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FEDERAL REGULATION OF RAILWAYS IN THE UNITED STATES.

At least 75 per cent. of the railroad traffic of the United States is concerned with State to State transportation.¹ The power to regulate this traffic between the States is reposed by the constitution in the Federal government. Notwithstanding this explicit delegation of power a long period elapsed before this power of control was exercised in regard to inter-State railway traffic. The majority of the railways of the United States have been chartered by the State legislatures. During the period 1830-50 the aid in developing railroads came mainly from the States. The strict constructionist point of view desired to limit the powers of the general government; and consequently the States were given practically a free hand, both in chartering and in regulating railroads. This attitude was helped on by the fact that it was not until the late fifties that the inter-State phase of transportation became important.

The extension of the railroad system, coupled with the rate wars and discriminations of the period succeeding the Civil War, caused a departure from the hitherto prevailing fetichistic belief in the regulative effects of free competition. The State Commissions "with power" were called into existence by this exigency. In default of action by the Federal power, the courts construed the powers of the State in regard to traffic regulation very liberally, so that an indirect control over inter-State commerce was ensured to the State commissions.²

¹ The data with reference to this matter are very imperfect. A table containing data concerning thirty-eight railroad systems will be found in the report of the Committee on inter-State Commerce (S.R., 1st session, 49th Congress, vol. 2, p. 138). Very few of the railways distinguish in their statistics between inter-State and intra-State traffic. The Iowa Railway Commission has experienced considerable difficulty, in its operation, on account of this fact.

² This was the attitude of the court in the cases of *Burlington and Quincy Railroad v. Iowa*, a case in which the power of the Iowa Commission to establish

The first movement towards the exercise of the Federal power took place in 1868, when a House Committee was appointed to inquire into the expediency of regulating the rates and conditions of transportation of the railways engaged in inter-State traffic. The Committee declared that Congress possessed power to regulate such carriers; in the absence of a detailed investigation it was not deemed advisable to draft a Bill to enforce this power.¹

The matter was kept before Congress by the conditions connected with the crisis of 1873. The disputes between the farmers of the West and the railroads, which culminated in the "Granger" legislation, gave a further impetus to the demand for Federal regulation. While the Supreme Court declared that the States had the power to regulate the intra-State traffic, this decision did not affect the inter-State rate which was important in the long haul to the seaboard.

In 1874 a Congressional Committee on "Cheap Transportation to the Seaboard" recommended publicity of rates, prohibition of stock watering, and the ensuring of efficient competition through the opening up of several lines of waterways under Government control.² During all this period petitions on the subject were constantly coming in. In 1878 Mr. Reagan, now chairman of the Texas Railway Commission, introduced a regulative measure into the House of Representatives.³ The essential portions of this measure are summarized as follows: discriminations in rates or in service were prohibited; a long and short haul clause was contained; and there was to be publicity of rate schedules.

The decision of the Supreme Court in the *Wabash Railway* case, in 1886, that the Illinois Railroad Commission could not exercise control over traffic originating out of the State or destined for a point outside the State, while only declaratory of a constitutional principle, served to still further attract attention to the unregulated nature of inter-State traffic.

The definitive attempt of Congress to deal with the matter dates from March, 1885, when the Senate Select Committee on Inter-State Commerce was appointed. After the hearing of evidence representing every shade of opinion and a careful consideration of the matter thus presented, a report was made in

maximum rates was concerned, as well as in *Munn v. Illinois*, and *Peik v. Chicago and North-Western Railway*.

¹ H. R., No. 57, 40th Congress, 2nd session, vol. 1.

² Report of Select Committee on Transportation Routes to the Seaboard, 43rd Congress, 1st session, Senate Report 307, pp. 240-3.

³ H. R., No. 3,547.

January, 1886. The findings of this Committee¹ present in a series of eighteen counts the evils attributable to the unregulated condition of the transportation system. These may be summarized under the following headings:²

(1) Local rates were unjustifiably high as compared with through rates; rates at non-competitive points were unreasonably high as compared with rates at competitive points.

(2) There existed an extensive system of local and personal discriminations.

(3) The existing policy of special rates, rebates, drawbacks, concessions, and rate fluctuations favoured the larger at the expense of the smaller shipper.

(4) The shipping public was suffering from the lack of a uniform system of classification.

(5) Capitalization and bonded indebtedness were in many cases watered.

(6) There was no adequate remedy under the existing law whereby redress of grievance might be obtained.

The Bill³ introduced by this Committee was subject to various modifications before it was finally adopted. The House of Representatives favoured radical action; the Bill in its final form was the result of a series of compromises. This must be borne in mind in any investigation of the working of the Act. This Act differed from the earlier propositions, in that it provided for a special tribunal to see to the enforcement of the provisions of the law.

The Inter-State Commerce Commission began its work under fortunate auspices. The railroads, exhausted by various rate wars, were willing to give the new organization a trial. The name of the distinguished jurist, Hon. T. M. Cooley, who was made chairman of the Commission, gave the public confidence in its decisions from the outset.

There is no doubt that the railroad men of the United States have accepted as final the power of the Federal government to regulate railroad transportation.⁴ The possession of this power

¹ The report of this Committee, usually known as the Cullom Committee, from the fact that Senator Cullom was its chairman, is vol. 2 of the Senate Reports for the 1st session of the 49th Congress.

² See pp. 180-1 of the report.

³ Senate Bill 1093.

⁴ See an article by Mr. H. P. Robinson, editor of the *Railway Age*, a pro-railway journal, in the *North American Review* for April, 1898, "State Regulation of Railways." Mr. Robinson is of the opinion that it would be better if it were possible to place all railway regulation under the control of the Federal government. See also in connection with the matter under consideration the summary of the matters

has been so often judicially established, that it is no longer in question.¹ The extreme individualistic attitude no longer finds such ready expression.² The criticism now indulged in is directed against the details of the method of regulation, not against the principle of regulation itself. It has indeed been claimed by some railway men that the regulation of rates by the Commission has been one of the leading causes of railway receiverships. A careful observation of the course of business during the years in question will show that this position is untenable.³ It is now acknowledged by railroad men that the Commission has done much to better conditions.⁴

It will have appeared from the list of grievances contained in the report of the Cullom Committee that the rate question was central in its importance. It may at once be admitted that the Commission in dealing with this matter has had only a partial success; the reasons for this demand a detailed analysis in a later portion of this paper. The requirements with reference to publicity of rates have been rigidly enforced; this has done much to protect the shipper. The opportunity for sudden fluctuations in the open rate have been abolished. While discriminations and preferences are not so wide spread as formerly, their results are even more serious because they have undoubtedly added to the already great advantages of large corporations. This question will always be a difficult one to deal with.

While the rate question has not been settled, it is undoubted that the following results have been obtained—there is greater publicity of rates: open rate wars have been lessened; and the long and short haul clause has lessened distance discriminations.

The Commission has had more success with the question of involved in the Florida Strawberry case. This will be found in the sixth report of the Inter-State Commerce Commission, p. 8.

¹ The *Railway Age* in a series of articles on railway insolvencies and railway rates, states that "the principle of the right of the people to control the rates is for ever established." See in this connection the Passenger cases 7 Howard 416, *Mobile v. Kimball* 102 U.S. 691, and *Brown v. Houston* 114 U.S. 662.

² An example of this point of view appears in the statement of M. M. Kirkman, Vice-President of the Chicago and North-Western Railroad. In his *Railway Rates and Governmental Control*, p. 56, he says that even when government aid has been granted, this does not justify governmental regulation, because the country obtains more than an equivalent.

³ See in this connection *Economic Aspects of Railroad Receiverships*, by H. H. Swain, pp. 75-76. See also "Recent Railroad Failures and their Lessons," by Simon Sterne, in the *Forum* for March, 1894.

⁴ See p. 14 of *Railway Pools, their Equity and Public Value*. This pamphlet is composed of a series of articles originally published in the *New York Mail and Express* by George R. Blanchard, who was commissioner of the now defunct Joint Traffic Association.

classification. In 1887 there existed a large number of classifications, both general and local. The complexity was such that it was difficult for a shipper to determine in what class his goods fell. Since classification is at the base of rate-making,¹ a change of classification being identical with a change of rate, it was obviously essential in the interests of the shipper that there should be uniformity of classification. The provision for publicity of rates would otherwise have been of little value. The railroads had already begun to see the disadvantages of the existing system. The Commission took the lead in a new agitation for greater uniformity. As a result of this there exist at present four leading classifications. The attempt is being made to obtain one classification for the United States. It must be remembered that the Commission has no power to draw up a classification. Its power is only advisory. If a complaint arises with reference to classification, the Commission can deal with the matter only if there is a complaint concerning unreasonable rates.² The Annual Convention of the Railroad Commissioners of the United States, at the meeting in Washington in 1898, recommended that Congress require the Commission to draw up a uniform classification.

In addition to the functions originally delegated to the Commission, Congress has given the further duty of enforcing the adoption by the railways, subject to its control, of automatic couplers and safety appliances.³ The Commission has from time to time extended the time within which the change by the railroads is to be made. Recently a further extension of six months has been granted.

The Commission has since its inception down to the end of 1898—the report for 1899 is not yet available—conducted 985 formal investigations in which points connected with the rela-

¹ See in this connection the opinion of the Commission as expressed in *Coxe Bros. v. Lenigh Valley Railway*. The portion of the opinion bearing on this subject will be found *in extenso* in the House Report on "Alleged Coal Combinations." H. R., vol. 1, Report No. 2,278, p. 196, 52nd Congress, 2nd session.

² At present, January, 1900, there is a dispute between the shippers and the railroads concerning a new classification. This classification makes a considerable increase in the less than car-load rates in addition to increasing rates generally. The opinion of the Attorney-General was asked by the Commission as to whether this fell under the Anti-Trust Act. He advised the Commission that it did not, and that the matter would come within the Commission's jurisdiction only if it was shown that there were unreasonable rates or preferences. See opinion of Attorney-General Griggs, A.P., despatch in St. Louis Republic, December 31, 1899.

³ The movement in this direction came in the first place from the New England States. Connecticut took the lead. See *15th Report of Massachusetts Board of Railway Commissioners*, p. 20.

tionship of the railways to the public have been involved. It is not to be assumed that the formal investigations exhaust the scope of the Commission's activity. The mediatorial position occupied by the Commission has done much to prevent grievances coming to a head.¹ The information concerning rates and the financial conditions of American railroads collected by the Commission has been of great value to shippers, carriers, and investors.² Although the Commission has not dealt directly with the evils of stock-watering, complained of by the Cullom Committee, it has indirectly dealt with the matter. By requiring exact statistical statements from the railroads, the forms for all being the same, greater publicity has been given to railroad accounts and operations. This will in time affect the work of the State Railway Commissions, since they are, in as far as circumstances will permit, approximating their statistical methods to those of the national Commission.

The point of view of the Commission has been that it stands as an impartial tribunal between the shipper and the railroad. It has done much to educate both the shipper and the carrier. Its administration is, on the testimony of railroad men, judicious.³ The attitude of the public to the railroads is, thanks to the Commission's work, much less indiscriminating than formerly.

In turning to the other side of the shield it must be distinctly borne in mind that the act was the outcome of a compromise. Its details are by no means homogeneous; and divergent principles are contained in it. While it was intended to afford a readier procedure and a more drastic enforcement than formerly existed, the indefiniteness of the phraseology of the Act has helped to defeat its avowed purpose. Powers have been conferred without any adequate method of enforcing them. In the construction of the law the courts have been concerned with the strict letter of the law, not with questions of public policy, and consequently the defects in the law have been made more glaring, and the scope of the Commission's activity has been continuously more circumscribed. The decisions of the courts have also narrowed the powers of the Commission in regard to matters that are stated with definiteness in the Act.

¹ 4 I.C.C.R., p. 3.

² See 10 I.C.C.R., p. 55. The statistical phase of the Commission's work has had the advantage, from the outset, of being under the direction of Professor H. C. Adams of the University of Michigan. Each road is required to make an annual report. For a time a system of monthly reports was adopted, but the system broke down.

³ See in this connection Blanchard, *op. cit.*, p. 15.

In the matter of rate-regulation the position of the Commission has been that its function is not to interfere with competition, but to allow it to operate in the proper manner. It has laid stress upon the necessity of having rates which are both steady¹ and reasonably remunerative.² When the law was passed the question of extortionate rates was important. By 1893 this phase was of less importance; disputes in connection with preferences and discriminations were on the increase.³ Since this date the question of extortionate rates has again come to the front. Down to the present the Commission has directed a reduction of rates in about one-third of the cases brought before it.⁴ The rate situation at present is affording still further opportunity for complaints concerning extortionate rates. The railroads have recently increased their rates by about 25 per cent.⁵

The decisions of the Commission on the rate question have been subject to judicial construction. The commerce Act provides that rates shall be reasonable and just.⁶ Of course no exact criterion of what constitutes a reasonable rate can be given. The reasonableness or otherwise will be relative to circumstances.⁷ At an early date the Commission adopted the position that the only criterion was what the traffic would bear.⁸ In terms of the enabling Act the Commission claimed the right not only to exercise control over rates, and to determine what constituted a reasonable rate, but also to enforce such reasonable rate.⁹ In its ninth report the Commission stated that the power to condemn a certain rate implied the power to indicate the reasonable rate.¹⁰ In the report of the succeeding year this position is reiterated; it is claimed that when particular rates are found to be unjust, the Commission should have power, due notice

¹ 2 I.C.C.R., p. 22. ² *Ibid.*, p. 23. ³ 7 I.C.C.R., p. 12. ⁴ 11 I.C.C.R., p. 22.

⁵ They justify their action on the ground that since they have charged low rates while business was dull, they are justified in charging higher rates when business has improved. It is also urged that the increased cost of steel rails, as well as of general railroad equipment, justifies the upward movement. See in this connection an interview with T. S. Davant, general freight agent of the Norfolk and Western, in *Memphis Commercial Appeal* of December 28th, 1899.

⁶ Section 1 of the Act to Regulate Commerce.

⁷ In the *Nebraska Maximum Rate* case (*Smyth v. Ames* 169, U.S., 466) the court endeavoured to furnish a criterion of reasonable rates. In essence, however, the decision of the court amounts to a statement that the reasonableness of rates will be relative to circumstances. A résumé of the case will be found in 12 I.C.C.R., pp. 51-53. A discussion of the matter from a pro-railway standpoint will be found in "State Regulation of Railways," by H. P. Robinson, in *North American Review* for April, 1898.

⁸ 1 I.C.C.R., pp. 36 and 96.

⁹ See 6 I.C.C.R., p. 12 and 7 I.C.C.R., pp. 10-11.

¹⁰ 9 I.C.C.R., p. 21.

having been given to the railroad, to fix rates.¹ These rates are amendatory, not initial. In prescribing a rate the Commission does not claim to prescribe the exact rate, but simply a maximum rate.² The Commission has asserted and exercised this power in sixty-eight cases.³

Until about 1896 there was a fairly general acquiescence by the railways in the exercise of this power. In March of 1896, however, the Supreme Court decided in the "Social Circle" case, that the Commission did not possess the power to prescribe reasonable rates.⁴ It was declared that there was no necessary or implied power in the enabling Act which conferred the rate-making power upon the Commission. In substance it was stated that the determination of what constituted a reasonable rate depended upon the facts of the particular case, and that the "power to pass upon the reasonableness of existing rates" does not imply "a right to prescribe rates."

It has already been mentioned that the Commission in prescribing reasonable rates has proceeded by prescribing maximum rates. The decision of the Supreme Court in the Freight Bureau cases in 1897 declared that the Commission did not possess the power to fix maximum rates.⁵

The refusal of the power to fix maximum rates was, in view of the practice of the Commission, a necessary implication from the refusal of the right to fix reasonable rates. Under the former process when a rate was declared unreasonable, and redress

¹ 10 I.C.C.R., p. 114. See also 11 I.C.C.R., p. 16. This position will be found repeated throughout the reports of the Commission. An explicit statement of it will be found in the case of *Coxe Bros. v. Lehigh Valley Railway* in the fourth report.

² The State Railway Commissions have sided with the Commission in this contention, *e.g.*, 26th Report of the Georgia Railway Commission, p. 13. See also summary of proceedings of tenth annual convention of Railroad Commissioners of the United States (12 I.C.C.R., p. 90).

³ See 11 I.C.C.R., p. 16. A few of the leading cases may be cited. *Coxe Bros. v. Lehigh* 4 I.C.C.R., p. 535, and 6 I.C.C.R., p. 27, arose on a complaint that unjust and unreasonable rates were being charged. The "Orange" case, 6 I.C.C.R., pp. 23-25, was concerned with the rates on north bound shipments of oranges. The Commission has also exercised the power to determine a reasonable passenger rate. This was in connection with a complaint with reference to the reasonableness of the rates charged by the Eureka Springs Railway, 11 I.C.C.R., p. 112.

⁴ This case, known popularly as the "Social Circle" case, is more exactly cited as the *Interstate Commerce Commission v. the Cincinnati, New Orleans and Texas Railway*. It will be found in 162 U.S., 184. Some consideration of its significance will be found in 10 I.C.C.R., pp. 16-23, as well as in 11 I.C.C.R., pp. 9-14. This overthrew the decision in the "Orange" case which had been upheld by the Circuit Court.

⁵ *Interstate Commerce Commission v. Cincinnati, New Orleans, and Texas Pacific Railway Co., et. al.*—167 U.S., 479.

through the declaration of a reasonable rate afforded, the redress enured to the advantage of the shipping public of the localities affected. The Commission may still enforce repayment of the portion of the past rate which exceeds a reasonable rate. But it has no control over the future rate. The railway may continue to charge the rate originally complained of; whether it will be unreasonable must be decided in the individual cases again arising. It may happen that continual decisions to the effect that a rate is unreasonable will ultimately cause the railway to change the rate; but this gives a very indirect redress.

The preference matter is intimately connected with the foregoing question. Preferences have, in recent years, been prominent both in the western and in the southern freight traffic. Some of the decisions rendered on the question of preferences have been given in constructions of the long and short haul clause.

The law does not prohibit all discriminations, but simply those that are unjust.¹ The most common way in which the preference clause has been violated has been through the granting of rebates.²

The Act provides that in addition to a fine, or in lieu of it, a violation of the preference clause is punishable by imprisonment. The imprisonment provision has had no practical effect; but the Commission insists on the retention of the provision.

The detection of preferences is an exceedingly difficult matter. The judicial construction of the preference clause has limited the power of the Commission to punish preferences. In the "Import Rate" case, which was decided by the Supreme Court in March, 1896, the general question at issue was whether in the carriage of goods from American seaports, carriers, subject to the Act, could discriminate in favour of import against domestic traffic of like kind and quantity for the same destination.³ The Commission decided that the exercise of such discrimination by the Texas and Pacific Railway was unjustifiable. The Supreme Court, in overruling this decision, said that the discrimination was justified by the competition at the original point of shipment.⁴ The carriers engaged in import traffic can now plead that water competition for freights at a foreign point takes them

¹ For the attitude of the Commission on this matter see 6 I.C.C.R., pp. 13-14.

² For details with reference to the extent and method of operation of this practice see the twelfth report of the Commission, pp. 13-14.

³ The case will be found in 162 U.S., 197.

⁴ In dissenting opinions rendered by Chief Justice Fuller and Justices Brown and Harlan the position of the Commission was upheld.

out of the operation of the Act as far as import traffic is concerned. This makes a substantial inroad on the powers of the Commission.

The House of Representatives, when the Commerce Law was under consideration, desired to give the long and short haul clause, which was intended to prevent distance discriminations, a rigid application. The enforcement of the clause has been characterized by a considerable degree of elasticity. This is owing to the fact that the Commission may, in its discretion, suspend the operation of the clause.¹ A large number of cases have arisen, under this clause, in connection with the railway system of the Southern States. Freight rates are normally higher in the South than in the North. This condition is aggravated by the fact that there is a wider margin between competitive and non-competitive rates in the South.²

The Act provides that the provisions of this clause shall apply "under similar circumstances and conditions." During the first year of its operation the Commission decided that railroads might depart from the clause, of their own initiative, when there existed "rare and peculiar competition."³ It was considered that the competition of Canadian carriers was of such nature that it would constitute rare and peculiar competition. It was considered that in so far as these carriers participated in inter-state traffic, they were not under the operation of the Act. The Commission soon found that to place such discretionary power in the hands of the American carriers opened the way for abuses; and so it has been found necessary to recede from the earlier position. Before departing from the clause the carriers must obtain the sanction of the Commission.

The independent position of the Canadian roads has been much exaggerated. In the transportation of State-to-State traffic they act simply as links in a chain of transportation. Hence if any violation of the long and short haul clause takes place it must of necessity be participated in by American roads. The evidence

¹ See section 4 of the Act.

² This is owing to the operation of the "Basing point" system. In making a rate to a local shorter distance station the rate is made by adding the rate to the basing point to the local rate back from the basing point to the shorter distance point. A somewhat detailed consideration of this system and of its effects will be found in 11 I.C.C.R., pp. 45, 105, and 285. An example of the operation of this system may be cited. The writer lives in Fayetteville, Arkansas, which is distant about 350 miles from St. Louis. Fort Smith, Arkansas, is a basing point and is about sixty miles beyond Fayetteville. The lumber rate from St. Louis to Fayetteville is made up of the St. Louis-Fort Smith rate plus the Fort Smith-Fayetteville rate.

³ See 1 I.C.C.R., pp. 67-68, and also 5 I.C.C.R., p. 334.

shows that, on the whole, this provision is rather better obeyed by the Canadian carrier than by the American.¹

The Commission has been quite willing, on cause shown, to permit American carriers to depart from the operation of the clause. Although the Cullom Committee was directed to report with reference to the regulation of vessels engaged in inter-State traffic, no recommendation was made. Water transportation was exempt partly because it was difficult to regulate it, but more especially because it was hoped thereby to stimulate competition. Although the Commission has from time to time claimed that the possession of regulative power, in this regard, is essential to thorough regulation of inter-state commerce, such power has never been granted. Water competition has been very effective as a regulator of rates.² The Erie Canal and the Mississippi have been looked upon as the prime regulators of rates. Owing to the fact that their improvement has not kept pace with the expansion of traffic, they are not as effective as formerly.³ The great lakes are still effective as a determining factor in the rate problem. The Commission has, in a series of cases, decided that the existence of effective water competition at an American shipping point would justify a departure from the clause.⁴ In 1890, in the transportation of petroleum and its products between New York and California points, there existed competition between all-rail and all-water lines. The railroads charged a "blanket" rate on petroleum between all points east of the 97th meridian and Californian points. The Commission declared that this rate was justified.⁵ The topic is at present under consideration. The New York—Pacific coast rates are the same as the St. Louis—Pacific Coast rates, although the latter distance is one thousand

¹ A detailed study of this topic will be found in an article of mine in the *University of Chicago Journal of Political Economy* for September, 1899, "Canadian Railways and the Bonding Question."

² See in this connection the evidence of Mr. Albert Fink before the Senate Committee on Labour and Education in 1885, Vol. 2, p. 468.

³ With reference to the lessened importance of the Erie Canal, see *Journal of Political Economy* for September, 1899, p. 553. The Canal Commission of New York State has recently reported in favour of an expenditure of \$60,000,000-00 upon the Erie Canal. Mr. Stuyvesant Fish, President of the Illinois Central Railway, recently testified before the Industrial Commission that the cost of handling railroad traffic had been so decreased that the Mississippi was no longer a determining factor in rate-making.

⁴ This position had been held as early as 1885 by a Federal Judge in Oregon. This arose in connection with the "long and short haul" clause of the Houlk Bill, a Commission law of the State of Oregon which was copied from the Reagan Bill, one of the earlier regulative bills introduced in the House of Representatives.

⁵ See 4 I.C.C.R., p. 228, *George Rice v. Atchison, Topeka and Santa Fé, et al.* See also 11 I.C.C.R., p. 40.

miles less than the former. It is claimed that this "postage stamp" rate is justified by competition of water routes.¹

Although there has been an elastic enforcement of this clause it has undoubtedly exerted a steadying effect upon rates. In connection with the insistence on publication of rates, the operation of the clause has undoubtedly helped the smaller shipper.

This clause has also been subject to judicial construction; and the scope of the Commission's powers have, in consequence, been limited. The clause provides that "under substantially similar circumstances and conditions," the long haul charge shall not be less than the short haul charge over the same line in the same direction, the shorter being included in the longer distance. The Commission has taken the position that competition does not, of itself, take the offending carrier out of the operation of the clause. The merits of the case must be examined; and if the competition, which the carrier alleges in justification of its action, is created through its own action in coming into competition with other carriers, subject to the Act, it cannot be claimed that there exists a dissimilarity of circumstances sufficient to take the offending carrier out of the operation of the Act.² It has been seen that, in the "Import Rate" case, the court held the converse of this in regard to import traffic. In November, 1897, in dealing with domestic traffic, the Supreme Court declared that existing railway competition did create sufficient dissimilarity of circumstances.³ A further modification of this clause has been made by the "line" decision. The clause prohibits the charging of a higher rate for a shorter than for a longer distance *over the same line* in the same direction, &c.⁴ In construing this clause the Commission held that by "line" a physical line was meant. The Courts took the view in 1892, that "there

¹ This condition has existed since the Milwaukee rate conference of June 25th, 1898. It is claimed further that the discrepancy between C.L. rates and L.C.L. rates is unjust to St. Louis. For example, the C.L. rates on agricultural implements is \$1.00 per hundred pounds, while the L.C.L. rate is \$1.50. In St. Louis a large part of the business of this nature is concerned with L.C.L. shipments. No decision in the matter has yet been given.

² 11 I.C.C.R., p. 38.

³ This is the decision in the Interstate Commerce Commission *v.* Alabama Midland Railway, *et al.*, 168 U.S., 144. A discussion of the points involved will be found in 11 I.C.C.R., pp. 37-46. In this case a lower rate was given for a distance fifty-two miles greater. At the shorter distance point, Troy, there were two competing roads. At the longer distance point, Montgomery, there existed a larger number of competing roads. It was claimed that the greater competition at Montgomery which, it was alleged, did not affect the Troy rate, justified this discrimination. The Supreme Court upheld this contention. This case is popularly known as the "Troy" case.

⁴ My own italics.

were as many lines as there were carriers, and that each is independent of any other as regards the legality of rates under the fourth section.”¹ This is an essential modification.

In the construction of section 22 of the Act, which relates to the cases in which free transportation or transportation at reduced rates may be granted, the Commission has held that there could not be free or reduced transportation except in the cases specifically excepted in the clause. The Courts, however, have taken the position that the details mentioned in this clause are illustrative, not exceptive.² Usually the Courts have construed the Act strictly; here the construction is broad.

The way for the consideration of the suggested amendments of the Act will be cleared by a summarized statement of the defects that have been manifested in its working. These may be considered under the headings of (a) lack of definite statement in the Act, (b) lack of power, (c) expense of procedure, (d) term of office.

In the absence of an express authorization in the Act to prescribe what shall constitute a reasonable rate, the Courts have held that the Commission has not such power in regard to future rates. In connection with the long and short haul clause it may be said that it has not been made sufficiently clear that the Commission has discretionary power to determine what the “similar circumstances and conditions” are; nor have the powers of the Commission, in regard to the competition that is to be taken cognizance of, been clearly delimited. In the construction of the law by the Courts questions of public policy have been neglected.

Under the heading of lack of power it is to be noted that the Commission, if the defendant will not act in accordance with its decision, has to depend upon the Courts. In the Act it is stated that the decisions and findings of the Commission shall be *primâ facie* evidence in cases arising thereon before the Courts. It has been judicially decided that such findings and decisions are *primâ facie* evidence only.³ This causes the decisions of the Commission to be lacking in finality. The Courts have not, in many cases, accepted these findings even as *primâ facie* evidence, but have proceeded *de novo*.⁴ This has affected not only the cases appealed by the railroads, but also those pertaining to the general

¹ Chicago and North Western Railway v. Osborne, 52 Fed. Rep., 912.

² 6 I.C.C.R., p. 26.

³ This decision was given in 1889 in the Kentucky Bridge Co. case, 37 Fed. Rep., 567.

⁴ 5 I.C.C.R., pp. 19-22.

process of the Commission. The defendants have often shown scant courtesy to the process of the Commission; instead of submitting all their evidence before the Commission, they have waited until the matter has come up before the Courts. When the offending carrier introduces some evidence before the Commission, it is often the custom to introduce much additional evidence before the Courts. Under such a condition the efficiency of the remedy provided by the Commerce Act is practically abolished. If the Commission gives a decision, the responsibility of instituting suit before the Courts, to enforce it, will, under existing circumstances, fall upon the Commission. There is no finality until the last court of resort is reached.

There is no doubt that this attitude on the part of the Courts has hampered the Commission. The cases of *Coxe Bros. v. Lehigh*, the *Social Circle* case, the *Import Rate* case, are examples of cases which have dragged on from three to four years before being decided. A long and short haul case brought before the Commission by the Georgia Railroad Commission in 1891 was decided by the Supreme Court in June, 1898.¹ The average duration of the cases which have been actually prosecuted before the Courts for the enforcement of the orders of the Commission has been about four years.²

It is possible that the lack of care in the wording of the Act, and the imperfections which have been shown to exist, are due in part to the conviction, at the time of the passing of the Act, that the measure was simply tentative. The Cullom committee did not regard the legislation as final.³ It is equally certain that the majority of those who took a careful interest in the problem of railroad regulation did not regard the legislation as final. Notwithstanding the fact that defects have been shown to exist, nothing has been done. The Commission is of the opinion that the imperfections of the Act have been exaggerated by judicial decisions. This is especially complained of in connection with the process of the Commission. The position taken by this body is that, subject to such review as the Courts think proper, the orders and findings of the Commission should be not merely *primâ facie* evidence, but conclusive upon all the parties concerned.⁴ It has expressed the opinion that, if the intention of the Act as understood at the time of its passage had been upheld by the Courts, the work of the Commission would have been much

¹ 88 Fed. Rep., 186.

² See 11 I.C.C.R., p. 32.

³ See p. 180 of the Cullom committee report.

⁴ 11 I.C.C.R., p. 34.

more efficient.¹ The same complaint shows in the eleventh and in the twelfth reports of the Commission: judicial decisions have so shorn the Commission of its powers that it has ceased to be a body for the regulation of inter-State carriers;² until further and important legislation is enacted, the best efforts at regulation must be feeble and disappointing.³ The complaint of the Commission that the railroads do not obey the law as loyally as at the outset, because "the process and the orders of the Commission go for nothing" in the interpretation of the Courts,⁴ although extreme in statement, is to a considerable degree borne out by facts.⁵

As a necessary corollary to the foregoing considerations, the expense to the complainants has been much greater than was anticipated. Neither in point of expedition nor of expense has there been a great economy in the cases that have been formally adjudicated upon.

While no public objection has been made to the term of office of the members of the Commission, or to the lack of formal indication of the qualifications requisite for a commissionership, it may be argued with justice that in both these particulars the Act is defective. The obtaining of the knowledge requisite to deal with the thousand and one problems presented is, even with previous qualifications, a work of time. The Commission must, of necessity, have a tradition of its own.⁶ And, to obtain this, a much longer term than six years, if not a life term, is requisite.⁷ It is true that a member may be reappointed; but, owing to the fact that the organisation of the Commission is bi-partisan, it being required that not more than three members shall belong to

¹ 6 I.C.C.R., p. 5.

² 11 I.C.C.R., p. 34.

³ 12 I.C.C.R., p. 5. The same opinion is expressed in the thirteenth report the advance sheets of which have just appeared.

⁴ 11 I.C.C.R., p. 34.

⁵ See in this connection 12 I.C.C.R., p. 5, *et. seq.* In this connection the statement of Mr. Justice Harlan, one of the dissenting judges in the "Troy" case, is of interest—"Taken in connection with other decisions defining the powers of the Interstate Commerce Commission, the present decision goes far to make the Commission a useless body for all practical purposes, and to defeat many of the important objects designed to be accomplished by the various enactments of Congress relating to interstate commerce It (the Commission) has been shorn by judicial interpretation of authority to do anything of an efficient nature." Quoted in 11 I.C.C.R., pp. 50-51.

⁶ See in this connection the statement of Professor H. C. Adams on a cognate topic in his article in the *Atlantic Monthly* for April, 1898, p. 443.

⁷ The argument for a longer term is further strengthened by the fact that it would attract men who would not otherwise be attracted by a salary of \$7,500.00. One of the commissioners, Mr. W. J. Calhoun, resigned in September 1899, because the salary was too small.

the same political party, there is manifestly, under the changing conditions of politics, an obstacle in the way of reappointment. In the absence of provisions in the Act with reference to the qualifications of commissioners, the Commission has been given a predominatingly legal *personnel*. There is no doubt that the body has been careful and judicious in its decisions. But it would appear that if provision were made for representation of the various great interests concerned with the proper operation of the transportation system, the efficiency of the Commission would be increased.

The amendments which have been recommended fall into two general classes: (a) those concerned with procedure, (b) those concerned with rate regulation.

The changes in regard to procedure which have been suggested are, in substance, as follows:—Orders of the Commission, other than those involving money payments, are to take effect within a period of thirty days from the date of the order. Within this period the company affected by the order may bring suit in the Courts. If this is not done, the order shall be final; and shall, on evidence of service, be enforced by the Courts.¹ A Bill to make these recommendations operative was introduced in the Senate in January, 1898.² But nothing has been done.

The anti-pooling clause of the Commerce Act can advantageously be considered in connection with the movements for granting the Commission defined powers in regard to rates. This clause, which, in popular estimation, is one of the most important in the Act, was the outcome of a compromise. It was not contained in the Senate Bill, nor was the Cullom committee in favour of such a policy.³ It is probable that its presence in the Commerce Act is attributable to the persistent advocacy of this policy by the Hon. J. H. Reagan.

When the clause was placed in the Act the quasi-monopolistic nature of railroad enterprise was not appreciated as it is to-day. It was considered that in free competition lay the safety of the people; that free competition applied in railroad enterprise; and that the mission of the Commission was to see that the pervasive effects of competition were felt. There has of recent years been a gradually changing tone in regard to the efficacy of the anti-pooling clause.

The railroads have been opposed to this clause from the

¹ 11 I.C.C.R., pp. 140-150.

² S.R. 3354, introduced by Senator Cullom.

³ See Cullom committee report, pp. 200-201.

outset. Their constant claim that the rebates they admittedly grant, are not given of free choice, but because, if one railroad does not yield to the exigent demands of large shippers for low secret rates, other roads, which are possibly in less favourable condition financially, will do so in order to obtain a larger volume of traffic, has, undoubtedly, a good foundation. The shipper has to be considered as a factor in secret rate-making. The railroads claim that if they are allowed to pool, each road being assured a certain portion of competitive traffic, there will, under proper arrangements and regulations, be no necessity to yield to the urgency of the large shippers.¹

The change of opinion has been hastened by the decisions of the Courts in the Traffic Association cases. The attitude towards these associations has been somewhat fluctuating. Although we find the Kansas Railway Commissioners testifying before the Cullom committee that these associations were necessary,² the National Commission was of opinion, at first, that the associations were not of much importance.³ At a later date the opinion was expressed that, although they were useful in establishing and obtaining publicity of joint rates, and in obtaining joint running arrangements, they had dangerous features connected with them.⁴ It is admitted, however, by the Commission that the requirements of the Commerce Act with reference to publicity of rates and the maintenance of joint rates, require conference and agreement between the carriers.⁵

The Commerce Act does not declare that traffic associations are illegal. But two decisions of the Supreme Court in 1897 and in 1898 established their illegality. The traffic agreement of the Trans-Missouri Association was decided, in March, 1897, to be a conspiracy in restraint of trade, and therefore illegal under the anti-trust law.⁶ In October of 1898 the Joint Traffic Association was also declared illegal under the anti-trust law.⁷

¹ See Blanchard, *op. cit.*, p. 6. This work is *ex parte* in tone. For a clear argument in favour of pools see Seligman in Vol. 2, No. 3, of the *Political Science Quarterly*—"Railway Tariffs and the Interstate Commerce Commission."

² See third report of the Kansas Railway Commission, p. 21. Professor Seligman, in the article referred to in the previous note, expresses the opinion that the only way to prevent personal discriminations is to recognise the traffic associations.

³ 4 I.C.C.R., p. 5.

⁴ 10 I.C.C.R., pp. 86-91.

⁵ 12 I.C.C.R., pp. 15-16.

⁶ This is the Sherman anti-trust law of 1890. As will be seen it is in essence a reaffirmation of the common law principle.

⁷ A summary of the history of the proceedings in the Joint Traffic Association case will be found in 12 I.C.C.R., pp. 48-51. For the railway point of view see Blanchard, *op. cit.*, p. 5, and also an article by the same writer in the *Forum* for June 1897—"The Trans-Missouri Decision." The Trans-Missouri case will be found in 169 U.S., 290; the Joint Traffic case is to be found in 171 U.S., 505.

Throughout the reports of the Commission is to be found a gradually changing attitude towards pooling. A large amount of testimony on the matter is contained in the sixth report, the bulk of which favours pooling under Government supervision.¹ A qualified support of this view appears in the text of the eighth report.² In the eleventh report it is stated that the majority opinion of the Commission is that pooling would steady rates.³ The Commission now takes the position that some restraints upon unrestricted competition are advisable in the interests both of the shipper and of the carrier.⁴

While the Commission has not expressed an opinion as to what form a pooling arrangement, if legalised, should take, it has expressed the opinion that pooling, if established, should be subject to supervision.⁵ The outcome of the changing attitude towards pooling has been the introduction of several legislative propositions. The Patterson Bill,⁶ which passed the House of Representatives in December, 1894, provided that the pooling contract was to be filed with the Commission. A period of twenty days was given within which it might be disapproved; if not disapproved within this period it went into operation. The Commission might at any subsequent time, subject to an appeal to the Courts, terminate the pool. If any dispute arose the Commission was to have power to prescribe reasonable rates. This measure was shelved in the Senate. The Foraker Bill,⁷ introduced into the Senate in March, 1897, occupied substantially the same position. This measure never came to a vote.

The main feature of the legislation proposed is, then, that in return for the legalising of pooling, the Commission shall be given a power to prescribe reasonable rates in regard to the traffic covered by the pool. The railroads, in their desire to obtain this legal recognition, are willing to concede the right of the Commission to supervise the operation of the pooling contract. However, they are not at present ready to concede as wide powers as are contained in the legislation referred to. They favour submitting the rates to the *preliminary* review of the

¹ 6 I.C.C.R., Appendix D.

² 8 I.C.C.R., pp. 80-83.

³ 11 I.C.C.R., pp. 48-50.

⁴ 12 I.C.C.R., pp. 19-21. See also in this connection the opinion of Hon. Martin A. Knapp, chairman of the Commission, as expressed in his "Introduction to Langstroth and Stiltz's Railway Co-operation," pp. XII-XV. This is one of the University of Pennsylvania publications issued in 1899. See also "Railroad Pooling," by Martin A. Knapp, in the *Annals of the American Academy of Political and Social Science*.

⁵ 9 I.C.C.R. pp. 101-102.

⁶ This was known as H.R. 7273.

⁷ Senate Bill, 1479.

Commission.¹ Owing to the obvious impossibility of the Commission examining into the reasonableness of these rates before they go into operation, this would afford no real safeguard.²

The more important amendments with reference to rates asked for by the Commission now may be summarised.³ Carriers shall give the Commission sixty days' notice of increases or of decreases in rates. At present the provision is that the carriers shall give *public* notice of ten days in case of increase, and of three days in case of decrease of rates. The Commission shall be empowered, in giving decisions on violations of the Act, to fix a maximum rate, determine divisions of a joint rate between carriers, and make changes in classification. It is recommended that the Commission be given substantially the same powers in regard to through rates and routes as are possessed by the English Railway Commission. It is further suggested that, in view of the recent decisions, the long and short haul clause be amended so as to read "the Commission . . . may in its discretion, upon notice, prohibit any common carrier from charging" more for the shorter than for the longer distance.

It is a significant fact that Mr. Reagan, who has been credited with the responsibility for the anti-pooling clause, has since pronounced himself in favour of pooling under restrictions.⁴ It is a further significant fact that Senator Butler, who made the strongest argument for the Patterson Bill in the Senate, is a leading member of the Populist party—a party whose record has been one of opposition to railroad monopoly. While public opinion is by no means a unit in favour of the repeal of the anti-pooling clause, there is a gradually increasing body of opinion in favour of such action. The great trouble in connection with the rate question to-day is the prevalence of rebates. While the pools were not an unqualified success under unregulated conditions, there is reason in the contention that, if they are given a

¹ See Blanchard, *op. cit.*, p. 27.

² Senator Chandler during the debate on the Patterson Bill moved an amendment to the effect that the Commission should examine into the rates before permitting the contract to become effective. Congress Record 53rd, Congress, 3rd Session, part 2, p. 1479. Hon. Martin A. Knapp, now chairman of the Commission, objected to this on the ground that it was not feasible. He, however, approved of the general principle of the legislation. See telegram from him quoted in speech of Senator Butler, *Congress Record* as ante, p. 2209.

³ The amendments and additional legislation suggested will be found in 11 I.C.C.R., pp. 140-150.

⁴ This opinion was expressed in a letter to Mr. W. Liggett, of St. Paul, Minnesota. The letter is dated April 14th, 1896. The value of Mr. Reagan's opinion is increased by the fact that he has been for years chairman of the Texas Railway Commission.

legal sanction under proper supervision, it will tend to a steadying of rates and to an elimination of the rebate evil.

The Commission's claim that it should be allowed to establish maximum rates, apart from any question of the legalising of pooling, has in general been opposed by the railroads. The attitude of the railroads is not only that this is a dangerous extension of governmental functions,¹ but also that there was no intention of conferring such power when the Act was passed.² On the other hand, it must be remembered that the power to affix maximum rates was exercised by the Commission, practically without protest, for about ten years.³

One of the principal objects of the Commerce Act was to establish just and reasonable charges for transportation.⁴ The Supreme Court has, however, decided that the powers of the Commission apply only to past rates. It would indeed appear as an obvious implication from the powers conferred by the enabling act that if any adequate redress is to be granted the power to prescribe a reasonable rate must also be possessed. In order to determine whether the rate is unreasonable the Commission must first have in mind some standard of what constitutes a reasonable rate. The prohibition of unjust and unreasonable rates is of little value if the power to declare a reasonable rate is not possessed.

The railroads commonly urge that the possession by the Commission of a power to fix maximum rates would be tantamount to depriving them of their property. This statement is *ex parte*. In the cases in which the Commission has fixed reasonable rates it has not shown the slightest desire to neglect the legitimate interests of the railroads. But even if the Commission should so act, and the assumption is not warranted by its history, the railroads have ever a ready redress under the Fourteenth Amendment.

The record of the Commission's work is one of chequered success and failure. But the failures are not necessarily to

¹ See an article in the *Forum* for July 1899, by Milton H. Smith, President of the Louisville and Nashville Railroad, entitled "Inordinate demands of the Interstate Commerce Commission." The same opinion will be found in the September 1897 number of the same journal in an article by Joseph F. Nimmo, Jr.—"The Interstate Commerce Commission and Rate Making."

² See in this connection a pamphlet on the railway rate question by Aldace F. Walker, chairman of the Atchison, Topeka and Santa Fé Railroad.

³ See in this connection a letter, in the *Chicago Times Herald* of March 30th, 1897, by Hon. W. R. Morrison, then chairman of the Interstate Commerce Commission.

⁴ I.C.C.R. v. B. & O.R.R.Co., 145 U.S., 263.

be regarded as attributable to intrinsic defects in the Commission plan. The defects in the Commerce Act have been intensified by judicial decisions. There has not been sufficient unanimity in the judicial decisions to warrant the opinion that all the members of the Supreme Court have been satisfied with the series of decisions which, whatever the wording of the Act may be, are certainly out of harmony with its spirit. Although the Supreme Court has at times dealt with matters from the standpoint of public policy, it has, in its construction of the Commerce Act, laid stress upon the technical legal phase. The railroad problem calls urgently for settlement. The United States has accepted the policy of private ownership; it must accept as a necessary consequence a judicious system of regulation. However far short of anticipations the work of the Commission may have fallen, there is no doubt that conditions are better to-day than they were in 1886.

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