that the utility be given the proper notice and a hearing where it can examine and cross-examine the witnesses.

3. When the power to regulate rates is conferred upon the legislative body of a municipality, the notice and hearing, if required at all, need only be informal. The idea apparently being that council, being the legislative branch of the municipality, is in a position somewhat like that of the legislature itself and as the legislature would not have to afford notice and hearing prior to the promulgation of rates, the city council, if it must need only give a very general notice of the time for the fixation of rates and a meager hearing.

**ARE THERE TWO CLASSES OF UTILITIES WITH RESPECT TO THE RATES TO BE CHARGED?**

It has always been recognized that there are two avenues through which a business may be forced into public service. According to Mr. Bruce Wyman the main feature of a public utility is the monopolistic feature, either legal, natural or virtual; while Mr. Charles K. Burdick insists that the essential factor is the use of some governmental power such as eminent domain, occupation of a public highway, *et cetera*. But the point raised by this question is whether there are two classes

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1 Wyman: Public Service Corporations (1911), Vol. 1, §§ 50-56.
2 "The Origin of Peculiar Duties of Public Service Corporations, 11 Col. L. Rev., 515, 616, 743 (1911)."
of utilities in reference to the determination of rates to be charged for the service rendered.

This idea was suggested by Mr. Justice Brewer, whose name will always be prominent in the development of this branch of the law. He was wont to divide all public utilities into two classes according to the intent with which they entered the business. Although his ideas were never sanctioned by the Supreme Court, it may be profitable to consider his views, for as late as 1911, a federal Circuit Court apparently considered it a proper basis of classification.

In Cotting v. Kansas City Stock Yards Company a Kansas statute defined what should constitute a public stock yard and regulated the maximum tolls to be charged. A bill was brought in the federal court to enjoin its enforcement on the ground of its unconstitutionality in depriving the corporation of its property without due process of law, and also denying it the equal protection of the laws. The statute was held unconstitutional on the latter point. But Mr. Justice Brewer took this occasion to present the views of himself and two other justices.

The precise point which called forth this discussion was the question of reasonable return. Judge Thayer in the Circuit Court had held that as the rates fixed by the statute would allow a reasonable return upon the present value of the property, that the rates themselves were reasonable and not confiscatory. This was the method of testing the reasonableness of railroad rates and he could see no difference between a utility in the form of a railroad and a stock yard in regard to the question of the confiscatory nature of the rate. But Mr. Justice Brewer did and made these two classes:

(1) A business “in which a public service is distinctly intended and rendered.”

5 Supra, note 3.
6 Supra, note 3, p. 114. In Halter v. Neb., 205 U. S. 34 (1906), it was said that this was all that was decided by the court.
7 82 Fed. 850 (1897).
(2) A business "in which without any intent of public service the owners have placed their property in such a position that the public have an interest in its use."

In the first class he would place all those utilities which enjoy some governmental power or special privilege. And in the latter all those which do not, but in which, due to economic conditions, the public have acquired an interest. In speaking of this difference he said:

"In the one case the owner has intentionally devoted his property to the discharge of a public service. In the other he has placed his property in such a position that willingly or unwillingly the public has acquired an interest in its use. In the one he deliberately undertakes to do that which is a proper work for the state. In the other, in pursuit of merely private gain, he has placed his property in such a position that the public have become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the state itself. In the other that he submits to only those necessary interferences and regulations which the public interests require."

It is hard to grasp the distinction between the two classes of business, when it is at once admitted that the state has declared them to be in public service. A state cannot force any business into public service if the business is such that the state itself could not enter. Hence there does not seem to be a logical difference between a business "which is the proper work for the state" and one which is conducted "in pursuit of merely private gains." It is idle to say that capital is invested in any business, other than a charity, which is not done so "in pursuit of merely private gain."

It is very doubtful whether any utility intentionally devoted its property to public use, until Munn v. Illinois was decided. According to Mr. Justice Brewer, a railroad would be classified in the first group of businesses, i.e., one which was intentionally

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8 Supra, note 3, p. 94. This distinction is not sound, for as soon as the business is declared to be in public service, it can henceforth exercise all these governmental powers if the legislature deems it necessary for the proper conduct of the business.

9 Supra, note 3, p. 93.

9 The Opinion of the Justices, 155 Mass. 588 (1892); 182 Mass. 605 (1903).

94 U. S. 113 (1876).
devoted to public service; but we can hardly believe even this
when we read what Mr. Justice Miller said in *Wabash Railway
Company v. Illinois* 12 about the Granger cases: 1a

"It was strenuously denied and very confidentially by all the
railroad companies, that any legislative body whatever had a right
to limit the tolls and charges to be made by the carrying companies
for transportation. And the great question to be decided, and which
was decided, and which was argued in all these cases, was the right
of the state within which a railroad company did business to regu-
late or limit the amount of any of these traffic charges."

In view of this language, it does not seem that the railroad
investor voluntarily accepted the conditions "of public service
which attach to like service performed by the state itself," nor
that he "intentionally devoted his property to the discharge of a
public service." It is not clear why the intention of the investor
should have anything to do with the question of the regulation
of the rates. If the business is one which is affected by the
public interest, it is only entitled to charge a reasonable rate and
it does not matter whether the business be that of common
 carriage, grain storage, or insurance.

In carrying out Mr. Justice Brewer's view, the rate to be
allowed the first class of public service corporations would be
fixed by determining whether or not the sum total of the net
income under the new rates would allow a proper return. The
rate to be allowed the second class, however, "is not to be meas-
ured by the aggregate of his profits, determined by the volume
of business, but by the question whether any particular charge
to an individual dealing with him, is, considering the service
rendered, an unreasonable exaction." In other words, the rate
to be charged by the first class would depend upon the proper
return on the present value of the property, while that by
the second class would depend upon the worth of the services.
All that need be said is that such a distinction has never been
recognized by the Supreme Court and their decisions are uni-
form in holding that if the rates fixed allow a proper return,
the utility has no complaint. 14

12 U. S. 558, 569 (1886).
14 94 U. S. 155, et seq. (1876).
The reason for this rule is plain. The judiciary cannot substitute its opinion for that of the legislature. All it can do is to protect property rights under the constitutional provisions. It is true that at common law the court could go into the reasonableness of a rate and determine whether in the light of all the circumstances the rate was fair to both the carrier and shipper. But when the legislature either directly or indirectly, declares what shall be a reasonable rate for the future, the question of reasonableness and the value of the service to the shipper is conclusively settled. The court can thereafter only inquire into whether the rates so promulgated will be confiscatory, and if not, they are valid.

**The Rate of Return.**

As the power of regulation is not equivalent to the power of confiscation, it is not difficult to see that the line between confiscatory and non-confiscatory rates will be for the courts to draw and not for the regulating bodies. This is a very difficult question and the courts will not interfere with the decision of the regulating bodies except in the clearest cases.

It has often been said that the utility is entitled to a *fair return*, or a *reasonable return*, and within the last few months the term *substantial compensation* has been used to express the same idea. Does this mean that the utility is entitled as a constitutional right to a return which the court regards as fair, reasonable, or substantial; or only a return which stops this side of confiscation (which may be termed for the sake of brevity a non-confiscatory return)? In other words, is a reasonable re-

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16 Reeder: Validity of Rate Regulations (1914), 33, note 14.
17 Noyes: American Railroad Rates (1905), 211, 212.
19 Louisville v. Cumberland Telephone, etc., Co., 225 U. S. 430, 436 (1912).
20 See Northern Rwy. v. N. Dakota, 236 U. S. 585 (1915); Norfolk & West. Rwy. v. Conley, *ibid.* 605.
turn the same as a non-confiscatory return? A non-confiscatory
return is the minimum return; it is the lowest possible return that
can be allowed a utility. This is a judicial question and no act
is constitutional which prohibits the final review of this question
to be made by the courts. On the other hand, a reasonable
return is a legislative question and the legislature in its discretion
can determine whether that return will be the same as the non-
confiscatory return or more. It is purely a legislative question
of business policy. Every reasonable return must be a non-
confiscatory return, but it does not necessarily follow that every
non-confiscatory return must be a reasonable return. For ex-
ample: It may be decided that for an electric light and power
business in a certain community the non-confiscatory return is
six per cent. This the court decides and is in the last analysis a
question for the Supreme Court of the United States, as it in-
volves a federal question under the Fourteenth Amendment.
The commission may decide that this same utility under the cir-
cumstances of the case, is entitled to a return of seven per cent.
Now this may or may not be a reasonable return when looked at
as a business proposition, but unless the statute which has created
the commission has provided for an appeal to the courts to test
the reasonableness of the return, the decision of the commission
is final and conclusive.

This was the effect of *Louisville and Nashville Railroad v.
Garrett.* The commission of Kentucky, after a hearing, made
an order on the railroad refusing an advance on certain freight
rates and commanding that the old rates be continued for the
reason that they were just and reasonable rates. The railroad
appealed to the federal court for an injunction, and among other
points alleged that the McChord Act,* under which the commis-
sioners had proceeded was unconstitutional because it did not
provide for a judicial review of the *reasonableness* of the rates,
and that the railroad had a right to appeal to the court on this
question. The Court in denying the application for an injunction
answered this contention by stating that the question of the

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*231 U. S. 298 (1913).
reasonableness of a rate was not an appropriate subject of judicial inquiry where the legislature had directly or indirectly determined what was to be regarded as reasonable. All that the Constitution demanded was that the question of whether these reasonable rates were confiscatory or not, be left as an appropriate subject of judicial inquiry. Of course, the legislature can allow this question to be reviewed by the courts, but the Fourteenth Amendment does not entitle the utility to the exercise by the courts of this privilege. It is, in other words, a matter of grace and not of right.

The logical result of this case is that the court cannot, unless it is expressly authorized by statute, review the question of reasonableness of the return, but only the question as to whether the return is confiscatory. If the utility cannot demand as a matter of right that the courts review the question of the reasonableness of the rates, it surely is not entitled to demand a judicial review as to the reasonableness of the return. The return is compiled from the aggregate of the rates less certain proper charges, and if the rate is not reviewable on the question of reasonableness, the return is not.

This was aptly phrased by Mr. Justice Hughes in the Minnesota Rate Cases, when he said:

"The rate making power is a legislative power and necessarily requires a range of legislative discretion. We do not sit as a board of revision to substitute our judgment for that of the legislature, or of the commission lawfully constituted by it, as to the matters within the province of either."

The next question is, what is a non-confiscatory return and how is it determined? Today it cannot be doubted that under normal conditions a rate or schedule of rates which does not afford the utility some return will be regarded as confiscatory. The word "normal" is important for there are several rulings of the Court to the effect that it is not necessary in all events to

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6 Wyman: Public Service Corporations (1911), Vol. II, §1125, however, states: "The result of this is that reasonableness of return has become a judicial question; and therefore the rules by which this shall be determined have become matters of law."

fix rates so that the utility will be able to pay dividends. In *Reagan v. Farmers' Loan and Trust Company,* where the property was worth more than its capitalization and upon the admitted facts the rates prescribed would not pay one-half the interest on the bonded debt, the Court declared that such rates were confiscatory. But Mr. Justice Brewer did not want to be understood as laying down any hard and fast rule. He recognized that there may be circumstances which would justify the Court in holding that the rates were not confiscatory although they failed to produce some profit to those who had invested their money. He states very clearly what some of the circumstances are:

“There may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discriminations as between individual shippers, resulting in general loss . . . the road may have been unwisely built, in localities where there is not sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the right of the community in which the road is built as well as the rights of those who have built the road.”

These specific allegations of justification for rates which yield no profit, yet are not confiscatory, may be grouped as follows: (1) Those circumstances which are due to fraud; (2) Those which are due to bad judgment.

It is not hard to see that if the managers of the utility have been fraudulent and maliciously wasteful the investors in the utility, are the ones who must suffer and not the public.

And so, too, must these same ones bear the burden of bad business judgment, for the Supreme Court have always said that the investors in public service corporations must take some risks and the state does not guarantee the safety of any business

This was first established in *Covington and Lexington Turnpike Company v. Sanford.* Here the rates prescribed by the leg-

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8154 U. S. 362 (1894).
9Ibid., page 412.
10“If that (the investment) has been reckless or improvident, losses may be sustained which the community does not underwrite”; Hughes, J., Minn. Rate Cases, 230 U. S. 352, 454 (1913).
11164 U. S. 578 (1896).
islature for the turnpike would not pay the operating expenses. But the Court wanted it to be plainly understood that they could not have said that the act was unconstitutional merely because the company could not earn, under the rates prescribed, more than four per cent on its capital stock. The utility had argued that the company in view of the circumstances was entitled to that it could not stand this reduction by the legislature because the travel over its road had been greatly reduced by the competition of the steam and electric railways. To this Mr. Justice Harlan replied:

"If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use the property. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends... If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public."

So it is that there may be cases where the special facts are such as to bring it within the rules laid down in these two cases. And although it is true that "each case must depend upon its special facts," yet the disposition of the Court has been to require an adequate return. What the elements and questions are that enter into the determination of this adequate or non-confiscatory return cannot be better shown than by quoting Mr. Justice Peckham's statement in Willcox v. Consolidated Gas Company.

"There is no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises. Such compensation must depend greatly upon circumstances and locality; among other things, the amount of risk in the business is a most important factor, as well as the locality where the business is conducted and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them. There may be other matters which in some cases might also be properly taken into ac-

22Ibid., 596.
24212 U. S. 19, 48-49 (1912).
count in determining the rate which an investor might properly expect or hope to receive and which he would be entitled to without legislative interference. The less risk, the less right to any unusual return upon the investments. One who invests his money in a business of a somewhat hazardous character is very properly held to have the right to a larger return without legislative interference, than can be obtained from an investment in Government bonds or other perfectly safe security."

This broad statement naturally divides itself into three parts, and the rule can be stated that the returns allowed by the regulating body must be viewed with respect to (1) the locality of the utility, (2) the usual return of similar investments in that locality, and (3) the risk assumed by the investor of that utility.

There is no more legal reason why stockholders in a gas company in New York City should be entitled to the same rate of return as stockholders in a gas company situated in some town in Oklahoma, than one who loans money in New York is legally entitled to the same return as one who loans money in Oklahoma. So also it is proper to judge the return in the light of similar investments in that locality. It is no argument to say that if the steel corporation pays a ten per cent dividend, that the street car company which is located in the same town must also be allowed at least that much. The former can make any return it is capable of, for it is not subject to governmental regulation, while the other is subject to regulation and is only entitled, as of legal right, to a non-confiscatory return, although the regulating tribunal should accord the utility a reasonable return which may very properly be in excess of the non-confiscatory return. It is also proper to take into account, the risk assumed by the investor. "The man that invested in gas stock in 1823 has a right to look for and obtain, if possible, a much greater rate upon his investment than he who invested in such property in the city of New York years after the risk and danger involved had been almost entirely eliminated." 15 If this were not true, it is evident that there would be a violation of the second part of the rule as above stated. The gas business of New York City in 1823 was not

15 Ibid., page 49.
the same sort of a business, from the viewpoint of investment, as the gas business of the same city in 1913. It was more hazardous.

It has been held by the Supreme Court that there is nothing in the nature of confiscation in reducing the rates of an irrigation company in California so that the return is six per cent;\(^\text{16}\) nor in reducing the rates of a water company situated in Knoxville, Tennessee to substantially six per cent or four per cent after allowance of two per cent for depreciation.\(^\text{17}\) A return of six per cent is the proper minimum return upon a manufactured gas plant in New York City which was "the most favorably situated gas business in America";\(^\text{18}\) and the same rate of return was upheld in the case of a similar business situated at Cedar Rapids, Iowa.\(^\text{19}\) But the rates of a railroad in Minnesota which for years past has not earned over four and fourteen hundredths per cent on the estimated reproduction value of the property, cannot be reduced.\(^\text{20}\)

One writer on this subject has suggested that the current rate of return to capital is the true basis of fixing the percentage.\(^\text{21}\) While there are some states and federal courts which, after a thorough discussion, have adopted this view, nevertheless the Supreme Court have not adopted it as the basic test. It is submitted that the Supreme Court will treat this question in the cases coming up for review from Maine to Arizona in the same method as they have treated the question of granting the power of eminent domain to corporations. The Court have decided that in the eminent domain cases the opinion and judgment of the lower courts who are familiar and in touch with local affairs and the needs of the people will have the greatest weight; and if the lower court has decided that the use for which this power

\(^{20}\) Minn. Rate Cases, 230 U. S. 469 (1913), in respect to the Minneapolis and St. Louis Railroad.
\(^{21}\) Wyman, Vol. II, § 1133, and cases cited therein.
was granted was a public use, they will be reluctant to upset it. This is brought out very clearly by Mr. Justice Moody in Hariston v. Danville and Western Railway:

"The determination of this question (whether the use is public or private) by the courts has been influenced in the different states by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people. In all these respects conditions vary so much in the states and territories of the Union that different results might well be expected. . . . The propriety of keeping in view by this court, while enforcing the Fourteenth Amendment, the diversity of local conditions and of regarding with great respect and judgment of the state courts upon what should be deemed public uses in that state is expressed, justified and acted upon in (citing several cases) . . . ."

The same general rule which the Court have laid down in regarding the question of public use for eminent domain applies in the cases of the fixation of the rate of return. Conditions in every city vary so, that there is no necessity for having one rate applicable for the one class of business all over the country. The judgment of the various commissions will strike a more equitable rate in the vast majority of cases and their first hand knowledge of local conditions should be given the greatest weight. And, yet, the Court can, in the exercise of their constitutional right, set aside such a rate.

After the proper minimum rate of return has been decided upon, the next question is whether the rates promulgated will yield this return. In determining this question the Court have practically committed themselves to the proposition that there is a presumption that the lower rates will bring in an increased gross revenue. In the Willcox Case, Mr. Justice Peckham in

22 208 U. S. 598, 606 (1908).
23 "Must it be declared, as a matter of law, that a reduction of rates necessarily diminishes the income? May it not be possible—indeed does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and, therefore, the earnings. At any rate, must the court assume that it has no such effect, and, ignoring all other considerations, hold as a matter of law, that a reduction of rates diminishes the earnings." Brewer, J., in Chicago, etc., Rwy. v. Wellman, 143 U. S. 339 (1891). See also Cedar Rapids v. Gas Light Co., 144 Iowa, 426, 444 (1909), affirmed in 223 U. S. 666 (1911).
24 Supra, note 14.
arguing that the reduced rates for gas would probably yield an increased revenue, cited the example of the elevated railroads in New York City, which "when first built charged ten cents for each passenger, but when the rate was reduced to five cents it is common knowledge that then receipts were not cut in two, but that from increased patronage the earnings increased from year to year, and soon surpassed the highest sum ever received upon the ten cent rate."

But this presumption does not apply in the case of a telephone company, although it was admitted to be applicable to railroads, water and gas companies, and telegraph companies. This distinction was brought out in *Louisiana Railroad Commission v. Cumberland Telephone Company*, where the presumption as to increased earnings was sought to be applied to reduced telephone rates, but the Court did not think the same argument applied, for in this business increased demand does not come unless it is accompanied by corresponding increase in expense, while in the other cases the increase in expenses was slight compared to the increased revenue. By way of proof the Court said:

"As an illustration the witness took a telegraph company which as he said, 'employs one wire and can send several messages at the same time over that wire; it employs its own operators to send the message, who consult each other's time and convenience in the handling of it, while the telephone company has to employ two wires, the sender of the message is his own operator, and the telephone operator simply fashions up the facilities for him, and the customer sends his own message, and becomes, therefore, his own operator, hence his convenience and time must be consulted; we have to be ready, in other words, with the operators and the appliances to suit the convenience of the customer, where as in the telegraph business it is just the other way; the customer brings in his message, and when it suits the convenience of the company to employ its operators and its apparatus to send it, they send the message.'"

Another point to bear in mind in the consideration of this question, is that the Court will not annul a promulgation of rates on the ground of confiscation unless the evidence is clear and convincing that the return will be lower than a non-confiscatory

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26 Ibid., page 427.
return, or in other words unless they can say. "that it was impos-
sible for a fair-minded board to come to the result that was
reached." They would rather have the new rates tested than set
them aside upon the basis of speculative figures. "Where the
case rests, as it does here, not upon observation of the actual
operation under the ordinance, but upon speculations to its effect,
based upon the operations of a prior fiscal year, we will not
guess whether the substantial return certain to be earned would
lack something of the return which would save the effect of the
ordinance from confiscation. It is enough that the whole case
leaves us in grave doubt." 27 And hence this places the burden
upon the utility of proving almost to a certainty that the new
rates will be confiscatory.

This was illustrated in the case of Louisville v. Cumberland
Telephone and Telegraph Company. 28 Here the city had,
through the councils, regulated the rates of the telephones. The
master found that the rates were not confiscatory, but he was
overruled by the federal District Court. That court had held
that the company in view of the circumstances was entitled to
at least a seven per cent return and as the proposed rates would
not, in his estimation, yield this return, he enjoined their enforce-
ment. 29 But the Supreme Court reversed this on the ground
that the whole question was "too much up in the air" for them
to feel authorized to let the injunction stand. The Court would
not express an opinion "whether to cut this telephone company
down to six per cent by legislation would or would not be con-
fiscatory." And they then summed up the whole problem in a
nutshell by pointing out that what the Court require before they
declare legislation, otherwise valid, void, on this ground of con-
fiscation, is clear evidence, "and when it is considered how spec-
ulative every figure is that we have set down with elusive exact-
ness, we are of the opinion that the result is too near the dividing

27 Supra, note 17, page 17. And in Des Moines Gas Co. v. Des Moines,
supra, note 19, in holding that a six per cent return was not confiscatory, Day,
J., said: "This is especially true in view of the fact that the ordinance was
attacked before there was opportunity to test its results by actual experience."
28 225 U. S. 430 (1912).
29 187 Fed. 637 (1911).
line not to make actual experiment necessary." In as much as every rate regulation case will have figures of a more or less speculative nature, this can be accepted as a general rule.³⁰

The regulating body has wide discretionary powers in fixing the rates and it is not bound to so fix them that every commodity transported or every sort of business engaged in produces the same percentage of return. For the very reason that there are so many factors to be considered, there must of necessity be a field for reasonable adjustments and classifications.³¹ However, there are certain well settled limits within which this discretionary power must be confined. The intrastate rates of a railroad cannot be reduced to a point of confiscation and be justified on the ground that the sum of the intra and inter state rates would still produce a non-confiscatory return. Each class of business must be permitted to produce for itself a non-confiscatory return.³² In other words, the state regulating body cannot so classify the rates in order to give the interstate business an advantage when the burden would have to be carried by the interstate business.³³ And neither can a regulating body justify the reduction of passenger rates to a point where the carrier is compelled to transport the people at a loss or "without substantial compensation" on the theory that the net return of both intrastate freight and passenger business is a non-confiscatory return.³⁴ While a railroad "cannot claim the right to earn a net profit from every mile, section or other part into which the road may be

³⁰ And also the Court must be fully advised as to what is done with the receipts and earnings, before they will nullify a rate on the ground of confiscation, Chicago, etc., R. R. v. Wellman, supra, note 23, at page 345.
³² Smyth v. Ames, 169 U. S. 466 (1898); Minn. Rate Cases, supra, note 7.
³³ The idea of regulating the business of transportation for a favored class is repugnant to ideas of the Court, and if the regulation appears to be such an interference it will be annulled without considering the effect which it would have on the total income of the carrier. For example see, Lake Shore & Michigan R. R. v. Smith, 173 U. S. 684 (1899), where the Court condemned a regulation as to sale of mileage books as undue regulation without considering the effect of such regulating on the income; and also Mo. Pac. R. R. v. Nebraska, 217 U. S. 196 (1910), where the Court also condemned a regulation as to the building of mere private connections.
³⁴ Norfolk & Western R. R. v. Conley, supra, note 3.
divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative," Nevertheless the tendency of the Court is toward the rule that the railroad can claim a right to earn "substantial compensation" (whatever that vague term may mean) upon each class of traffic which it carries. The regulating body, although it has wide discretion in the fixation and classification of rates cannot compel the transportation of one class at a loss.

In Minneapolis and St. Louis Railroad Company v. Minnesota, the state commission reduced the rate on hard coal in carload lots between certain termini. The utility refused to obey this order on the ground that such an order was unreasonable, and offered to prove that if the rates upon all freight were fixed at the amount imposed by the commission upon coal in carload lots that it could not pay operating expenses. The Court pointed out that this was not proof that the coal in carload lots would have to be carried at a loss. And in holding that upon such proof the Court could not overrule the commission's act, as arbitrary and confiscatory, it was distinctly noted that they did not intend "to intimate that the road is not entitled to earn something more than expenses." It is clear then that in this case the railroad lost for the lack of proper proof, and not because the Court were impressed with the idea that a railroad could be compelled to carry a certain class of freight even at a loss if the total net return of the intrastate freight business was non-confiscatory. Later on, there appears in the decisions the thought that a railroad must be allowed some compensation in addition to the actual cost of operation. True it is, that the

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36 186 U. S. 257 (1902).
37 In Atlantic Coast Line R. R. v. N. Car. Comm., 206 U. S. 1, 25 (1907), White, J., gave the impression that in the above case, the Court had in mind the rule that the intrastate freight business could be compelled to carry the loss of certain classes of freight. It is also to be noted that in both Atl. Coast Line R. R. v. Florida, 203 U. S. 256, 260, and Seaboard Air Line R. R. v. Florida, 203 U. S. 261, 270 (1906), the rates on a segregated article of traffic, phosphate, was upheld solely for the reason that the railroad could not prove that the cost of transportation exceeded the gross return on that commodity.
transportation duties in these cases were ones which at the common law the carrier was not compelled to perform (termed "off the line service"), yet it indicates a certain policy of the Court.

It does not seem possible that the Court would hold that a carrier can be forced to transport coal at a loss, simply because it is a transportation duty which is compellable, but that the carrier cannot be forced to haul cars to and from a shipper's warehouse for the purpose of reconsigning the goods, unless a profit is earned, simply because it is a transportation duty which is not compellable. If the Chicago grain warehouses, by reason of their situation, were so affected with a public interest that they could be legislated into the field of public service, what is there to prevent the regulating bodies from ruling that these "off the line services" are hereafter to be considered as true transportation services? There is such a reasonable connection between the "off the line service" and the true transportation service that the Court could not say that such an act or order was a deprivation of property without due process of law. While it is true that the cases do make this distinction, yet do not all of them when considered as a whole show that the broad policy of the Supreme Court is that a utility cannot be compelled to transport any class of commodities at a rate which will entail a loss irrespective of the net income? 39

The recent case of Northern Pacific Railway Company v. North Dakota, 40 bears out the same fundamental idea. The legislature segregated the rates on intrastate shipments of coal and regulated them. The railroad proved that the rates as fixed by the act would not permit it to pay the expenses of transporta-

39 In Inter. Com. Comm. v. Union Pacif. R. R., 222 U. S. 541, 549 (1912), Lamar, J., said: "If the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate."

40 Supra, note 3.
tion, and for this reason the Court held the act unconstitutional as being confiscatory. In this case the legislature had singled out the coal traffic to be the subject of special regulation, and while the rates prescribed were to operate on all classes of coal, their practical application was almost solely to lignite coal. And it has been suggested that "had the coal rates been some of a number of other rates adopted by the legislature at the same time . . . that under this decision unless the result of all such rates would be confiscation the court would not have interfered." Although Mr. Justice Hughes did place some emphasis on the fact that the act only applied to one class of traffic, separate and distinct from a general classification, nevertheless it is thought that in view of the prior discussions of the Court on the same subject the decision can be regarded as holding that a carrier cannot be compelled to transport a class of traffic at a loss, or "without substantial compensation," and this is irrespective of the net return on all classes of freight.

But the rule is not the same when a utility is ordered to install certain facilities for the benefit of the public. This was pointed out by the present Chief Justice in Atlantic Coast Line v. North Carolina Commission:

"The distinction between such an order relating to such a subject (to furnish certain facilities) and an order fixing rates . . . is quite apparent. This is so because as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be

"The lower court, 145 N. W. 135; 26 N. Dak. 438 (1914), drew a distinction between "out of pocket costs," and general overhead expenses. The former represented the sum which was actually spent in moving the coal, and the other represented the sum which would have been expended notwithstanding the fact that lignite coal had never been transported. They held, therefore, that if the gross income paid the "out of pocket costs" that was sufficient. The Supreme Court repudiated this and found "no basis for distinguishing in this respect between so-called outlays which are none the less actually made because they are applicable to all traffic, instead of being exclusively incurred in the traffic in question. Illustrations are found in outlays for maintenance of way and structures, general expenses and taxes."

"63 Univ. of Penna. L. Rev., 551, 553 (April, 1915).

"It is also to be noted that where the carriers can prove that the rate will not afford transportation expenses, it is not bound to go farther and prove the value of the property. It would be useless to do so. Northern Pac. Rwy. Co. v. N. D.; Norfolk & Western R. R. v. Conley, supra, note 3.

"Supra, note 37, at page 26."
compelled, although by doing so as an incident some pecuniary loss from rendering such services may result."

Of course, this does not mean that the loss caused by installing such facilities is not an item, for it is an important one. But it does mean that it is not a bar to enforcement as in the case of a rate which causes a loss. The public benefit is also to be considered in this connection and if the public are greatly to benefit the railroad cannot protest against the enforcement of such an order, simply upon the ground that the particular order is confiscatory, and especially so when the railroad in the aggregate makes its proper return. A balance of equities in such a case must be made and if the benefit to the public outweighs the pecuniary loss to the carrier, the order is not unreasonable. It is quite clear that under such a rule each case will have to be decided mostly upon its own particular facts. So where the shipping public would greatly benefit if two railroads would provide facilities for the interchange of shipments, such an order is not unreasonable even if it compels the railroads to purchase more land.\textsuperscript{45} And the mere fact that the carrier will not be able to pay the expense of a train run on a certain schedule will not prevent the enforcement of the order when it will afford travellers a connection with a through train and relieve them from spending many hours at the junction.\textsuperscript{46}

That there is a distinction between an order regulating rates and an order regulating facilities is quite apparent. The only difficult problem is to justify the distinction. Mr. Chief Justice White made the distinction in classifying the duty to afford facilities as a \textit{primal} duty of the carrier. The inference from this is that he considered the duty to afford reasonable rates as a \textit{secondary} duty. The only difficulty with this idea is that both at the common law and under statutory regulation

\textsuperscript{45} Wisconsin, \textit{etc.}, R. R. v. Jacobson, 179 U. S. 287 (1900).
\textsuperscript{46} \textit{Supra}, note 37. The daily loss from operating this train would be $15.00. But the action of the regulating body may well be guided by the fact that the additional service would curtail too great a loss. See action of Pennsylvania Public Service Commission in refusing additional service because non-compensatory. Miners, \textit{et al.}, v. P. & R. R. R., 1 Pa. Comm. Rep. 99 (1914); Stevens v. N. Y. C. R. R., 3 \textit{ibid.} 12 (1915).
there does not appear to be such a distinction as he has drawn. It was and is just as much a primal duty of the carrier to afford reasonable rates as to afford proper facilities.

It is submitted that the justification rests upon the underlying difference between public service regulation in general and rate regulation. The former, as has been pointed out previously is a branch of the police power of the sovereign which legislates for the health, safety and morals of the people and which is not subject to the Fourteenth Amendment when used bona fide. Hence any loss due to the installation of switching facilities, or the operation of a train at a different schedule would be caused by the uncompensated obedience to the police power. On the other hand rate regulation belongs to that division of the police power which denotes "all the power of government which the states did not expressly or impliedly surrender by the adoption of the Federal Constitution." As it is subject to the Fourteenth Amendment, an order which would compel the carrier to transport traffic at a rate which would cause a loss or would not produce "substantial compensation" would be unconstitutional.

It has been suggested that relief from the Jacobson and the North Carolina Commission cases can be had by raising the rates; that although the Supreme Court compelled the railroads to afford these facilities, yet they did not hold that the rates could not be raised to pay for this outlay. There are two objections to this: (1) The tenor of both opinions is contrary to such an idea, the whole argument being based on the idea that the rates could not be raised for this reason alone. (2) Under the principle of the Gill case, the railroad is not entitled to a profit on every division of the road, nor upon every train operated. It is merely uncompensated obedience to the police power.

A difficult question will arise when a state segregates a

See "Where Is the Power to Regulate Rates to Be Classed," supra, 64 Univ. of Penna. L. Rev. 2.

Ibid.

Supra, note 45 and note 37.

Supra, note 35.
class of traffic, as it can,\textsuperscript{61} and then instead of regulating the rates, orders the carrier to afford certain facilities which the carrier can prove will compel it to carry the traffic at a loss. For example, if in \textit{Northern Pacific Railway v. North Dakota},\textsuperscript{52} the state had compelled the railroad to offer cars specially adapted for the carriage of lignite coal, and the railroad could have proved that obedience to the order meant a loss on the transportation of the traffic, would the order have been valid? Such an order would lie between the poles of the North Carolina case and the North Dakota case. It may be that the Court could well say to the state: This is not a true order to install facilities, but an order regulating rates on a segregated class of traffic under the guise of an order to install facilities and hence you must either allow the railroads to raise the rates to meet such additional expense or annul your order. An order to install facilities either for shipper or passengers may be so unreasonable that it will be declared void, for "broad as is the power of regulation, the state does not enjoy the freedom of an owner."

\textit{Douglass D. Storey.}

\textit{Law School, University of Pennsylvania.}

\textsuperscript{61} Northern Pacific Rwy. v. N. Dak., \textit{supra}, note 3.
\textsuperscript{52} \textit{Supra}, note 3.