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SHIPPERS AND CARRIERS
OF
INTERSTATE AND INTRASTATE FREIGHT

Second Edition

SHIPPERS AND CARRIERS
OF
INTERSTATE AND INTRASTATE FREIGHT

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PREFACE.

No branch of the law is more important than that relating to the rights and duties of shippers and carriers, and no branch of the law is less generally known. The purpose of this book is to assist those who may be called upon to advise as to such rights and duties to an understanding of this interesting phase of the law.

In approaching the subject the experience of an active practitioner was drawn upon to determine what would be most useful, not only to the legal profession, but to traffic men, whether in the employ of the carriers or of those bureaus organized throughout the country to aid and advise shippers.

From this experience, it was thought that where the state of the authorities justified, the law should be given as nearly as might be in the language of the courts of final authority. For this reason, where questions have been definitely determined, liberal quotations have been inserted.

Many questions, however, affecting the subject of this book have not yet been settled. Where this is true, the opinions of the federal courts, the Interstate Commerce Commission and state courts, have been referred to and discussed. In this way it has been sought to deduce the principles of the law.

The Act to Regulate Commerce has been annotated, not only with the decisions of the courts, but also with the opinions of the Interstate Commerce Commission. This will enable one desiring to investigate a particular provision of that act to trace the construction thereof by the references which have been made thereto by the tribunals whose duty it is to enforce this great statute.

The Sherman and Clayton Anti-Trust Statutes, the Twenty-Eight Hour Law, and other acts affecting the question are cited and discussed in so far as they relate to the subject under investigation. Statutes such as the Safety Appliance Acts, the Employers' Liability Act, the Hours of Service Act, the Federal Trade Commission and Anti-Trust Acts, and other acts, a knowledge of which is necessary to those who, as practitioners or other-

wise have to do with the enforcement of those laws, or are required to advise or act with reference thereto, are inserted.

Because the conference rulings of the Interstate Commerce Commission are of such general use and are not always available, and adopting the suggestions of lawyers and traffic officials familiar with the practice before the Commission, these conference rulings have been copied following the appendices.

While few lawyers have given special attention to the questions here discussed, the widening scope of interstate commerce makes it necessary that all practitioners shall be ready to advise clients as to their rights and liabilities growing out of the law relating to transportation.

Claims for overcharge, for loss and for damage on shipments moving from one state to another arise in the business of most manufacturers, jobbers and merchants. The law fixing the rights growing out of such shipments is found in the statutes and decisions of the Federal Government. To make the Laws more easily available and understandable is the purpose of this work. With what success that purpose has been effected must be determined by those who may make use of what is herein set down.

Intrastate transportation is so closely related to that which is interstate, that a new chapter has been added, in which is discussed intrastate transportation in so far as it affects directly or indirectly the principal subject of the book. The author desires to acknowledge the valuable assistance of Mr. Henry B. Armes, who has assisted in revising the manuscript.

EDGAR WATKINS.

Washington, D. C., October, 1915.

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Act March 4, 1907, Chapter 2907, 34 Stat. L. 1260 et seq., requiring inspection of meat.

Act March 3, 1905, 33 Stat. L. 1264, Ch. 1496, U. S. Comp. St. Supp. 1909, p. 1185, relating to transportation of animals from quarantine territory.

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C.

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York Mfg. Co. *v.* I. C. R. Co. (3 Wall., 70 U. S. 107, 18 L. Ed. 170), 34, 35, 40.
Young, Ex parte (209 U. S. 123, 52 L. Ed. 714, 28 Sup. Ct. 441), 50, 60, 63, 453.

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Zakonaite *v.* Wolf (226 U. S. 272, 57 L. Ed. 218, 33 Sup. Ct. 31), 316, 396.
Zeterberg *v.* G. N. R. Co. (117 Minn. 495, 136 N. W. 295), 25.

Shippers and Carriers of Interstate and Intrastate Freight

CHAPTER I.

State Regulation of Carriers Engaged in Interstate Commerce.

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§ 1. **Scope of Chapter.**—Paragraph 3, Section 8, Article 1, of the Constitution of the United States contains the grant of power to Congress over interstate commerce and gives Congress the power "to regulate commerce with foreign nations, among the several states, and with the Indian tribes."

It is not the purpose of this book to treat of the subject of interstate commerce in its widest scope, the work being confined to a discussion of the rights and duties of shippers and carriers. To determine what these rights and duties are it is necessary to

discuss what is interstate commerce, when a carrier is engaged therein, and to what regulations an interstate carrier is subject. That such carrier may, as to that portion of its business which is within a particular state, be subjected to some state regulation is, under the present laws of Congress, indisputable. The extent of this regulation by the state is the subject of this chapter.

It may be said, as a general rule, that the proper state authorities, duly acting, may pass all reasonable laws for the regulation of the health, happiness and safety of its citizens; and such laws and regulations are not invalid merely because they may incidentally affect interstate commerce. It may be further stated that the mere existence of power in Congress to regulate interstate commerce does not exclude the states from the exercise of power over such commerce. In the absence of congressional legislation, or in the absence of action by the Interstate Commerce Commission where the matter has been delegated to it, states may legislate affecting interstate commerce.

§ 2. **Interstate Commerce Defined.**—Interstate commerce, as defined in the Constitution of the United States, is commerce "among the several states," but the Constitution does not define commerce. What "commerce" includes can not be definitely stated or limited. Its primary meaning is traffic, purchase and sale, but it means also intercourse, interchange or mutual exchange of commodities. It includes the carrying by independent carriers of things or commodities which are ordinarily the subject of traffic and which have in themselves a recognized value in money. This intercourse includes all the preliminary, intervening and consummating acts, instrumentalities and dealings that bring about the sale or exchange of commodities. It embraces transportation by land and water and the means and appliances necessary thereto, including transportation of persons and property.[1] The transmission of intelligence by telegraph or telephone

[1] Gibbons *v.* Ogden, 9 Wheat. 22 U. S. 1, 6 L. Ed. 23 (1824); Lottery case, Champion *v.* Ames, 188 U. S. 321, 345, 47 L. Ed. 492, 23 Sup. Ct. 321; Simpson et al, R. R. Com. of Minnesota *v.* Shepard ("Minnesota Rate Cases") 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729, and cases cited; United States *v.* Swift & Co., 122 Fed. 529, modified and subject discussed, Swift & Co. *v.* United States, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. 276. For a discussion of what transportation is included within the provisions of the Act to Regulate Commerce, see, *post*, Sec. 67.

is an agency of commerce and intercommunication. The powers of Congress over interstate commerce must "keep pace with the progress of the country, and adapt themselves to the new development of time and circumstances.[2] The decisions in the White Slave cases[3] are but an adaptation to modern day developments of the principles stated in Gibbons *v.* Ogden, Note 1 *supra*.

§ 3. **Power of Congress Exclusive, When.**—Congress alone has power directly to regulate or burden interstate commerce, and as to such direct burden or regulation the power of Congress is plenary, all pervading, exclusive and indivisible. In the absence of federal regulation interstate commerce is free from regulation. Says Mr. Justice Hughes in the Minnesota Rate Cases:[4]

[2] Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 9, 24 L. Ed. 708; Western Union Tel. Co. *v.* Texas, 105 U. S. 460, 26 L. Ed. 1067; Western Union Tel. Co. *v.* Pendleton, 122 U. S. 347, 30 L. Ed. 1187, 7 Sup. Ct. 1126; teaching by correspondence schools commerce, International Text Book Co. *v.* Pigg, 217 U. S. 91, 54 L. Ed. 678, 30 Sup. Ct. 481, but see the opinion of a state court contra, International Text Book Co. *v.* Lynch, 81 Vt. 101, 69 Atl. 541. Shoemaker *v.* Chesapeake & Potomac Tel. Co., 20 I. C. C. 614, regulation by Interstate Commerce Commission of an interstate telephone line; Postal Tel.-Cable Co. *v.* City of Mobile, 179 Fed. 955, 960, "telegraph business is commerce." Messages passing from one state to another is interstate commerce and subject to Federal and free from state regulation, Western Union Tel. Co. *v.* Crovo, 220 U. S. 364, 55 L. Ed. 498, 31 Sup. Ct. 399; Western Union Tel. Co. *v.* Commercial Milling Co., 218 U. S. 403, 54 L. Ed. 1088, 31 Sup. Ct. 59, affirming Commercial Milling Co. *v.* Western Union Tel. Co., 151 Mich. 425, 115 N. W. 698. Insurance is not commerce, New York Life Ins. Co. *v.* Deer Lodge County, 231 U. S. 495, 58 L. Ed. 332, 34 Sup. Ct. 167 and cases cited.

[3] Hoke *v.* United States, 227 U. S. 308, 57 L. Ed. 523, 33 Sup. Ct. 281, 43 L. R. A. (N. S.), 906, Ann. Cas. 1913E 905; Athanasaw *v.* United States, 227 U. S. 326, 57 L. Ed. 528, 33 Sup. Ct. 285; Ann. Cas. 1913E, 911; Bennett *v.* United States, 227 U. S. 333, 57 L. Ed. 531, 33 Sup. Ct. 288; Johnson *v.* United States, 215 Fed. 679. That a state, Congress having acted, may not forbid the importation of women for immoral purposes, is held in State *v.* Harper, 48 Mont. 456, 138 Pac. 495, 51 L. R. A. (N. S.), 157.

[4] Simpson et al., R. R. Com. of Minnesota *v.* Shepard, 230 U. S. 352, 399, 57 L. Ed. 1151, 33 Sup. Ct. 729, citing McCulloch *v.* Maryland, 4 Wheat., 17 U. S. 316, 405, 426, 4 L. Ed. 579; The Daniel Ball, 10 Wall. 77 U. S. 557, 565,

"There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. * * * The grant in the Constitution, of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive."

The statement of this rule in Western Union Telegraph Co.

19 L. Ed. 999; Smith *v.* Alabama, 124 U. S. 465, 473, 31 L. Ed. 508, 8 Sup. Ct. 564; Baltimore & O. R. Co. *v.* Interstate Com. Com., 221 U. S. 612, 618, 619, 55 L. Ed. 878, 31 Sup. Ct. 621; Southern Ry. Co. *v.* United States, 222 U. S. 20, 26, 27, 56 L. Ed. 72, 32 Sup. Ct. 2; Mondou *v.* New York, N. H. & H. R. R. Co., 223 U. S. 1, 47, 54, 55, 56 L. Ed. 327, 32 Sup. Ct. 169, 38 L. R. A. (N. S.), 44; Chicago, R. I. & P. R. Co. *v.* Hardwick Farmers' Elevator Co., 226 U. S. 426, 57 L. Ed. 284, 33 Sup. Ct. 174; St. Louis, I. M. & S. R. Co. *v.* Edwards, 227 U. S. 265, 57 L. Ed. 506, 33 Sup. Ct. 26; Reversing same style case, 94 Ark. 394, 127 S. W. 713. In McDermott *v.* Wisconsin, 228 U. S. 115, 128, 57 L. Ed. 514, 33 Sup. Ct. 431, it was said, that Congress has ample power not only "to pass laws which shall regulate legitimate commerce among the states and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce and to bar them from the facilities and privileges thereof."

v. James[5] shows that as to "those matters relating to commerce which are not of a nature to be affected by locality, but which necessarily ought to be the same over the whole country," failure of Congress to act is "a declaration that in those respects commerce should be free and unregulated by any statutory enactment."

Street railways engaged in interstate commerce can not be regulated as to their interstate rates by state authority.[6] In the Shreveport case[7] rates established under authority of the laws of the state of Texas were maintained by the carriers on intrastate traffic, which rates unlawfully discriminated against interstate rates maintained by the same carriers. Upon complaint to the Interstate Commerce Commission, it was found from the evidence of record that such relationship of rates resulted in undue preference and unjust discrimination, in violation of section 3 of the Act to Regulate Commerce. The carriers defendant contended that the unlawful discrimination, if any, resulted from rates made under authority of the laws of Texas, and that such rates so made were not subject to the jurisdiction of the Interstate Commerce Commission. The contention of the carriers was not adopted, the Supreme Court holding that section 3 prohibited all unjust discrimination, and that the fact that the discrimination arose from intrastate rates did not deprive Congress of the power to remove it, and that "in removing the injurious discriminations against interstate traffic * * * Congress is not bound to reduce" interstate rates "below what it may deem to be a proper standard, fair to the carrier and to the public."

[5] Western Union Tel. Co. v. James, 162 U. S. 650, 40 L. Ed. 1105; 16 Sup. Ct. 934, and see Welton v. Missouri, 91 U. S. 275, 282, 23 L. Ed. 347; Hall v. De Cuir, 95 U. S. 5 Otto 485, 24 L. Ed. 547; Mobile County v. Kimball, 102 U. S. 691, 26 L. Ed. 238; Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 Sup. Ct. 1087.

[6] South Covington Ry. v. Covington, 235 U. S. 537, 59 L. Ed. ; 35 Sup. Ct. 158.

[7] Houston E. & W. T. Ry. Co. v. United States, 234 U. S. 342, 58 L. Ed. 134, 1341, 34 Sup. Ct. 833, affirming Tex. & P. Ry. Co. v. U. S., 205 Fed. 380, and sustaining order of the commission in Railroad Com. of La. v. St. L. S. W. Ry. Co., 23 I. C. C. 31. See also, Corp. Com. of Okla. v. A. T. & S. F. Ry. Co., 31 I. C. C. 532; Merchants Exchange of St. Louis v. B. & O. R. Co., 34 I. C. C. 341.

§ 4. **Power of the States Indirectly to Affect Interstate Commerce.**—That Congress alone may directly regulate or burden interstate commerce does not mean that the states may not in the absence of federal action and under the police power of the state pass regulations which may indirectly affect such commerce. Where diversity of treatment is possible, until Congress acts there is room for state regulation which may have an indirect effect on interstate commerce. The power of Congress being supreme, when there is federal action state regulations are thereby superseded.[7] As to all external concerns Congress alone may act. As to "internal concerns which *affect* the states generally," [8] Congress having failed to act, a state may legislate in "safeguarding life and property and promoting comfort and convenience within its jurisdiction," although such legislation may extend incidentally to the operation of the carrier in the conduct of interstate business." [9]

This incidental regulation by a state, as well as all legislation, must not be violative of the due process and equal protection clauses of the Constitution of the United States. How this principle has been applied will appear from the illustrations contained in this chapter.

[8] Gibbons *v.* Ogden, 9 Wheat. 22 U. S. 1, 6 L. Ed. 23 (1824).

[9] Simpson et al., R. R., etc., Com. of Minnesota *v.* Shepard, ("Minnesota Rate Cases") 230 U. S. 352, 410, 57 L. Ed. 1151, 33 Sup. Ct. 729, citing cases; see also Chicago, R. I. & P. Ry. Co. *v.* Hardwick Farmers' Elevator Co., 226 U. S. 426, 57 L. Ed. 284; 33 Sup. Ct. 174, reversing Hardwick Farmers' Elevator Co. *v.* Chicago, R. I. & P. Ry. Co., 100 Minn. 25 124 N. W. 819. When Congress acts prior state laws in conflict are superseded, Northern Pac. Ry. Co. *v.* State of Washington, 222 U. S. 370, 56 L. Ed. 237, 32 Sup. Ct. 160; Barrett *v.* City of New York, 232 U. S. 14, 58 L. Ed. 483, 34 Sup. Ct. 203. The question is well discussed and properly decided in People *v.* Erie R. Co., 135 App. Div. 767, 119 N. Y. Supp. 893; it was there held that the fact that Congress had legislated, although the legislation was suspended, superseded the state law; the case was reversed on appeal, although it would seem that the lower court correctly stated the law: People *v.* Erie R. Co., 198 N. Y. 369, 91 N. E. 849. For an elaborate discussion, if not a correct conclusion, see So. Ry. Co. *v.* R. R. Com. of Indiana, 179 Ind. 23, 100 N. E. 337. This case was reversed because Congress had acted. So. Ry. Co. *v.* Railroad Com. of Indiana, 236 U. S. 439, 59 L. Ed. —, 35 Sup. Ct. 304.

§ 5. **Commerce within the Exclusive Control of the States.**—We have seen that there is a commerce over which Congress has exclusive control. There is also a commerce which, in the absence of federal regulation, may be indirectly affected by state legislation. There is also a commerce which is wholly intrastate, the regulation of which does not affect directly or indirectly interstate commerce. This commerce the states alone may regulate. In the Railroad Commission cases,[10] at p. 334, the Supreme Court of the United States said:

"Every person, every corporation, everything within the territorial limits of a state is, while there, subject to the constitutional authority of the state government. Clearly under this rule Mississippi may govern this corporation, as it does all domestic corporations, in respect to every act and everything within the state which is the lawful subject of state government. It may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the state, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi. So it may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. In this way it may certainly require the company to fence so much of its road as lies within the state; to stop its trains at railroad cross-

[10] Stone *v.* Farmers Loan & Trust Co., 116 U. S. 307, 334, 29 L. Ed. 636, 6 Sup. Ct. 191, 334, 338. This case was quoted with approval in the Minnesota Rate Cases, page 415, for which see note 9, *supra*. For a summary of state legislation, see Interstate Com. Com. *v.* Cincinnati, N. O. & T. P. Ry. Co., 167 U. S. 479, 495, 42 L. Ed. 243, 17 Sup. Ct. 896, also cited at page 414 of the opinion in the Minnesota Rate Cases. The classification of power made herein in sections 3, 4 and 5 is made by Mr. Justice McKenna in Southern Ry. *v.* Reid, 222 U. S. 424, 435, 56 L. Ed. 257, 32 Sup. Ct. 140, where he said: "The power of the state over the general subject of commerce has been divided into three classes: First, those in which the power of the state is exclusive; Second, those in which the states may act in the absence of legislation by Congress; Third, those in which the action of Congress is exclusive and the state cannot act at all." Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204, 209, 38 L. Ed. 962, 14 Sup. Ct. 1087; Western Union Telegraph Co. *v.* James, 162 U. S. 650, 655, 40 L. Ed. 1105, 16 Sup. Ct. 934.

ings; to slacken speed while running in a crowded thoroughfare; to post its tariffs and time-tables at proper places, and other things of a kindred character affecting the comfort, the convenience, or the safety of those who are entitled to look to the state for protection against the wrongful or negligent conduct of others."

In the same case, at p. 331, the court showed that this exclusive jurisdiction to act does not mean that the extent of the regulation is itself unlimited. The court said: "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the state can not require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

States may regulate the commerce within their respective jurisdictions by legislating directly, or they may, as has been done in nearly all of the states, delegate to a board or commission certain powers to prescribe rules and regulations, to fix rates and to exercise a general supervision over the corporations or persons within the regulative jurisdiction. The legislative acts creating commissions and prescribing the powers and duties thereof must of necessity speak in more or less general terms, for as said by the Supreme Court of Florida:[11] "The difficulty of making a specific enumeration of all such powers as the Legislature may intend to confer upon Railroad Commissioners for the regulation of common carriers in the interest of the public welfare renders it necessary to confer some power in general terms; and general powers in general terms; and general powers given are intended to confer other powers than those specially enumerated."

§ 6. **All Commerce Subject to Regulation.**—The divisions showing where the power to regulate commerce rests in the different classes named in the three preceding sections, as said by the Supreme Court, "express but the extreme boundaries of the

[11] State *v.* Atlantic C. L. R. Co., 61 Fla. 799, 54 So. 900; State *v.* Atlantic C. L. R. Co., 56 Fla. 617, 47 So. 969.

subject."[12] More definite principles must be applied to particular cases. But in all cases the power to regulate rests somewhere.

It must of necessity be burdensome to interstate carriers to be subject to regulation by two governments acting independently of each other, and it is frequently a difficult question to determine which has the power to require a particular act or to make a particular rule. That Congress may extend its power is clearly indicated in the Minnesota Rate cases and the Shreveport case, cited *supra,* and that the extent of the power of Congress under the Constitution may include a scope much wider than has been exercised under the Act to Regulate Commerce and acts supplemental thereto and amendatory thereof, is shown by the decisions of the Supreme Court under the Employers' Liability Acts.[13]

Some of the delicate and difficult questions which arise from the dual regulation of carriers, appear from the result of the decision of the Supreme Court in the Minnesota Rate cases, Sec. 3 *supra*. Duluth, Minnesota, and Superior, Wisconsin, are about 3 miles apart, and each is located on Lake Superior. Rates from and to these ports must of necessity be the same. From Duluth to Minnesota points over one line is an intrastate movement; over other lines such movement is interstate. All shipments from Superior to Minnesota points move interstate. That the paramount authority of Congress may be exercised, the regulation of rates from these cities, whether interstate or intrastate, must be by national authority. Under the decisions in the Minnesota Rate cases, the Minnesota rate schedule to Duluth intrastate became effective. Higher rates having been paid pending the litigation, shippers intrastate received a refund of part of the rate paid by them, and in complaints before the Interstate Commerce Commission it was contended that the refunds paid on intrastate shipments should be adopted as the measure of refunds on interstate shipments. The Interstate Commerce Commission applied the paramount authority of the national govern-

[12] Southern Ry. Co. *v.* Reid, *supra.*

[13] Sec. 332, *post.* Mondou *v.* N. Y., N. H. H. R. Co., Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 38 L. R. A. (N. S.) 44.

ment regarding the state, prescribed rates as a fact to be considered, but determined the question for itself.[14]

§ 7. **Eminent Domain.**—The right of eminent domain is an incident to sovereignty. The right has been defined as the power to compel an owner to sell and convey property when the public necessities require.[15] The right must, of course, be exercised within constitutional limits. The right may be exercised for a public purpose and upon payment of a proper compensation, after due process of law, against the right of way of an interstate carrier. It has been held by the Supreme Court of the United States [16] that the power of eminent domain was not surrendered by the states to the United States nor affected by the federal Constitution, except that it must be exercised in accordance with due process of law upon payment of compensation. The power of eminent domain extends to tangibles and intangibles, including choses in action, contracts and charters. An appropriation of a contract under the right of eminent domain, with compensation, neither challenges its validity nor impairs the obligation thereunder. It is a taking of property, not an impairment of an obligation. Every contract, whether between the state and an individual or between individuals only, is subject to the law of eminent domain, for there enters into every engagement the unwritten condition that it is subject to appropriation for public use.

Congress has made all railroads governmental post roads [17] and authorized telegraph companies, under certain conditions, to con-

[14] Freight rates from Minnesota points, 32 I. C. C. 361. Rates on Beer and Other Malt Products, 31 I. C. C. 544. Compare Corp. Com. of Okla. *v.* A. T. & S. F. Ry. Co., 31 I. C. C. 532; Trier *v.* C. St. P. M. & S. Ry. Co., 30 I. C. C. 352.

[15] United States *v.* Jones, 109 U. S. 513, 27 L. Ed. 1015, 3 Sup. Ct. 346; Cincinnati *v.* Louisville & N. R. Co., 223 U. S. 390, 56 L. Ed. 481, 32 Sup. Ct. 267; Fletcher *v.* Peck, 6 Cranch, 10 U. S. 87, 3 L. Ed. 162.

[16] Cincinnati *v.* Louisville & N. R. Co., 223 U. S. 390, 56 L. Ed. 481, 32 Sup. Ct. 267, and also see, Western Union Tel. Co. *v.* Pennsylvania R. R. Co. et al., 195 U. S. 540, 49 L. Ed. 312, 25 Sup. Ct. 133, 1 Ann. Cas. 517.

[17] Acts June 15, 1866, c. 124, 14 Stat. 66 (Rev. Stat. sec. 5258 U. S. Comp. Stat. 1901, p. 3565), and Acts June 8 1872, c. 335, 17 Stat. 308, 309 (Rev. Stat. sec. 3964, U. S. Comp. St. 1901, p. 2707); 5 Fed. Stat. Ann. 900.

struct, maintain and operate lines thereover.[18] These acts alone gave no right to telegraph companies to acquire the use of the railroads' right of way,[19] but a state statute giving such right against the right of way of an interstate carrier is not invalid as an attempted regulation of interstate commerce; it being the opinion of the Circuit Judges of the Sixth Circuit that "it was the intention of Congress to leave to the states the question of granting or withholding the right of eminent domain."[20] The right arising under a state law comes within that division of the state's powers which may be exercised in the absence of federal regulation.

That the United States may exercise the power to condemn land "whenever it is necessary or appropriate * * * in the execution of any of the powers granted * * * by the Constitution,"[21] can not be doubted. Nor can the state "by action or inaction, prevent, unreasonably burden, discriminate against or directly regulate interstate commerce or the right to carry it on."[22] This quotation, read in the light of the case in which the language was used, is a declaration that a state, by refusing the right of eminent domain, can not prohibit interstate commerce.

§ 8. **States May Establish Means for Interstate Transportation.**—The states may grant corporate franchises, and the corporations so created, being authorized so to do by the law

[18] Acts July 24, 1866, c. 230, 14 Stat. 221 (Rev. Stat. secs. 5263-5269 (U. S. Comp. St. 1901, pp. 3579, 3580)). Cincinnati *v.* Louisville & N. R. Co., 223 U. S., 56 L. Ed. 481, 32 Sup. Ct. 267, Western Union Tel. Co. *v.* Penn. R. R. Co., 195 U. S. 540, 49 L. Ed. 312, 25 Sup. Ct. 133, 1 Ann. Cas. 517.

[19] See also Williams *v.* Talladega, 226 U. S. 404, 57 L. Ed. 275, 33 Sup. Ct. 116, holding that the federal statute was merely permissive and citing cases.

[20] Louisville & N. R. Co. *v.* Western Union Tel. Co., 207 Fed. 1, 124 C. C. A. 573.

[21] United States *v.* Gettysburg Elec. Ry., 160 U. S. 668, 679, 40 L. Ed. 576, 16 Sup. Ct. 427; Kohl *v.* United States, 91 U. S. 367, 23 L. Ed. 449; Cherokee Nation *v.* Kansas Railway, 135 U. S. 641, 656, 34 L. Ed. 295, 10 Sup. Ct. 965; Chappell *v.* United States, 160 U. S. 499, 40 L. Ed. 510, 16 Sup. Ct. 397.

[22] Oklahoma, West. Attorney General *v.* Kansas Natural Gas Co., 221 U. S. 229, 262, 55 L. Ed. 716, 31 Sup. Ct. 564; affirming Haskell *v.* Kansas Natural Gas Co., 172 Fed. 545.

of their creation, may engage in interstate transportation. It is also true that a state may, as a general rule, exclude a corporation of another state from transacting ordinary business within its limits, or permit the engaging in such business on terms. The state creating a corporation does not confer thereon the right to engage in interstate commerce, nor can a state "exclude from its limits a corporation engaged in such commerce." [23] In Oklahoma *v.* Kansas Natural Gas Co.,[23] the Supreme Court of the United States held invalid a law of Oklahoma which prohibited a corporation of another state from engaging in the transportation of oil from Oklahoma in interstate commerce. The law was sought to be sustained upon the theory that it was made to "conserve" the natural resources of the state. In denying the validity of this contention the court argued that, if Oklahoma could exercise such power, other states might, and, said the court, "a complete annihilation of interstate commerce might result." Mr. Justice McKenna, at p. 261 of the opinion, quotes with approval these propositions:

"No state by the exercise of, or by the refusal to exercise, any or all of its powers, may prevent or unreasonably burden interstate commerce within its borders in any sound article thereof.

"No state by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on."

A corollary to this statement of the law is, "that a corporation of one state authorized by its charter to engage in lawful commerce among the states, may not be prevented by another state from coming into its limits for all the legitimate purposes of such commerce." [24] This is true because the right to carry on interstate commerce is not a privilege granted by a state but is one of the privileges of every citizen of the United States, "and the accession of mere corporate facilities * * * can not have the effect of depriving them of such right." [25] *A fortiori*

[23] See note 22 *supra*, 221 U. S. at p. 260 and cases cited throughout opinion.

[24] Western Union Tel. Co. *v.* Kansas, 216 U. S. 1, 27, 54 L. Ed. 355, 30 Sup. Ct. 190.

[25] Buck Stove Co. *v.* Vickers, 226 U. S. 205, 215, 57 L. Ed. 189, 33 Sup. Ct. 41. See also. Mercantile Trust Co. *v.* Tex. & P. Ry. Co., 216 Fed. 220—holding that a railroad company incorporated under an act of Congress can not be excluded by a state from doing business within its borders.

Congress might create or license a corporation to engage in commerce "among the states" and no state could prevent such corporation "from coming into its limits for all the legitimate purposes of such commerce."

Nonincorporation does not prevent the regulation of a common carrier.[26]

§ 9. **Regulation of Facilities—Depots.**—The Acts of Congress regulating interstate commerce apply to "common * * * carriers engaged in the transportation of passengers or property * * * by railroad."[27] "Railroad" includes "all switches, spurs, tracks and terminal facilities of every kind used or necessary in the transportation of * * * persons or property * * * and also all freight depots."[28] The act does not apply to "transportation of passengers or property * * * wholly within one state."[29]

A station for the accommodation of passengers and for the receipt and delivery of freight is necessary both for interstate and intrastate transportation, and generally such stations serve the needs of each class of transportation. It has been held that the provision limiting the scope of the Acts of Congress regulating interstate transportation applies to all portions of the act;[30] although the limiting proviso does not justify a state in discriminating against interstate commerce.[31]

From this it follows that there is a field in which the states may act in regulating carriers, although such carriers may be engaged in both interstate and intrastate transportation. The boundaries of the respective powers of the state and federal governments are not distinctly marked. It has been said that the Act of Congress, "excludes the right of a state to regulate * * * the obligation of furnishing the means of interstate transportation."[32]

[26] Platt *v.* LeCocq, 150 Fed. 391, reversed on another point, Platt *v.* LoCocq, 158 Fed. 723, 85 C. C. A. 621, 15 L. R. A. (N. S.), 558; United States Express Co. *v.* State, 164 Ind. 196, 73 N. E. 101.

[27] Sec. 1, Act to Regulate Commerce, *post*, sec. 335.

[28] Id., sec. 337, *post*.

[29] Id., sec. 336, *post*.

[30] Simpson, et al., R. R. Com. of Minnesota *v.* Shepard, 230 U. S. 352, 432, 433, 57 L. Ed. 1511, 33 Sup. Ct. 729.

[31] Houston & Texas Railway *v.* U. S., 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833.

[32] Demurrage cases, Chicago R. I. & P. Ry. Co. *v.* Hardwick Farmers Elevator Co., 226 U. S.

In the Larabee Mills case [33] it was held that the mere grant by Congress of power to the Interstate Commerce Commission does not, in the absence of action by the Commission, change the rule that the states "may regulate many matters which indirectly affect interstate commerce." There is, as said by Mr. Justice Hughes in the Minnesota Rate Cases,[34] an "interblending of operations in the conduct of interstate and local business by interstate carriers. * * * The same right-of-way, terminals, rails, bridges are provided for both classes of traffic; * * * the proportion of each sort of business varies from year to year and, indeed, from day to day; * * * no division of the plant, no apportionment of it between interstate and local traffic, can be made today which will hold tomorrow; * * * terminals, facilities and connections in one state aid the carrier's entire business and are an element of value with respect to the whole property and the business in other states." But notwithstanding this is true, Congress has not occupied the whole field, and the states may act so as indirectly to affect interstate transportation where, "congressional action leaves room without a conflict for the operation of the state law in the same field." [35]

A statute in Mississippi required railroads to "establish and maintain such depots as shall be reasonably necessary for the public convenience," and to "stop such of the passenger and freight trains at any depot as the business and public convenience shall require." The Railroad Commission of Mississippi having ordered a carrier to stop an interstate train at a particular depot, Mr. Justice Peckham delivering the opinion of the court, after citing cases, said: [36] "Upon the principle decided in these cases, a state railroad commission has the right, under a state statute, so far as railroads are concerned, to compel a

426, 57 L. Ed. 284, 33 Sup. Ct. 174; St. Louis I. M. & S. Ry. *v.* Edwards, 227 U. S. 265, 269, 270, 57 L. Ed. 506, 33 Sup. Ct. 26.

[33] Missouri Pac. Ry. Co. *v.* Larabee Flour Mills Co., 211 U. S. 612, 623, 53 L. Ed. 352, 29 Sup. Ct. Rep. 214, affirming Larabee Flour Mills Co. *v.* Missouri Pac. Ry., 74 Kan. 808, 88 Pac. 72.

[34] Note 30 *supra*.

[35] Louisville & N. R. Co. *v.* Hughes, 201 Fed. 727, 742.

[36] Mississippi R. R. Com. *v.* Illinois C. R. Co., 203 U. S. 335, 344, 51 L. Ed. 209, 27 Sup. Ct. Rep. 90, affirming Illinois C. R. Co. *v.* Mississippi R. R. Com., 138 Fed. 327, 70 C. C. A. 617.

company to stop its train under the circumstances already referred to, and it may order the stoppage of such trains if the company does not otherwise furnish proper and adequate accommodation to a particular locality, and in such cases the order may embrace a through interstate train actually running and compel it to stop at a locality named. In such case, in the absence of congressional legislation covering the subject, there is no illegal or improper interference with the interstate commerce right." The order, however, was held invalid as unreasonable.

A carrier may not be compelled by mandamus to build a station at a particular place in the absence of a specific statutory duty so to do,[37] but when the statute so authorizes, mandamus will lie to compel the construction of a depot.[38] It may be said that the proper governmental authority, whether legislative or administrative, the latter being by statute authorized, may regulate the location and require the construction of depots and the maintenance of necessary depot facilities. Such regulation must in all cases be reasonable and must be made upon proper consideration of the rights of both the carriers and the public. Whether such regulation can be enforced by mandamus or by suits for penalties depends upon the terms of the particular regulating statute. The Interstate Commerce Commission has exercised the right

[37] Northern Pac. R. Co. *v.* Washington Territory, 142 U. S. 492, 35 L. Ed. 1092, 12 Sup. Ct. 283, but see the vigorous dissent of Mr. Justice Brewer concurred in by Justices Field and Harlan. The majority opinion is sustained by a well-reasoned argument quoted from People *v.* N. Y. L. E. & W. R., 104 N. Y. 58, 9 N. E. 856, although there is authority supporting the dissenting view, Concord & M. R. Co. *v.* Boston & M. R. Co., 68 N. H. 464, 41 Atl. 263.

[38] People *v.* Delaware & H. Canal Co., 32 N. Y. App. Div. 120, 52 N. Y. Supp. 850, affirmed in 165 N. Y. 362, 59 N. E. 138; Central of Georgia Ry. Co. *v.* State, 104 Ga. 831, 31 S. E. 531; Railroad Commissioners of South Carolina *v.* Columbia & G. R. Co., 26 S. C. 353, 2 S. E. 127; Northern Pac. R. Co. *v.* Territory (Wash. T.), 13 Pac. 604; McCoy *v.* Cincinnati I. St. L. & C. R. Co., 13 Fed. 3; State *v.* Republican Val. R. Co. (Neb.), 26 N. W. 205 and 24 N. W. 329. The right of a commission to locate a station does not authorize a requirement that separate freight and passenger depots be maintained. State *v.* Yazoo Valley R. Co., 87 Miss. 679, 40 So. 263.

to regulate the use of freight terminals,[39] and such regulation is within its statutory power. It would seem that regulations as to the construction, location, operation and maintenance of depots, being regulations which can best be made by a local tribunal, are at least in the present state of the federal law and in view of non-action by the Interstate Commerce Commission, within the cognizance of state laws and state commissions.[40] Such regulation does not burden or impede, but aids and facilitates intercourse and traffic.[41]

Under these principles, a railroad may be compelled to install a telephone in a depot to facilitate its business [42] but not for general commercial purposes.[43]

The business of a railroad is transportation, and it can not be compelled to provide scales at local stations for the convenience of stock shippers.[44]

[39] Federal Sugar Refining Co. *v.* Baltimore & O. R. Co., 17 I. C. C. 40, 47, 20 I. C. C. 200; Cattle Raisers' Asso. *v.* C. B. & Q. R. R. Co., 11 I. C. C. 277; R. R. Com. of Ky. *v.* L. & N. R. R. Co., 192 U. S. 568, 48 L. Ed. 565, 24 Sup. Ct. 339.

In United States *v.* B. & O. R. Co., 231 U. S. 274, 58 L. Ed. —, 34 Sup. Ct. 75, the order of the Commission was set aside but the right to regulate conceded.

[40] Cases illustrating the exercise of the power by state authority are: Atty. Gen. of Mass. *v.* Eastern R. Co., 137 Mass. 45; Board of R. R. Com'rs of Kansas *v.* Missouri P. R. Co., 71 Kan. 193, 80 Pac. 53; Corporation Commission of N. C. *v.* Seaboard A. L. Ry., 161 N. C. 270, 76 S. E. 554; St. Louis I. M. & S. Ry. Co. *v.* State, 31 Okla. 509, 122 Pac. 217; Horton *v.* So. Ry. Co., 173 Ala. 231, 55 So. 531; College Arms Hotel Co *v.* Atlantic C. L. R. Co., 61 Fla. 553, 54 So. 459; St. Louis S. W. Ry. Co. *v.* State, 97 Ark. 473, 134 S. W. 970; State *v.* Ogden Rapid Transit Co., 38 Utah 242, 112 Pac. 120; Pecos & N. T. Ry. Co. *v.* Railroad Com. of Texas, 56 Tex. C. A. 422, 120 S. W. 1055; R. R. Com. of Tex. *v.* Chicago, R. I. & G. Ry. Co., 114 S. W. 192, reversed 102 Tex. 393, 117 S. W. 794; Louisiana R. & N. Co. *v.* R. R. Com. of La., 121 La. 849, 49 So. 884.

[41] Morris-Scarboro-Moffitt Co. *v.* Southern Express Co., 146 N. C. 167, 59 S. E. 667; Pittsburg C. C. & St. L. R. Co. *v.* Hunt, 171 Ind. 189, 86 N. E. 328.

[42] Atchison T. & S. F. Ry. Co. *v.* State, 23 Okla. 210, 100 Pac. 11.

[43] Atchison T. & S. F. Ry. Co. *v.* State, 23 Okla. 231, 100 Pac. 16. See as to right to require rates to be posted, Johnson *v.* Seaboard A. L. Ry., 78 S. C. 361, 52 S. E. 644.

[44] New Mex. Wool Growers' Asso. *v.* A. T. & S. F. R. Co., N. M., 145 Pac. 1077; G. N. R. Co. *v.* Minnesota, 238 U. S. 340, 59 L. Ed. —, 35 Sup. Ct. 753.

§ 10. **Regulation of Facilities—Terminal Roads.**—Short lines of railroad engaged as common carriers in the business of transporting freight between the termini of other common carriers and industries not directly on the lines of the principal carriers are designated as terminal railroads. Generally this terminal railroad is located in only one state and is a state corporation. It delivers freight which may be brought to it by other carriers or delivers freight from industries to other carriers, such freight being destined from or to points both within and without the state in which the terminal railroad is located.

In a federal case decided in 1887 it was held that a "switching" service was local and might be regulated by a state commission,[45] but it can not now be doubted that, where a delivery service by a terminal road relates to freight which moves in interstate commerce, as to such transportation the carrier is not legally subject to any regulation by state authority. The Interstate Commerce Commission has regulated rates of terminal charges, holding that, "A state statute fixing terminal charges is not controlling with respect to interstate transportation."[46] Discrimination by a terminal company was prohibited.[47] Through routes and joint rates with terminal roads have been ordered.[48] That such roads, as to interstate transportation of which the terminal haul is a part, are within the Act to Regulate Commerce has been recognized and established by the Supreme Court of the United States.[49] In the Southern Pacific Terminal case,[50] Mr. Justice McKenna quotes approvingly language of the Commission aptly expressing the rule. He there

[45] Chicago M. & St. P. Ry. Co. *v.* Becker, 32 Fed. 849; the rate prescribed by the State Commission was enjoined as being too low, same case 35 Fed. 883.

[46] Wilson Produce Co. *v.* Penna. R. Co., 14 I. C. C. 170.

[47] Eichenberg *v.* So. Pac. Co., 14 I. C. C. 250; order approved, So. Pac. Terminal Co. *v.* Int. Com. Com., 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279.

[48] Mfgrs. Ry. Co. *v.* St. Louis I. M. & S. Ry. Co., 21 I. C. C. 304; and see, Peale *v.* Cent. R. Co. of N. J., 18 I. C. C. 25, and cases cited, at p. 33.

[49] Int. Com. Com. *v.* Chicago B. & Q. R. Co., 186 U. S. 320, 46 L. Ed. 1182, 22 Sup. Ct. 824; So. Ry. Co. *v.* St. L. Hay & G. Co., 214 U. S. 297, 53 L. Ed. 1004, 29 Sup. Ct. 678; Int. Com. Com. *v.* Stickney, 215 U. S. 98, 54 L. Ed. 112, 30 Sup. Ct. 66; United States *v.* Union Stock Yards & Transit Co., 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83.

[50] Note 47, *supra*.

quoted: "The Terminal Company is part and parcel of the system engaged in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all of their terminals from our regulating authority."

Terminal roads, therefore, as to all questions of rates and regulations, are subject to the jurisdiction of the state or the federal government in the same way as other common carriers. When the regulation relates to intrastate transportation and does not affect interstate commerce, a state commission may act, otherwise the Interstate Commerce Commission alone has power to prescribe rates, rules and regulations.

§ 11. **State Laws Forbidding the Consolidation of Competing Carriers.**—A constitutional provision of the state of Kentucky prohibiting the consolidation of stocks, franchises or property, as well as the purchase and lease, of parallel or competing lines of railroad does not so interfere with interstate commerce as to be invalid. The "instruments of commerce" may be regulated by the states. In sustaining the foregoing law of Kentucky, Mr. Justice Brown, announcing the opinion of the Supreme Court, said:[51]

"The power to construct them (railroads) involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserved to itself the superior right to control their commerce and forbid interference therewith; while to the states remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.

"If it be assumed that the states have no right to forbid the

[51] Louisville & N. R. Co. *v.* Kentucky, 161 U. S. 677, 40 L. Ed. 849, 16 Sup. Ct. 714. Explained, Northern Securities Co. *v.* United States, 193 U. S. 197, 348 48 L. Ed. 679, 705, 24 Sup. Ct. 436. Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 40 L. Ed. 838, 16 Sup. Ct. 705. Simpson, et al., R. R. Com. of Minnesota *v.* Shepard, 230 U. S. 352, 432, 433, 57 L. Ed. 1511, 33 Sup. Ct. 729.

consolidation of competing lines, because the whole subject is within the control of Congress, it would necessarily follow that Congress would have the power to authorize such consolidation in defiance of state legislation—a proposition which needs only to be stated to demonstrate its unsoundness."

§ 12. **Regulation of Facilities—Spur Tracks.**—Where an order of a state tribunal affects only intrastate commerce, the question of whether or not it was arbitrary and unreasonable is for the state courts, and it is proper to require a carrier to furnish facilities for making the necessary connections for passenger travel; even if, in doing so, that service must be furnished at a loss.[52]

A state statute authorizing a state commission to require a railroad to permit the erection of an elevator upon its road bed was held by the Supreme Court of the United States to be invalid;[53] and the same court held void a law compelling all railroads, upon application and when a specified elevator capacity exists, to "erect, equip and maintain a side track or switch of suitable length to approach as near as four feet of the outer edge of their right of way when necessary, and in all cases to approach as near as necessary to approach an elevator that may be erected by the applicant or applicants adjacent to their right of way for the purpose of loading grain into cars from said elevator, and for handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain, without favoritism or discrimination in any respect whatever." One of the contentions made in the argument against the validity of this law was that it conflicted with the commerce clause of the Constitution of the United States. This contention was not determined, as the law was held invalid because it failed to provide indemnity to the carrier.[54]

A regulation requiring a carrier to deliver cars beyond its

[52] Atlantic C. L. R. Co. *v.* North Carolina Corp. Com., 206 U. S. 1, 51 L. Ed. 933; 27 Sup. Ct. 585, affirming North Carolina Corp. Com. *v.* Atlantic C. L. R. Co., 137 N. C. 1, 49 S. E. 191, 115 Am. St. Rep. 636.

[53] Missouri Pac. Ry. Co. *v.* Nebraska, 164 U. S. 403, 41 L. Ed. 489, 17 Sup. Ct. 130.

[54] Missouri Pac. Ry. Co. *v.* Nebraska, 217 U. S. 196, 54 L. Ed. 727, 30 Sup. Ct. 461.

tracks to a private switch is illegal.[55] In McNeill *v.* Southern Ry. Co., cited note, *supra,* the North Carolina Corporation Commission entered an order requiring the railway company, upon payment of freight charges, to make delivery of the cars beyond its right of way on the siding of a private coal company. The order was held invalid as "amounting to an unlawful interference with interstate commerce."

That a spur track ordered by a state commission may be for the present benefit of only one industry, does not make the condemnation of property necessary for the construction of the spur track the taking of property for a private purpose.[56] A state has no power to compel a carrier to switch cars from a connection with a competing road to a designated side track within its own terminals for the purpose of being laden with freight for immediate transportation.[57] If the transportation is intrastate, different carriers may be compelled by state authority to interchange freight.[58]

§ 13. **Requiring Physical Connections between Carriers.**—In the Jacobson case,[59] under authority of a law of Minnesota, the State Railroad Commission ordered a connection between two common carriers of the state, and this order the courts enforced. The carriers contended that the order was void as an unreasonable regulation of commerce, and that in requiring the construction of the connecting track, the order and judgment took property without due process of law. In the brief the contention was made that the law upon which the proceedings were had was "an ill-disguised attempt to control and regulate interstate traffic." The court did not construe the order as directly affecting interstate commerce and overruled the other contentions of the plaintiff in error. The opinion concludes as follows:

"In this case the provision is a manifestly reasonable one,

[55] Central Stock Yards Co. *v.* Louisville & N. R. Co., 118 Fed. 113, 55 C. C. A. 63, 63 L. R. A. 213; McNeill *v.* So. Ry. Co., 202 U. S. 543, 50 L. Ed. 1142, 26 Sup. Ct. 722.

[56] Union Lime Co. *v.* Chicago & N. W. Ry. Co., 233 U. S. 211, 58 L. Ed. 924, 34 Sup. Ct. 522.

[57] Ill. C. R. Co. *v.* Railroad Com. of La., 236 U. S. 157, 59 L. Ed. —, 35 Sup. Ct. 275.

[58] Mich. C. R. Co. *v.* Mich. R. Com., 236 U. S. 615, 59 L. Ed. —, 35 Sup. Ct. 423.

[59] Wisconsin M. & P. R. Co. *v.* Jacobson, 179 U. S. 287, 45 L. Ed. 194, 21 Sup. Ct. 115.

tending directly to the accommodation of the public, and in a manner not substantially or unreasonably detrimental to the ultimate interests of the corporation itself.

"Although to carry out the judgment may require the exercise by the plaintiff in error of the power of eminent domain, and will also result in some, comparatively speaking, small expense, yet neither fact furnishes an answer to the application of defendant in error."

The Jacobson case differs from the McNeill case, Sec. 12, *supra*, in that in the McNeill case there was an order to connect with a private plant, while in the Jacobson case two state common carriers were directed to make a physical connection. In the Jacobson case, the Supreme Court said *arguendo* that the order for the connection there did not affect interstate commerce, and Mr. Justice Peckham, for the court, said:

"But the Supreme Court of the state, in the opinion delivered therein, said that there was ample evidence in the case of a necessity for such track connection resulting from the benefit which would accrue to exclusively state commerce, when considered alone, to justify the ordering of the connection in question."

In the Jacobson case the regulation only incidentally affected interstate commerce; in the McNeill case the regulation had direct reference to interstate commerce. In discussing the McNeill case, Mr. Justice White said:

"The cars of coal not having been delivered to the consignee, but remaining on the tracks of the railway company in the condition in which they had been originally brought into North Carolina from points outside of that state, it follows that the interstate transportation of the property had not been completed when the corporation commission made the order complained of."

These facts clearly differentiate the two cases, and make the respective opinions harmonious.

The more recent case of the Larabee Mills[60] is interesting and instructive. In that case the Supreme Court of Kansas compelled, by mandamus, the Missouri Pacific Railway Company to deliver cars from another road over existing transfer tracks to the mill of the Larabee Mills, that the mill might be

[60] Missouri Pac. Ry. Co. *v.* Larabee Flour Mills Co., 211 U. S. 612, 53 L. Ed. 352, 29 Sup. Ct. 214.

enabled to ship out its manufactured product, three-fifths of which went to points outside the state of Kansas. It appeared that the railway company accorded similar privileges to other flour mills along its right of way. In the Supreme Court of the United States the railroad relied strongly on the McNeill case. The two cases are much alike. In the McNeill case the delivery of loaded cars was sought over a private track to a coal yard; who built the track is not disclosed. In the Larabee Mills case the delivery of empty cars was sought over a track, the ownership of which is not disclosed, but which was essentially for the private use of the mill. In the McNeill case it appears that the coal cars were brought from another state, although it must have been true that at times the spur track was used in intrastate transportation; in the Larabee Mills case there was both interstate and intrastate transportation from the mill. Thus far there seems to be no legal distinction between the two cases. There is, however, one clear distinction. The order in the Larabee Mills case was made to prevent discrimination; such fact does not appear in the McNeill case. In the Larabee Mills case it was contended by the railroad "that no duty was imposed on the railroad company by act of the legislature or mandate of commission or other administrative board." To this argument Mr. Justice Brewer answered:

"No legislative enactment, no special mandate from any commission or other administrative board was necessary, for the duty arose from the fact that it was a common carrier. This lies at the foundation of the law of common carriers. Whenever one engages in that business the obligation of equal service to all arises, and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts. * * * All these questions are disposed of by one well-established proposition, and that is, that a party engaging in the business of a common carrier is bound to treat all shippers alike and can be compelled to do so by mandamus or other proper writ."

What, then, the Supreme Court of Kansas did was to enforce the common-law duty of the carrier to treat all shippers alike. This it had the right to do prior to action by Congress or the Commission appointed by Congress, even though in doing so interstate commerce might be affected. This principle Mr. Justice Brewer states:

"This case does not rest upon any distinction between interstate

commerce and that wholly within the state. It is the contention of counsel for the mill company that it comes within the oft-repeated rule that the state, in the absence of express action by Congress, may regulate many matters which indirectly affect interstate commerce, but which are for the comfort and convenience of its citizens. Of the existence of such a rule there can be no question. It is settled and illustrated in many cases. * * * The mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens."

In discussing the McNeill case, Mr. Justice Brewer said:

"There are many points of resemblance between that case and this, but there is this substantial distinction: In that was presented and determined solely the power of a state commission to make orders respecting the delivery of cars engaged in interstate commerce beyond the right of way of the carrier and to a private siding—an order which affected the movement of the cars prior to the completion of the transportation, while here is presented, as hereinbefore indicated, the question of the power of the state to prevent discrimination between shippers, and the common-law duty resting upon a carrier was enforced. This common-law duty, the state, in a case like the present, may, at least in the absence of congressional action, compel a carrier to discharge."

Mr. Justice Moody dissented, placing his dissent on the McNeill case, between which and the instant case he saw no legal distinction.

These cases were determined prior to the passage of the Hepburn Act,[61] which act extended the power of the Interstate Commerce Commission.

Since the passage of that act, the Supreme Court has held void a state regulation requiring a physical connection between common carriers of the state of Washington.[62] In this, the

[61] Act June 29, 1906, 34 Stat. L. 584, c. 3591, U. S. Comp. St. Supp. 1907, p. 892, Fed. Stat. Ann. Supp. 1907, p. 168, Secs. 338, 400.

[62] Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. Ed. 863, 32 Sup. Ct. 535.

Fairchild case, the order to make the connection was held void, the reason for so holding being stated by Mr. Justice Lamar as follows:

"There is nothing by which to compare the advantage to the public with the expense to the defendant and nothing to show that within the meaning of the law there is such public necessity as to justify an order taking property from the company."

The effect of the order on interstate commerce was not discussed, nor was that question raised, it seemingly being assumed that the order related to intrastate commerce.

It appears from the authorities and in view of the enlarged powers of the federal commission under the Acts of 1906 and 1910, that a physical connection could not be ordered by authority of the states when the purpose of the connection was wholly or partly to accommodate interstate commerce.[63] It has, however, been held, and upon what appears to be sound reasoning based upon authority, that such connections may be required

[63] So. Ry. Co. *v.* Reid, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. 140; United States *v.* Union Stock Yard & Transit Co., 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; New York C. & H. R. Co. *v.* Hudson County, 227 U. S. 248, 57 L. Ed. 499, 33 Sup. Ct. 269; Seaboard A. L. Ry. Co. *v.* R. R. Com. of Georgia, 206 Fed. 181; see also Atlantic S. R. & G. Ry. Co. *v.* State, 42 Fla. 358, 29 So. 319, 89 Am. St. Rep. 233. At common law individuals could not force the right to connect private tracks, People *v.* Chicago & N. W. Ry., 57 Ill. 436; State *v.* Willmar & S. F. Ry. Co., 88 Minn. 448, 93 N. W. 112. No objection that connection is with main line, Morris Draying Co. *v.* Greenville & H. Ry. Co., 62 N. J. Eq. 768, 48 Atl. 568, affirming 59 N. J. Eq. 372, 46 Atl. 638. Law may apply to contiguous roads which do not cross, New York L. & W. Ry. Co. *v.* Erie R. Co., 31 App. Div. 378, 52 N. Y. Supp. 318, appeal dismissed 157 N. Y. 674, 51 N. E. 1092; Gallagher *v.* Keating, 28 Misc. Rep. 131, 58 N. Y. Supp. 366. Statute authorizing plant tracks to connect valid, Reeser *v.* Philadelphia & R. Ry. Co., 215 Pa. 136, 64 Atl. 376. May require connections though roads do not cross at grade, International & G. N. R. Co. *v.* R. R. Com. of Texas, 99 Tex. 332, 89 S. W. 961, affirming 86 S. W. 16, — Tex. Civ. App. —; Jacobson *v.* Wisconsin, M. & P. R. Co., 71 Minn. 519, 74 N. W. 893, 40 L. R. A. 389, 70 Am. St. Rep. 358. A railroad company is not compelled to switch freight which was not consigned over its lines from the line of one railroad to that of another in the same city, Texas & N. O. Ry. Co. *v.* Gulf & I. Ry. Co. of Texas, 54 S. W. 1031, affirmed. Gulf & I. Ry. Co. *v.* Texas & N. O. Ry. Co., 56 S. W. 328, 93 Tex. 482.

when made to accommodate intrastate commerce, the requirement being one for a facility for transportation and in no way burdening interstate commerce.[64] The use of terminal facilities can not be taken from one carrier for the benefit of another.[65] This does not mean that one road may not in a proper case be required to switch the cars of another and connecting carrier.[66]

§ 14. **Delivery over Connecting Tracks.**—Railroads are organized for a public purpose and to serve primarily the public good and convenience. The Interstate Commerce Commission has power to require physical connections between interstate carriers, and like power exists in the states so far as the requirements of intrastate commerce may reasonably demand.

That these connections may serve the public demands and needs, it is necessary that they be used. How far then may a carrier be compelled to receive and deliver cars over these connections when established?

There is a commerce which is intrastate and a commerce which is interstate. Each may be served by these connections, and both state and federal authorities may act for the purpose of requiring adequate service for the transportation within their respective jurisdictions. Neither the state government nor the federal government may require the establishment of facilities for transportation which is not within its proper sphere. This situation makes carriers subject to independent regulation from separate tribunals and it sometimes is a difficult question to determine which tribunal may require a particular facility, the facility required by either being usually for the benefit of the commerce of both.

While this duplication of control over carriers is frequently burdensome, until Congress acts, the courts must adjust the conflicting regulations as best they may. Applying these principles

[64] Pittsburg, C. C. & St. L. Ry. Co. *v.* Hunt, 171 Ind. 189, 86 N. E. 328; State *v.* Florida E. C. Ry. Co., 58 Fla. 524, 50 So. 425; Chicago, I. & L. Ry. Co. *v.* R. R. Com. of Indiana, 175 Ind. 630, 95 N. E. 364.

[65] Louisville & N. R. Co. *v.* Central Stock Yards, 212 U. S. 132, 53 L. Ed. 441, 29 Sup. Ct. 246, reversing same styled case, 133 Ky. 148, 97 S. W. 778; Commonwealth *v.* Norfolk & W. Ry. Co., 111 Va. 59, 68 S. E. 351.

[66] Penna. R. Co. *v.* U. S., 236 U. S. 351, 59 L. Ed. —, 35 Sup. Ct. 370.

it can not be doubted that the states may, in proper cases, require carriers of intrastate commerce to receive and deliver cars from and to other carriers over the connections. This service must be necessary and must be reasonably compensated for, and provision must exist for the protection of the carrier in its compensation and for the return of its cars.[67]

That a carrier may be compelled to transport freight over the connection between the terminus of another line to a team track or other siding on its own line, was determined by the Supreme Court in Grand Trunk Railway Co. *v.* Michigan Railroad Commission.[68] In this case discrimination was alleged before the Commission, which made an order requiring that the discrimination be removed and that a new tariff be filed and made effective granting "like charges for the movement of a carload shipment received from an *industry* in the city of Detroit, upon said Grand Trunk Western Railway, consigned for delivery upon a team track or other siding of said road, within the same city, and for a like shipment received by said Grand Trunk

[67] Central Stock Yards *v.* Louisville & N. R. Co., 192 U. S. 568, 48 L. Ed. 565, 24 Sup. Ct. 339, affirming Central Stock Yards Co. *v.* Louisville & N. R. Co., 118 Fed. 113, 55 C. C. A. 63, 63 L. R. A. 213; Louisville & N. R. Co. *v.* Central Stock Yards Co., 212 U. S. 132, 53 L. Ed. 441, 29 Sup. Ct. 246, reversing Louisville & N. R. Co. *v.* Central Stock Yards Co., 133 Ky. 148, 97 N. W. 778; So. Ry. Co. *v.* St. Louis Hay & Grain Co., 214 U. S. 297, 53 L. Ed. 1004, 29 Sup. Ct. 678, reversing So. Ry. Co. *v.* St. Louis Hay & Grain Co., 153 Fed. 728, 82 C. C. A. 614. Indemnity may be required of an irresponsible carrier, Enterprise Transportation Co. *v.* Pennsylvania R. Co., 12 I. C. C. 326; Wisconsin, M. & P. R. Co. *v.* Jacobson, 179 U. S. 287, 45 L. Ed. 194, 21 Sup. Ct. 115, affirming Jacobson *v.* Wisconsin, M. & P. R. Co., 71 Minn. 519, 74 N. W. 893, 40 L. R. A. 389, 70 Am. St. Rep. 358; Minneapolis & St. L. R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 900, affirming State *v.* Minneapolis & St. L. R. Co., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514; Oregon R. & Nav. Co. *v.* Fairchild, 224 U. S. 510, 56 L. Ed. 863, 32 Sup. Ct. 535, reversing State ex rel. Oregon R. & N. Co. *v.* R. R. Com. of Washington, 52 Wash. 17, 100 Pac. 179.

[68] Grand Trunk Ry. Co. *v.* Michigan R. Com., 231 U. S. 451, 58 L. Ed. 310, 34 Sup. Ct. 152, affirming same styled case, 198 Fed. 1009. To same effect see Chicago, I. & L. Ry. Co. *v.* R. R. Com. of Indiana, 175 Ind. 630, 95 N. E. 364; Thompson *v.* Missouri, K. & T. Ry. Co., 105 Tex. 372, 126 S. W. 257, on rehearing 128 S. W. 109, 2 Ann. Rep. Ind. Pub. Ser. Com. 107 *et seq.*, Seaboard A. L. Ry. Co. *v.* R. R. Com. of Ga., 206 Fed. 181, 213 Fed. 27.

Western Railway from a *connecting carrier* at a junction point within the corporate limits of the city of Detroit, consigned to a team track or other siding upon said road within the same city."

The carrier filed a tariff which the Commission suspended and an injunction was sought. The question arising in the suit was stated by the Supreme Court as follows:

"The question in the case is whether, under the statutes of the state of Michigan, appellants can be compelled to use the tracks it *owns and operates* in the city of Detroit for the interchange of *intrastate traffic;* or, stating the question more specifically, whether the companies shall receive cars from another carrier at a junction point or physical connection with such carrier within the corporate limits of Detroit for transportation to the team tracks of the companies; and whether the companies shall allow the use of their team tracks for cars to be hauled from their team tracks to a junction point or physical connection with another carrier within such limits and be required to haul such cars in either of the above-named movements or between industrial sidings."

The question thus stated was resolved in favor of the validity of the order of the state commission, although throughout the opinion emphasis is laid upon the fact of "the exceptional situation of Detroit" where the service required by the order covered an area of twenty-two miles.

To the contention that the last order suspending the tariff, which was the order involved, interfered with interstate commerce, the court said, "the contention is premature, if not without foundation." The question as stated related to intrastate commerce, and the answer must be similarly limited. The Jacobson case, cited note *supra*, was relied on, and the second of the Stock Yards cases, cited note *supra*, was distinguished. Had the order of the Michigan Commission required the transportation or delivery of commodities moving to or from another state, it would have been a direct attempt to regulate interstate commerce, and void under the decisions in the cases of McNeill *v.* Southern Ry. Co.[69] and Ill. C. R. Co. *v.* Railroad Commission

[69] McNeil *v.* So. Ry., 202 U. S. 543, 50 L. Ed. 1142, 26 Sup. Ct. 722, modifying So. Ry. Co. *v.* Greensboro Ice & Coal Co., 134 Fed. 82. See Sec. 13 *supra*. Ill. Cent. R. Co. *v.* Railroad Com. of La., 236 U. S. 157, 59 L. Ed. —, 35 Sup. Ct. 275.

of Louisiana. The Michigan case referred to a transportation service to be performed by the carrier for a fixed compensation and does not answer the *quære* in the Riverside Mills case[70] as to whether or not "a carrier can be compelled to accept goods for transportation beyond its own lines or be required to make a through or joint rate over independent lines." The Supreme Court of Georgia has answered the question negatively,[71] the Judge delivering the opinion using this language:

"A corporation may voluntarily make a contract of this sort, but there is no law that we know of which compels it to make one against its wishes. And, speaking for myself, I doubt very much the power of the legislature to enact a law compelling a railroad to make a contract for a through bill of lading beyond its terminus."

Under the Act to Regulate Commerce (secs. 338 and 400, *post*), the Interstate Commerce Commission is given the power, which is frequently exercised, to require connecting carriers to establish through routes and joint rates, and there appears no reason why a state should not, as to intrastate commerce in a proper case, compel carriers to interchange freight.

§ 15. **Regulating Crossings.**—The state may regulate public railroad crossings. The police powers of the state are sufficient to enable them to protect the public from danger at places where railroads cross public streets and roads and where one railroad crosses another. Such regulation, although affecting interstate railroads, falls within the class of legislation "which," as was said by Chief Justice Marshall, "can be most advantageously exercised by the states themselves."[72] Congress has not attempted to legislate on the subject, and that state legislation "relating to railway crossings" is valid has been deter-

[70] Atlantic C. L. R. Co. *v.* Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7, affirming Riverside Mills *v.* Atlantic C. L. R. Co., 168 Fed. 987.

[71] Coles *v.* Central R. & B. Co., 86 Ga. 251, 12 S. E. 749; State *v.* Wrightsville & Ten. R. Co., 104 Ga. 437, 30 S. E. 891; Wadley So. Ry. Co. *v.* State, 137 Ga. 497, 73 S. E. 741. To the same effect, see Lotsfreich *v.* Central R. & B. Co., 73 Ala. 306; Gulf, C. & S. F. Ry. Co. *v.* State, 56 Tex. Civ. App. 353, 120 S. W. 1028; Home Tel. Co. *v.* Granby & Neosho Telephone Co., 114 Mo. 1111, 126 S. W. 773.

[72] Gibbons *v.* Ogden, 9 Wheat. 22 U. S. 1, 6 L. Ed. 23.

mined so frequently as to make extensive citation of authorities unnecessary.[73]

Similar to the power of the states to regulate crossings is the power to exercise a control over the right of way. A law of Texas prescribing the duty of preventing the growth of particular vegetation was held valid.[74] Regulations requiring guard posts on railroad trestles and bridges, and stock gaps at crossings, are within the police power of a state.[75]

A law of the state of Georgia requires railway locomotives running on the main line to be equipped with electric headlights of a certain prescribed character. Locomotives thus required to be equipped were used in hauling interstate freight, and it was urged that the statute constituted an unwarrantable interference with interstate commerce. The validity of the statute was sustained by the Supreme Court of Georgia,[76] and, upon a writ of error to the Supreme Court of the United States, the judgment of the state court was affirmed. The Supreme Court of the United States cited as controlling, the case of New York, N. H. & H. R. Co. *v.* New York, 165 U. S. 628, 41 L. Ed. 853, 17 Sup.

[73] New York & N. E. R. *v.* Bristol, 151 U. S. 556, 38 L. Ed. 269, 14 Sup. Ct. 437, extension of grade crossings; Chicago, B. & Q. R. Co. *v.* Nebraska, 170 U. S. 57, 42 L. Ed. 948, 18 Sup. Ct. 513, viaduct over a street; Grand Trunk Ry. Co. *v.* R. R. Com. of Indiana, 221 U. S. 400, 55 L. Ed. 786, 31 Sup. Ct. 537, interlocking plant at crossing of two railroads; Grand Rapids & I. Ry. Co. *v.* Hunt, 38 Ind. App. 657, 78 N. E. 358; St. Louis, I. M. & S. R. Co. *v.* McNamare, 91 Ark. 515, 122 S. W. 102, blocking frogs; State *v.* Louisville & N. R. Co., 177 Ind. 553, 96 N. E. 340; Atlantic C. L. R. Co. *v.* Goldsboro, 232 U. S. 548, 58 L. Ed. 721, 34 Sup. Ct. 364, regulating operation of cars in streets and affirming same styled case, 155 N. C. 356, 71 S. E. 514.

[74] Mo. K. & T. Ry. Co. *v.* May, 194 U. S. 267, 48 L. Ed. 971, 24 Sup. Ct. 638.

[75] Alabama Great So. R. Co. *v.* Fowler, 104 Ga. 148, 30 S. E. 243; New York Cent. & H. R. R. Co. *v.* New York, 165 U. S. 628, 41 L. Ed. 853, 17 Sup. Ct. 418, affirming 142 N. Y. 646, 37 N. E. 568, holding valid a law relating to heating trains. See the case of Chicago M. & St. P. R. Co. *v.* Minneapolis, 232 U. S. 430, 58 L. Ed. 671, 34 Sup. Ct. 400; same styled case 115 Minn. 460, 133 N. W. 169, Ann. Cas. 1912D. 1027, and cases cited in the opinion of the Supreme Court of the United States.

[76] Atlantic C. L. R. Co. *v.* Georgia, 135 Ga. 545, 69 S. E. 725, 32 L. R. A. (N. S.) 20.

Ct. 418, *supra*, where a law prescribing regulations concerning the heating of cars was held valid, and stated the principle applicable to be: "In the absence of legislation by Congress, the states are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce." [77] Having in mind that Congress has enacted several safety appliance acts,[78] it would seem that there is reason supporting the argument that Congress has already "occupied the field" wherein "safety in the physical operation of railroad trains" is provided. This decision of the Supreme Court can with difficulty be reconciled with a subsequent decision of the Court, holding that a law of Indiana requiring hand-holds on freight cars used in interstate commerce was void.[79]

§ 16. **Elevator Charges.**—Transportation, as defined by the Act to Regulate Commerce, *post*, Sec. 337, includes all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

The charges for elevating products as a part of an interstate transportation of such products is clearly not subject to state regulation, but must be prescribed by the Interstate Commerce Commission.[80]

In the Minnesota Rate Cases, at pp. 413, 414, of the opinion, Mr. Justice Hughes cited the Granger cases and the Railroad Commission cases, and in referring to the Munn case,[81] said:

"The court had before it the statute of Illinois governing the grain warehouses in Chicago. Through these elevators, located with the river harbor on the one side and the railway tracks on the other, it was necessary, according to the course of trade,

[77] Atlantic C. L. R. Co. *v.* Georgia, 234 U. S. 280, 58 L. Ed. 312, 34 Sup. Ct. 829.

[78] Sec. 330, *post*, appendices B to J.

[79] Southern R. Co. *v.* R. R. Com. of Ind., 236 U. S. 439, 59 L. Ed. —, 35 Sup. Ct. 304; reversing same styled case, 179 Ind. 23, 100 N. E. 337.

[80] Int. Com. Com. *v.* Diffenbaugh, 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22; Union Pac. R. Co. *v.* Updike Grain Co., 222 U. S. 215, 56 L. Ed. 171, 32 Sup. Ct. 39.

[81] Simpson et al., R. R. Com. of Minnesota *v.* Shepard, 230 U. S. 352, 432, 433, 57 L. Ed. 1511, 33 Sup. Ct. 729; Munn *v.* Illinois, 94 U. S. (4 Otto) 113, 24 L. Ed. 77.

for the product of seven or eight states of the West to pass on its way to the states on the Atlantic coast. In addition to the denial of any legislative authority to limit charges it was urged that the act was repugnant to the exclusive power of Congress to regulate interstate commerce. The court answered that the business was carried on exclusively within the limits of the state of Illinois, that its regulation was a thing of domestic concern and that 'certainly, until Congress acts in reference to their interstate relation, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction.' In the decision of the railroad cases, above cited, the same opinion was expressed."

Congress did act in 1906, and now the states may not regulate grain and similar elevators save as to elevation not affecting interstate commerce.

§ 17. **Through Routes and Joint Rates.**—The statute provides that, as to transportation, within the Act to Regulate Commerce, the Interstate Commerce Commission may require carriers to establish through routes, the Commission having the power to prescribe the rate and determine the divisions.[82] A state legislative act under which through routes and joint rates are prescribed, is valid when interstate commerce is not directly affected and when the requirement therefor is reasonable.[83] In the absence of a statute, through routing could not be enforced,[84] and, as said by Mr. Justice Holmes,[85] "the requirement to deliver, transfer and transport freight to any point where there is

[82] Sec. 399, *post;* and a state commission, as to intrastate commerce, may apportion a joint rate. State *v.* Minneapolis & St. L. R. Co., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514, affirmed Minneapolis & St. L. R. Co. *v.* State of Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 900.

[83] But such a statute affecting interstate transportation is void, Lowe *v.* Seaboard A. L. Ry. Co., 63 S. C. 248, 41 S. E. 297, 90 Am. St. Rep. 678.

[84] In Wadley So. Ry. *v.* State, 137 Ga. 497, 507, 73 S. E. 741, the Supreme Court of Georgia said: "It is true that railroad companies can not be required to issue through bills of lading, or to contract to forward goods beyond their own lines. Coles *v.* Central R. Co., 86 Ga. 251, 12 S. E. 749; State *v.* W. & T. R. Co., 104 Ga. 437 30 S. E. 891."

[85] Central Stock Yards *v.* Louisville & N. R. Co., 192 U. S. 568, 571, 48 L. Ed. 565, 24 Sup. Ct. 339.

a physical connection between the tracks of the railroad companies must be taken to refer to cases where the freight is destined to some further point by transportation over a connecting line."

As to intrastate commerce, a state may prohibit discrimination by a carrier against another, and where a joint rate is established it is subject to governmental regulation.[86] This does not mean that a carrier may be compelled to make a contract to deliver over another road, but carriers may be compelled to deliver freight to and receive freight from a connecting carrier.[87]

States, however, have no power to compel a carrier to switch cars between a connection with a competing interstate carrier and a designated side track within its own terminals, when such movement is for the accommodation of interstate traffic.[88]

§ 18. **Regulation of the Movement of Trains. Sunday Law.**—The legislature of the state of Georgia prohibited the running of freight trains on any road in the state on Sunday. There were certain exceptions referring to trains carrying live stock and delayed trains. A conviction being had under the statute, and an affirmance thereof by the highest state court, the case was appealed to the Supreme Court. That court sustained the Georgia statute.[89] Mr. Justice Harlan, concluding the opinion, said:

"The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate. It applies to the transportation of interstate freight the same rule precisely that

[86] Stephens *v.* Central of Ga. Ry. Co., 138 Ga. 625, 631, 75 S. E. 1041, 42 L. R. A. (N. S.) 541, 1913E, Ann. Cas. 609; Wadley Southern Ry. Co. *v.* State, 137 Ga. 497, 73 S. E. 741. Affirmed: Wadley S. R. Co. *v.* Georgia, 235 U. S. 651, 59 L. Ed. —, 35 Sup. Ct. 214.

[87] § 14, *supra;* Hudson V. R. Co. *v.* Boston & M. R. Co., 45 Misc. 520, 92 N. Y. Supp. 928, affirmed same styled case, 106 App. Div. 375, 94 N. Y. Supp. 545; International & G. N. R. Co. *v.* R. R. Com. of Tex., Tex. Civ. App., 86 S. W. 16, affirmed same styled case, 99 Tex. 332, 89 S. W. 961; Inman *v.* St. L. S. W. R. Co., 14 Tex. Civ. App. 39, 37 S. W. 37.

[88] Illinois C. R. Co. *v.* Railroad Com. of La., 236 U. S. 157, 59 L. Ed. —, 35 Sup. Ct. 275.

[89] Hennington *v.* Georgia, 163 U. S. 299, 41 L. Ed. 166, 16 Sup. Ct. 1086; Simpson, et al., R. R. Com. of Minnesota *v.* Shepard, 230 U. S. 352, 432, 433, 57 L. Ed. 1511, 33 Sup. Ct. 729.

it applies to the transportation of domestic freight. And it places the business of transporting freight in the same category as all other secular business. It simply declares that, on and during the day fixed by law as a day of rest for all people within the limits of the state from toil and labor incident to their callings, the transportation of freight shall be suspended.

"We are of the opinion that such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation designed to secure the well being and to promote the general welfare of the people within the state by which it was established, and therefore not invalid by force alone of the Constitution of the United States."

§ 19. **Same Subject. Requiring the Operation of a Particular Train.**—An order of a railroad commission made under adequate statutory authority, which requires a railroad company to furnish transportation between two points in the state, and to arrange its schedule to make connections with through interstate trains, is not, when required by public convenience, illegal. Nor is such order unreasonable because the operation of the particular train required by the order may entail some pecuniary loss to the carrier.[90]

The Railroad Commission of Kansas, after hearing, ordered an interstate railroad to operate a passenger service from a point within the state to the state line, although the railroad had no station at the state line. The Supreme Court of the United States, having found that the order was not arbitrary or unreasonable, discussed and determined the contention made, that the order was void because it operated as a direct burden upon interstate commerce. In support of the contention the carrier urged "that the charter of the Interstate Railroad Company, the builder of the branch, provided for a road not only in Kansas but to extend into Texas and Missouri, and therefore for an interstate railroad."

[90] Atlantic C. L. R. Co. *v.* North Carolina Corp. Com., 206 U. S. 1, 51 L. Ed. 933, 27 Sup. Ct. 585, 11 Ann. Cas. 398. The effect on interstate commerce of the order involved in this case was not considered. This decision affirms North Carolina Corp. Com. *v.* Atlantic C. L. R. Co., 137 N. C. 1, 49 S. E. 191, 115 Am. St. Rep. 636.

The court held that the charter of the railroad "did not change the nature and character of our constitutional system and, therefore, did not destroy the power of Kansas over its domestic commerce," and that the order being reasonable was not void; and, in concluding the opinion of the court, Mr. Justice (later Mr. Chief Justice) White said:[91]

"Even if the performance of the duty of furnishing adequate local facilities in some respect affected interstate commerce, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed."

When it was sought to enjoin an order of the New York Public Service Commission, which required the carrier to restore certain trains which had been discontinued, the district judge held, under the facts there of record, that such an order was void. It appeared that, without the trains which had been discontinued, the service accommodated the necessities of the people, and that to operate the additional trains would mean a loss to the carrier. Under the facts the judge aptly said: "What is reasonable and what is reasonably necessary is not to be determined by the occasional wants and wishes and convenience of a very few people living at points along the line.[92] In holding void a statute of Wisconsin requiring "that every village having two hundred or more inhabitants and a post office, and being within one-eighth of a mile of a railroad, must be given by such railroad the accommodation of at least two passenger trains each way each day, if four or more passenger trains are run each way daily," the authorities are cited by the Supreme Court and the principles established by the authorities given as follows: "(1) It is competent for a state to require adequate local facilities, even to the stoppage of interstate trains or the rearrangement of their schedules. (2) Such facilities existing—that is, the local conditions being adequately met—the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce. (3) And this, whether the interference be

[91] Missouri Pac. Ry. Co. *v.* Kansas, 216 U. S. 262, 283, 284, 54 L. Ed. 472, 30 Sup. Ct. 330, citing Atlantic C. L. R. Co. *v.* Wharton, 207 U. S. 328, 52 L. Ed. 230, 28 Sup. Ct. 121. See also State *v.* Chicago, M. & St. P. R. Co., 11 S. D. 282, 77 N. W. 104.

[92] Delaware L. & W. R. Co. *v.* Van Santwood, 216 Fed. 252.

directly by the legislature or by its command through the orders of an administrative body (4) The fact of local facilities this court may determine, such fact being necessarily involved in the determination of the federal question whether an order concerning an interstate train does or does not directly regulate interstate commerce, by imposing an arbitrary requirement." [93]

§ 20. **Same Subject. Speed of Trains.**—In the absence of legislation by Congress, a city ordinance regulating the speed limit of trains within the city limits, is not as to interstate trains unconstitutional. This law was announced by Mr. Justice Brewer (Erb *v.* Morasch, 177 U. S. 584, 44 L. Ed. 897, 20 Sup. Ct. 819), who said:

"A city, when authorized by the legislature, may regulate the speed of railroad trains within the city limits. Richmond, F. & P. R. Co. *v.* Richmond, 96 U. S. 521, 24 L. Ed. 734; Cleveland, C. C. & St. L. R. Co. *v.* Illinois ex rel. Jett. 177 U. S. 514, 44 L. Ed. 868, 20 Sup. Ct. Rep. 722. Such act is, even to interstate trains, one only indirectly affecting interstate commerce, and is within the power of the state until at least Congress shall take action in the matter."

A statute of Nebraska fixing a rate of speed for cattle trains moving between points within the state and providing a sum as liquidated damages for its violation, is valid, the Supreme Court of the United States having held that the legislature had power "to impose a limitation of the time for the transportation of live stock" and "to provide a definite measure of damages," such damages being "difficult to estimate or prove." [94]

§ 21. **Same Subject. Requirement That Trains Shall Stop at Particular Stations.**—In determining whether or not a state statute or a regulation of a state commission indirectly affecting interstate commerce is valid, the Supreme Court looks to the facts to see whether or not the regulation is reasonable. To require a train to run at a low rate of speed through a city

[93] Chicago, B. & Q. R. Co. *v.* Railroad Com. of Wis., 237 U. S. 220, 59 L. Ed. —, 35 Sup. Ct. 560.

[94] Chicago, B. & Q. R. Co. *v.* Cram, 228 U. S. 70, 84, 57 L. Ed. 734, 33 Sup. Ct. 437, affirming Cram *v.* Chicago, B. & Q. R. Co., 84 Neb. 607, 122 N. W. 31, 26 L. R. A. (N. S.) 1022, 85 Neb. 586, 123 N. W. 1045, 26 L. R. A. (N. S.) 1028, 19 Ann. Cas. 170; Chicago, B. & Q. R. Co. *v.* Kyle, 228 U. S. 85, 57 L. Ed. 741, 33 Sup. Ct. 440, affirming Kyle *v.* C., B. & Q. R. Co., 84 Neb. 621, 122 N. W. 37.

may cause more delay than to require such train to stop at a particular station three minutes. We have just seen in the preceding section that the limitation of speed was held legal. This was because the regulation was necessary and reasonable. A regulation, however, to stop an interstate train at a point where reasonable facilities for travel already exist is unreasonable and an invalid attempt to regulate interstate commerce.[95] This is true because the regulation was not a reasonable exercise of the police power of the state. The opinion written by Mr. Justice Peckham concludes:

"The transportation of passengers on interstate trains as rapidly as can with safety be done is the inexorable demand of the public who use such trains. Competition between great trunk lines is fierce and at times bitter. Each line must do its best even to obtain its fair share of the transportation between states, both of passengers and freight. A wholly unnecessary, even though a small, obstacle, ought not, in fairness, to be placed in the way of an interstate road, which may thus be unable to meet the competition of its rivals. We by no means intend to impair the strength of the previous decisions of this court on the subject, nor to assume that the interstate transportation, either of passengers or freight, is to be regarded as overshadowing the rights of the residents of the state through which the railroad passes to adequate railroad facilities. Both claims are to be considered, and after the wants of the residents within a state or locality through which the road passes have been adequately supplied, regard being had to all the facts bearing upon the subject, they ought not to be permitted to demand more, at the cost of the ability of the road to successfully compete with its rivals in the transportation of interstate passengers and freight."

A requirement of the law of the state of Illinois that an interstate mail and passenger train should run to a county seat three and a half miles off the main line is an unconstitutional interference and obstruction of interstate commerce.[96] A purely local train, however, although carrying passengers and mail des-

[95] Mississippi Railroad Com. *v.* Ill. Cent. R. Co., 203 U. S. 335, 51 L. Ed. 209, 27 Sup. Ct. 90. See notes 54 L. Ed. U. S. Reports 970, 14 L. R. A. (N. S.) 293, and State *v.* St. L. & S. F. R. Co., 105 Mo. App. 207, 79 S. W. 714.

[96] Ill. Cent. R. Co. *v.* Illinois, 163 U. S. 142, 41 L. Ed. 107, 16 Sup. Ct. 1096.

tined to points beyond the state, may properly be required to stop at county seats directly on the line traversed by such train.[97]

The Mississippi case, *supra,* may, upon a casual reading, appear in conflict with a former decision of the Supreme Court.[98] The causes, however, are easily distinguishable. In the Mississippi case the facts showed that there were reasonable facilities for travel without enforcing the order therein under investigation. In the Ohio case all trains up to three each way each day were required to stop. Ultimately the question of whether or not a particular police regulation is reasonable must be passed upon by the courts and in one case the Supreme Court held the regulation to stop unnecessary and, therefore, unreasonable. In the other, under the facts, the regulation was necessary and, therefore, reasonable. The Ohio case cites and discusses the authorities, and the conclusion of the opinion makes reference to the rule adopted subsequently in the Mississippi case. This conclusion is as follows:

"Our present judgment has reference only to the case before us, and when other cases arise in which local statutes are alleged not to be legitimate exertions of the police powers of the state, but to infringe upon national authority, it can then be determined whether they are to be controlled by the decision now rendered. It would be impracticable, as well as unwise, to attempt to lay down any rule that would govern every conceivable case that might be suggested by ingenious minds."

The Mississippi case was followed upon similar facts.[99]

§ 22. **State Regulation of Carriers and Their Employees.**—A state statute requiring engineers to be examined and licensed is not void, although it may incidentally and remotely affect interstate commerce.[100]

A law of a state forbidding those affected with color blindness from acting as locomotive engineers is a valid exercise of the

[97] Gladson *v.* Minnesota, 166 U. S. 427, 41 L. Ed. 1064, 17 Sup. Ct. 627.

[98] Lake S. & M. S. R. Co. *v.* Ohio, 173 U. S. 285, 43 L. Ed. 702, 19 Sup. Ct. 465.

[99] Atlantic C. L. R. Co. *v.* Wharton, 207 U. S. 328, 52 L. Ed. 230, 28 Sup. Ct. 121; Herndon *v.* Chicago R. I. & P. R. Co., 218 U. S. 135, 54 L. Ed. 970, 30 Sup. Ct. 633.

[100] Smith *v.* Alabama, 124 U. S. 465, 31 L. Ed. 508, 8 Sup. Ct. 564, 1 I. C. R. 804.

state's police power.[101] In sustaining the above principle, Mr. Justice Field said:

"It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties and liabilities of employees and others on railway trains engaged in that commerce; and that such legislation will supersede any state action on the subject. But until such legislation is had, it is clearly within the competency of the state to provide against accidents on trains whilst within their limits. Indeed, it is a principle fully recognized by decisions of state and federal courts, that wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the states, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable."

Under this principle, a state law requiring a certain number of employees to a train, known as the Full Crew Law, is valid.[102] A law requiring an electric head light on engines has been held valid, although it is near the margin of the power of a state if it does not offend against the commerce clause of the federal Constitution.[103]

If a state can not regulate the employees of railroads in so far as they are engaged in intrastate commerce, they can not be regulated.[104]

Congress having in 1908 passed a second Employees' Liability

[101] Nashville, C. & St. L. R. Co. *v.* Alabama, 128 U. S. 96, 32 L. Ed. 352, 9 Sup. Ct. 28.

[102] Chicago, R. I. & P. Ry. Co. *v.* Arkansas, 86 Ark. 412, 111 S. W. 456; for note see 32 L. R. A. (N. S.) 22; Chicago, R. I. & P. Ry. Co. *v.* Arkansas, 219 U. S. 453, 55 L. Ed. 290, 31 Sup. Ct. 275. But a law of Texas prohibiting anyone from acting as a conductor on a railway train without previous service as a brakeman is void as a denial of the equal protection of the law. Smith *v.* Texas, 233 U. S. 630, 58 L. Ed. 1129, 34 Sup. Ct. 681; reversing same styled case, 63 Tex. Cr. App. 183, 146 S. W. 900.

[103] Atlantic C. L. R. Co. *v.* State of Georgia, 135 Ga. 545, 69 S. E. 725, 32 L. R. A. (N. S.) 20; same styled case, 234 U. S. 280, 58 L. Ed. 312, 34 Sup. Ct. 829.

[104] Howard *v.* Illinois C. R. Co., 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. 141. See a discussion of Smith *v.* Alabama and similar cases in dissenting opinion of Mr. Justice Moody.

Act, which is valid, the passage of that act removed that subject from the sphere of state action.[105] There being nothing in the federal laws to conflict therewith, it is within the power of a state legislature to require carriers to pay employees wages semi-monthly, although the carriers and employees are engaged in interstate commerce.[106]

Congress having acted upon the subject of the hours of labor of interstate railway employees,[107] the subject is beyond state control, and a state law fixing such hours for a shorter period than those fixed by the federal statute, is void.[108]

§ 23. **Blowing Whistle and Checking Speed at Crossings.**—In the absence of congressional action upon the same subject matter, states may regulate "the manner in which interstate trains shall approach dangerous crossings, the signals which shall be given, and the control of the train which shall be required under such circumstances. Crossings may be so situated in reference to cuts or curves as to render them highly dangerous to those using the public highways. They may be in or near towns or cities, so that to approach them at a high rate of speed would be attended with great danger to life or limb. On the other hand, highway crossings may be so numerous and so near together that to require interstate trains to slacken speed indiscriminately at all such crossings would be practically destructive of the successful operation of such passenger trains. Statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation, but also a direct burden upon interstate commerce, and therefore beyond the power of the state to enact."

This quotation clearly and authoritatively gives the general

[105] For a discussion of this Act see *post*, Sec. 332; see also Northern Pac. Ry. Co. *v.* Washington, 222 U. S. 370, 56 L. Ed. 237, 32 Sup. Ct. 160; North Carolina R. R. Co. *v.* Zachary, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305; reversing same styled case, 156 N. C. 496, 72 S. E. 858; Erie R. R. Co. *v.* Williams, 233 U. S. 685, 58 L. Ed. 1155, 34 Sup. Ct. 761; affirming same styled case 199 N. Y. 525, 92 N. E. 1084, 136 App. Div. 902, 120 N. Y. Sup. 1023.

[106] State *v.* Missouri Pac. R. Co., 242 Mo. 339, 147 S. W. 118.

[107] Appendix F, Sec. 331, *post*.

[108] Erie R. Co. *v.* New York, 233 U. S. 671, 58 L. Ed. 1149, 34 Sup. Ct. 756, reversing, Erie R. Co. *v.* New York, 198 N. Y. 369, 91 N. E. 849, 29 L. R. A. (N. S.) 240, 139 Am. St. Rep. 829, 19 Ann. Cas. 811.

rule, the application of which to a Georgia statute requiring an interstate carrier to check its trains at public crossings resulted in a holding that the statute was valid.[109] Such holding, however, must be limited to the facts of that case and the decision is not authority for the principle that the power of the state in this respect is unlimited.

This principle sustains those state statutes requiring cattle guards under reasonable rules and regulations.

§ 24. **Furnishing Cars for the Receipt and Delivery of Shipments.**—Prior to the passage of the Hepburn Act,[110] the Texas legislature passed a law prescribing rules under which carriers should furnish cars to shippers. A penalty was fixed as follows:

"When cars are applied for under the provisions of this chapter, if they are not furnished the railway company so failing to furnish them shall forfeit to the party or parties so applying for them the sum of $25 per day for each car failed to be furnished, to be recovered in any court of competent jurisdiction, and all actual damages such applicant may sustain."

The only excuse which the carrier could give to escape the penalty was "strikes or other public calamity." The Texas Court of Civil Appeals having sustained a judgment for a penalty under the statute,[111] the cause was appealed to the Supreme Court, and that court determined the question of whether the regulation was reasonable, as it had a right to do, the regulation affecting interstate commerce. The Texas statute was held void as being an unreasonable regulation of interstate commerce. Mr. Justice Brown, delivering the opinion said:[112]

"While there is much to be said in favor of laws requiring railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length, and frequency of stops, for the heating, lighting, and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute re-

[109] So. Ry. Co. *v.* King, 217 U. S. 524, 533, 534, 54 L. Ed. 868, 30 Sup. Ct. 594.

[110] *Post*, Secs. 335 to 338.

[111] Houston & T. C. R. Co. *v.* Mayes, 36 Tex. Civ. App. 606, 609, 83 S. W. 53, 55.

[112] Houston & T. C. R. Co. *v.* Mayes, 201 U. S. 321, 50 L. Ed. 772, 26 Sup. Ct. 491. See also, So. Ry. Co. *v.* Melton, 133 Ga. 277, 65 S. E. 665.

quirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the state, and amounts to a burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states, or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather."

Had the regulation allowed all proper excuses for failing to furnish the cars, it would have been reasonable and, therefore valid. In concluding the opinion, Mr. Justice Brown said:

"Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature."

The Texas courts have held that the law discussed above was valid as to intrastate commerce.[113]

§ 25. **Same Subject. Rule Since Hepburn Act.**—In Southern Railway Co. *v.* Reid,[114] a statute of the State of North Carolina requiring that freight be received, when tendered, and forwarded by a route selected by the shipper under penalty of $50 a day and actual damages, was held invalid when applied to an interstate shipment. This decision was placed upon the ground that there was a conflict between the federal and the state statutes, although the court cited the Mayes case, *supra*, and pointed out that the state statute and the state decisions relating thereto left no doubt as to what excuses or defenses might be offered for a failure to comply with the law. In the course of the opinion, Mr. Justice McKenna took occasion to describe the wide scope of the Acts to Regulate Commerce. He said (p. 440):

[113] Allen *v.* Tex. & P. Ry. Co., 100 Tex. 825, 101 S. W. 792, reversing same styled case, Tex. Civ. App., 98 S. W. 450; Texas & P. Ry. Co. *v.* Taylor, 42 Tex. Civ. App. 331, 118 S. W. 1097; Texas & P. Ry. Co. *v.* Andrews, 54 Tex. Civ. App. 418, 118 S. W. 1101, 55 Tex. Civ. App. 302.

[114] So. Ry. Co. *v.* Reid, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. 140.

"There is scarcely a detail of regulation which is omitted to secure the purpose to which the Interstate Commerce Act is aimed. It is true that words directly inhibitive of the exercise of state authority are not employed, but the subject is taken possession of."

In the Hardwick Elevator case[115] the Chief Justice, after referring to Sections 1, 8, 9 and 10[116] of the Act to Regulate Commerce as amended by the Hepburn Act, said:

"As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the state had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the state over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme."

The application of this principle to the Minnesota Reciprocal Demurrage Law there involved resulted in holding that law void. The state court held that the law applied to both interstate and intrastate commerce and that the regulation was valid and within the principle that Congress not having acted, the state might.[117] The principle was not denied by the Supreme Court, but it was held that Congress had acted, and that as Congress had covered the whole field the state was thereby rendered "impotent to deal with a subject over which it had no inherent but only permissive power."

[115] Chicago, R. I. & P. Ry. Co. *v.* Hardwick Farmers Elevator Co., 226 U. S. 426, 57 L. Ed. 284, 33 Sup. Ct. 174; Sec. 22, *supra*. Sec. 306 first edition was cited in the argument in this case, p. 431.

[116] *Post*, §§ 335, 338, 382, 383. For regulation of demurrage charges by the Int. Com. Com. see: Wilson Prod. Co. *v.* Penn. R. Co., 16 I. C. C. 116, 121; Peale, Peacock & Kerr *v.* Cent. R. Co. of N. J., 18 I. C. C. 25, 35; Re demurrage Investigation, 19 I. C. C. 496, 498; Lehigh Valley R. Co. *v.* United States, 188 Fed. 879, 887.

[117] Hardwick Elevator Co. *v.* Chicago, R. I. & P. R. Co., 110 Minn. 25, 124 N. W. 819, 9 Ann. Cas. 1088.

Following the Elevator case, the Supreme Court has held void a Mississippi regulation concerning the "delivery of cars at the termination of interstate commerce transportation," [118] and an Arkansas statute relating to reciprocal demurrage.[119]

The states may not regulate rates "on that part of interstate carriage which includes the actual placing of the shipment into vessels ready to be carried beyond the state." [120]

A state may regulate the parking of taxicabs and the rate of charges within the state, although at times such vehicles may be used in interstate commerce.[121]

There is nothing in the federal law which would make invalid a state law which permits the recovery of damages for failure to deliver or transport interstate freight in a reasonable time, such law being merely a statement of the common law on the subject and being in no way in conflict with any provision of the Act to regulate commerce.[122]

[118] Yazoo & M. V. R. Co. *v.* Greenwood Grocery Co., 227 U. S. 1, 57 L. Ed. 389, 33 Sup. Ct. 213, reversing same styled case, 96 Miss. 403, 51 So. 450.

[119] St. Louis, I. M. & S. Ry. *v.* Edwards, 227 U. S. 265, 57 L. Ed. 506, 33 Sup. Ct. 26; see also Arkansas statute as to distribution of cars, St. Louis Ry. Co. *v.* Arkansas, 217 U. S. 136, 54 L. Ed. 698, 30 Sup. Ct. 476.

[120] Oregon R. R. Com. *v.* Worthington, 225 U. S. 101, 56 L. Ed. 1087, 32 Sup. Ct. 653. Requiring double decked cars on interstate shipments is an illegal regulation by a state; Stanley *v.* Wabash, St. L. & P. R. Co., 100 Mo. 435, 13 S. W. 709, 8 L. R. A. 549, where is found numerous citations of authorities.

[121] Yellow Taxicab Co. *v.* Gaynor (Taxicab cases), 82 Misc. R. 94, 143 N. Y. Supp. 279.

[122] Western & A. R. Co. *v.* Summerour, 139 Ga. 545, 77 S. E. 802; Oliver *v.* Chicago, R. I. & P. R. Co., 89 Ark. 466, 117 S. W. 238, holding law valid as to intrastate and invalid as to interstate commerce; Yazoo & M. V. R. Co. *v.* Keystone Lumber Co., 90 Miss. 391, 43 So. 605, no interstate commerce was here moved; Zetterberg *v.* Great N. Ry. Co., 117 Minn. 495, 136 N. W. 295, decided before Hardwick Elevator case, note, *supra*. Statutes providing penalties for unreasonable delay of intrastate shipments valid, Lexington Grocery Co. *v.* So. Ry. Co., 136 N. C. 396, 48 S. E. 801; Stone *v.* Atlantic C. L. Ry. Co., 144 N. C. 220, 56 S. E. 932, and cases cited; Rollins *v.* Seaboard A. L. Ry., 146 N. C. 218, 59 S. E. 671; but carrier relieved if conditions causing delay reresult from causes for which it is not responsible, Garrison *v.* So. Ry. Co., 150 N. C. 575, 64 S. E. 578. Discrimination in the order of shipments prohibited: Hill & Morris *v.* St. L. S. W. Ry. Co. of Texas, 75 S. W. 874, reversed

A municipal ordinance compelling an express company to give a bond conditioned "for the safe and prompt delivery of all baggage," etc., intrusted to it or its agents, in so far as it applied to interstate commerce was held to be void, because as said in the opinion of the court: "Congress has exercised its authority and has provided its own scheme of regulation." [123]

A state statute which merely required a railroad company to furnish cars within a reasonable time after demand and which, as construed, left the question of what was a reasonable time to be determined in view of the requirements of interstate commerce, is not a direct burden thereof and is valid. This statute is nothing but a statement of the carrier's common law duty to furnish the necessary equipment enabling it to perform its undertaking of public transportation.[124]

§ 26. **Same Subject. Rule Established.**—Where a state statute or regulation conflicts with a federal regulation affecting interstate commerce, the state law is void. In the absence of a federal statute the states may not make regulations directly burdening interstate commerce. Congress has taken possession of the field of regulation as to the receipt and delivery of freight moving in interstate commerce and no direct control with reference thereto can be exercised by state authority. Any regulation by a state of an interstate carrier affects to some extent interstate commerce, and it is clearly intimated by Mr. Justice Hughes in the Minnesota Rate Cases, *supra*, that Congress might so extend the scope of federal regulation as to exclude even this remote effect of state legislation. But in the same cases it was shown that Congress has not as yet exercised the full power that it might under the Constitution of the United States and that the proviso exempting intrastate commerce from the Acts to Regulate Commerce leaves a field for state action.[125] The Commerce Acts

on the construction of the statute, St. L. S. W. Ry. Co. of Texas *v.* Hill & Morris, 97 Tex. 506, 80 S. W. 368; Tex. C. R. Co. *v.* Hannay-Frerichs & Co., Tex. Civ. App., 130 S. W. 250. Delay caused by not shipping on Sunday no ground for recovering penalty, Cram *v.* Chicago, B. & Q. R. Co., 84 Neb. 607, 122 N. W. 31, rehearing denied 123 N. W. 1045, 26 L. R. A. (N. S.) 1028, 19 Ann. Cas. 170.

[123] Barrett *v.* New York, 232 U. S. 14, 58 L. Ed. 483, 34 Sup. Ct. 203, reversing same styled case, 183 Fed. 793, 189 Fed. 268.

[124] Ill. C. R. Co. *v.* Mulberry Hill Coal Co., 238 U. S. 275, 59 L. Ed. —, 35 Sup. Ct. 760.

[125] For proviso, see Sec. 336, *post*.

amendatory and supplementary are not so inclusive nor so exclusive as are the laws relating to the rights and protection of employees,[126] and the decision under the Employees Protective Acts go further than they do under the commerce regulating acts. The decision relating to furnishing cars and holding state statutes on the subject illegal do not go so far as to hold that a state may not legislate as to the furnishing and the delivery of cars used in the shipment of freight between points in the state. But, while there is left to the states a power of regulation as to intrastate transportation, such power must not be exercised in a way to burden interstate transportation.

A state may not require that cars be furnished for intrastate commerce when the requirement would, if obeyed, prevent a carrier from furnishing cars for interstate commerce in like proportion. The state regulation must not discriminate in favor of intrastate commerce or against interstate commerce.

These principles were illustrated by the decision of the Supreme Court in Hampton *v.* St. Louis I. M. & S. Ry. Co.,[127] where a law of Arkansas was involved requiring an interstate carrier to furnish cars on demand, the section of the law making the requirement concluding with the proviso:

"Interstate railroads shall furnish cars on application for interstate shipments the same in all respects as other cars to be furnished by intrastate railroads under the provisions of this Act."

The Supreme Court of the state said:[128]

"The failure to furnish cars under the terms of the act under investigation will establish *prima facie* a breach of duty on the part of the railroad companies. This will not preclude their right to set up such defense as will excuse or justify the failure. That a fair division of cars with interstate business made it impossible to answer all demands made for cars for intrastate business would apparently be within the limit of proper defenses in

[126] Employers' Liability Acts, Sec. 332, *post.*

[127] Hampton *v.* St. L. I. M. & S. Ry. Co., 227 U. S. 456, 57 L. Ed. 596, 33 Sup. Ct. 263, reversing St. L. I. M. & S. Ry. Co. *v.* Hampton, 162 Fed. 693.

[128] Oliver *v.* Chicago, R. I. & P. Ry. Co., 89 Ark. 466, 470, 117 S. W. 238. See also Proctor & Gamble *v.* United States, 225 U. S. 282, 286, 56 L. Ed. 1091, 32 Sup. Ct. 761.

cases of demands too unusual to be foreseen; and, viewed in this way, the act is relieved of the imputation of burdening interstate commerce."

Mr. Justice Lurton, speaking for the Supreme Court of the United States, said that the proviso probably meant no more than that there should be "no discrimination against demands for cars for interstate shipments," but should the act be construed "as extending the act so as to regulate the furnishing of cars for interstate shipments, it would be invalid by reason of the provisions of the Hepburn Amendment to the Act to Regulate Commerce of June 29, 1906."

Construing the act as applying only to intrastate commerce and as permitting the defenses stated by the court of the state, the Supreme Court held that, under the pleadings, the agreement of the parties and the ruling of the court below, there was no showing by the railroad "that in the operation of the act interstate commerce has been illegally restrained or burdened, or that any defense which it may have for the neglect to comply with the provisions of the act as to furnishing cars has been or will be denied by virtue of its obligation as an interstate railroad," and that the act should not have been enjoined.[129]

Bills of lading are but contracts for carriage, and when they refer to interstate transportation the federal government may make regulations with reference thereto, and when the transportation is intrastate the regulations are within the power of the states.[130]

§ 27. **Requirements as to Accounting and Reports.**—The Interstate Commerce Commission has the statutory power to require of carriers within its jurisdiction to keep such accounts as may be prescribed and make reports to the Commission upon certain prescribed forms.[131] These statutory requirements are valid.[132] As all, or at least practically all, carriers within the ju-

[129] See Mulberry Hill Coal Co. case, Sec. 25, *supra*.

[130] Bills of Lading, 29 I. C. C. 417.

[131] Sec. 433, *post*. Separation of Operating Expenses, 30 I. C. C. 676.

[132] Kansas C. S. Ry. Co. *v.* United States, 231 U. S. 423, 58 L. Ed. 296, 34 Sup. Ct. 125; Interstate Com. Com. *v.* Goodrich Transit Co., 224 U. S. 194, 211, 56 L. Ed. 729, 32 Sup. Ct. 436. See the Commission's discussion of the question in the Twenty-seventh Annual Report of the Interstate Commerce Commission, pp. 37, 38.

risdiction of the Interstate Commerce Commission are at the same time engaged in both interstate and intrastate commerce, these accounts and reports must of necessity include matter relating to each kind of commerce.

It is frequently necessary to consider the cost of both interstate and intrastate commerce in order to determine what is a fair rate on either.

The United States Supreme Court has stated the reasons for the federal statute as follows:[133]

"It is true that the accounts required to be kept are general in their nature and embrace business other than such as is necessary to the discharge of the duties required in carrying passengers and freight in interstate commerce by joint arrangement between the railroad and the water carrier, but the Commission is charged under the law with the supervision of such rates as to their reasonableness and with the general duty of making reports to Congress which might require a knowledge of the business of the carrier beyond that which is strictly of the character mentioned. If the Commission is to successfully perform its duties in respect to reasonable rates, undue discriminations and favoritism, it must be informed as to the business of the carriers by a system of accounting which will not permit the possible concealment of forbidden practices in accounts which it is not permitted to see and concerning which it can require no information. It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in their accounts, is a regulation of business not within the jurisdiction of the Commission, as seems to be argued for the complainants. The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act that it may property regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business."

Consistent with this holding is the decision of the Court of Civil Appeals of Texas, that the state may require that carriers

[133] Interstate Com. Com. *v.* Goodrich Transit Co., *supra.*

as to intrastate commerce shall keep accounts supplementary to those required by the Interstate Commerce Commission.[134]

§ 28. **Transmission and Delivery of Telegraph and Telephone Messages.**—That companies engaged in the telegraph and telephone business are, where their lines extend from one state to another, engaged in interstate commerce is undisputed,[135] and Congress has legislated expressly including such within the Acts relating to commerce.[136]

Prior to the Act of 1910 enlarging the scope of the Act to Regulate Commerce, state statutes regulating the delivery of telegraph messages had been before the Supreme Court. The Indiana statute regulating interstate messages sent from as well as into the state was held void because the state law could "not extend to the delivery of messages in other states." [137]

The Georgia statute providing a penalty for failure to receive and deliver in the state telegraph messages was held valid although applicable to interstate messages.[138]

A Michigan statute which prevented the telegraph company from contracting to relieve itself from its common law liability merely gave sanction to an inherent duty, and the statute was held not to be void under the commerce clause of the Constitution of the United States.[139]

A state law relating to the delivery of a telegram and providing a penalty was held void when the default occurred within a navy

[134] R. R. Com. of Texas *v.* Texas & P. Ry. Co., Tex. Civ. App., 140 S. W. 829. To the same effect see R. R. Com. of Miss. *v.* Gulf & S. I. R. Co., 78 Miss. 750, 29 So. 789; People *v.* Joline, 65 Misc. Rep. 394, 121 N. Y. Supp. 857. But without statutory authority a commission may not require reports by telegraph. State *v.* Louisville & N. R. Co., 57 Fla. 526, 49 So. 39.

[135] Sec. 2, note 2, *supra*; Western Union Tel. Co. *v.* Crovo, 220 U. S. 364, 55 L. Ed. 498, 31 Sup. Ct. 399; Western Union Tel. Co. *v.* Pendleton, 122 U. S. 347, 30 L. Ed. 1187, 7 Sup. Ct. 1126; Western Union Tel. Co. *v.* James, 162 U. S. 650, 40 L. Ed. 1105, 16 Sup. Ct. 934; Western Union Tel. Co. *v.* Commercial Milling Co., 218 U. S. 403, 416, 54 L. Ed. 1088, 31 Sup. Ct. 59; Postal Tel.-Cable Co. *v.* City of Mobile, 179 Fed. 955, and cases cited at page 960.

[136] Act 1910, Secs. 335, 340, *post*; Shoemaker *v.* Chesapeake & P. Telephone Co., 20 I. C. C. 614.

[137] Western Union Tel. Co. *v.* Pendleton, *supra*.

[138] Western Union Tel. Co. *v.* James, *supra*.

[139] Western Union Tel. Co. *v.* Commercial Milling Co., *supra*.

yard,[140] although the same law when delivery was made in the territory within the jurisdiction of the state was, in an opinion following the Georgia and Michigan cases, *supra,* held valid.[141]

In the last cited case the court said:

"The requirement of the Virginia statute as here applied is a valid exercise of the power of the state in the absence of legislation by Congress. It is neither a regulation of nor a hindrance to interstate commerce, but is in aid of that commerce."

Similiar language calling attention to the "absence of legislation by Congress" appears in the cases relating to the Georgia and Michigan statutes. As the Amendment of 1910 says that *"telegraph, telephone and cable companies (whether wire or wireless)* engaged in sending messages from one state, territory, or district of the United States to any other state, territory, or district of the United States or to any foreign country, * * * shall be considered and held to be common carriers within the meaning and purpose of this Act," there is legislation by Congress and it would seem that the decisions relating to the delivery of interstate freight, sections *supra,* would be applicable to interstate messages, and that state laws regulating the receipt and delivery of telegrams and telephone messages from points in one state to points in another are void.

§ 29. **Separate Coach Laws.**—The statute of Louisiana, which, as construed by the courts of that state, compelled common carriers to receive, in apartments set aside for whites only, negro passengers, was held by the Supreme Court to be invalid in so far as it affected interstate commerce.[142] The court quoted from the opinion of Mr. Justice Field, in Welton *v.* Missouri,[143] to the effect that, "inaction (by Congress) * * * is equivalent to a declaration that interstate commerce shall remain free and untrammeled," and said:

"Applying that principle to the circumstances of this case, congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or with-

[140] Western Union Tel. Co. *v.* Chiles, 214 U. S. 274, 53 L. Ed. 994, 29 Sup. Ct. 613.

[141] Western Union Tel. Co. *v.* Crovo, *supra.*

[142] Hall *v.* DeCuir, 95 U. S. 5 Otto 485, 24 L. Ed. 547.

[143] Welton *v.* Missouri, 91 U. S. 275, 282, 23 L. Ed. 347, 350.

out, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the state court, seeks to take away from him that power so long as he is within Louisiana; and while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly established, we think this statute, to the extent that it requires those engaged in the transportation of passengers among the states to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void."

While this decision has been criticised by text book writers, it is sound in principle. Carriers may not unjustly discriminate between those who patronize them, but they are free, subject to that rule and the further one that charges must not be unreasonable, to regulate the general conduct of their business. It can not be held an unjust discrimination to require whites and negroes to ride in separate compartments of a public conveyance, the accommodations being equal. For the negro to contend that he is discriminated against in favor of the white man would be a contention on his part of inferiority to the white man. The separation of equals discriminates in favor of neither. Whatever may be said as to the actual inferiority of the negro, he is, under the law, entitled to equal rights with the other races.

The state of Mississippi has a law requiring railroads carrying passengers to give "separate accommodations to white and colored races," by furnishing either separate coaches or separate compartments in the same coach. The law was construed by the state courts as applying only to commerce within the state. The Supreme Court of the United States held the law valid.[144] The decision is in harmony with the case of Hall *v.* DeCuir, *supra*. In the Louisiana case the regulation affected interstate commerce and was invalid; in the Mississippi case the regulation did not affect interstate commerce and was valid. In the Mississippi case the court said:

"The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits

[144] Louisville, N. O. & T. Ry. Co. *v.* Mississippi, 133 U. S. 587, 33 L. Ed. 784, 10 Sup. Ct. 348, 2 I. C. R. 801. The case in the Supreme Court of Mississippi was styled Louisville, N. O. & T. Ry. Co. *v.* Mississippi, 66 Miss. 662, 5 L. R. A. 132, 6 So. 203, 2 I. C. R. 615, 14 Am. St. Rep. 509.

of the territory of the state, and is not commerce among the states, or interstate commerce, but is exclusively commerce within the state. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the states. It has often been held in this court, and there can be no doubt about it, that there is a commerce wholly within the state, which is not subject to the constitutional provision, and the distinction between commerce among the states and the other classes of commerce between citizens of a single state, and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other."

Louisiana subsequently passed a separate coach law, which the Supreme Court sustained, as it affected only commerce in that state.[145]

A similar law in Kentucky was also sustained by the Supreme Court.[146]

A state statute requiring the separation of interstate passengers would be void as an attempt to regulate interstate commerce, but, as said in Hall *v.* DeCuir *supra*, Congress having failed to act, the subject of the separation of the races in interstate transportation is unregulated and interstate carriers are free to make such reasonable rules with reference thereto as they see fit; reasonable including the requirement that there be no discrimination in the accommodation.[147]

A statute of Oklahoma applying to intrastate travel, in so far as it gave equal, although separate accommodation to passengers, members of the white and negro races, was held valid by the

[145] Plessy *v.* Ferguson, 163 U. S. 537, 41 L. Ed. 256, 16 Sup. Ct. 1138.

[146] Chesapeake & O. Ry. Co. *v.* Kentucky, 179 U. S. 388, 45 L. Ed. 244, 21 Sup. Ct. 101. See also Edwards *v.* N. C. & St. L. Ry. Co., 12 I. C. C. 247; Gaines *v.* Seaboard A. L. Ry. Co., 16 I. C. C. 471; Cozart *v.* So. Ry. Co., 16 I. C. C. 226.

[147] Chiles *v.* Chesapeake & O. R. Co., 218 U. S. 71, 54 L. Ed. 936, 30 Sup. Ct. 667; Hall *v.* DeCuir, *supra*, is cited in Simpson, et al., R. R. Com. of Minnesota *v.* Shepard, 230 U. S. 352, 432, 433, 57 L. Ed. 1511, 33 Sup. Ct. 729.

Supreme Court, and in so far as it provided accommodations for whites not accorded to negroes, it was held to be invalid.[148]

§ 30. **Posting Time of Trains.**—A statute of the state of Indiana requiring all railroads to "cause to be placed in a conspicuous place in each passenger depot of such company located at any station in this state at which there is a telegraph office, a blackboard at least three feet long and two feet wide, upon which such company or person shall cause to be written, at least twenty minutes before the schedule time for the arrival of each passenger train stopping upon such route at such station, the fact whether such train is on schedule time or not, and if late, how much," and providing a penalty for violating the regulation, is within the legislative power. It is true that the regulation may apply to the time of an interstate train, but the matter is one of local concern, one upon which Congress has not acted, and one which does not directly affect interstate commerce.[149] If, however, the regulation is unreasonable, or is made by a commission without a finding of facts or evidence showing the relation between the receipts and the expense, it is void.[150]

§ 31. **Laws to Promote the Security and Comfort of Passengers.**—States may protect the personal security of those who are passengers on cars used within their limits. Under this principle, a law of New York prescribing how passenger cars should be heated, was, in the absence of national regulation on the subject, valid. This was true, although the regulation incidentally affected interstate commerce.[151]

The statute requiring passenger cars to be heated, *supra*, was relied upon to sustain the Georgia statute requiring engines to be equipped with electric head lights. Since the Supreme Court

[148] McCabe *v.* A. T. & S. F. Ry. Co., 235 U. S. 151, 59 L. Ed. , 35 Sup. Ct. 69.

[149] State *v.* Indiana & I. S. Ry. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502; State *v.* Cleveland, C. C. & St. L. Ry. Co., 157 Ind. 288, 61 N. E. 669. Posting a tariff of rates would be governed by the same principles. Johnson *v.* Seaboard A. L. Ry. Co., 78 S. C. 361, 52 S. E. 644.

[150] Kansas C. S. Ry. Co. *v.* State, 27 Okla. 806, 117 Pac. 207; St. Louis & S. F. R. Co. *v.* Newell, 25 Okla. 502, 106 Pac. 818.

[151] New York, N. H. & H. R. Co. *v.* New York, 165 U. S. 628, 41 L. Ed. 853, 17 Sup. Ct. 418. In a note to the decision will be found cited a large number of cases sustaining the general principle involved in the statement of law in this section.

sustained the New York law, *supra*, Congress has passed several statutes relating to safety appliances, and even though after the passage of these statutes the heating law might be sustained, it would seem that the electric headlight law, in so far as it applies to a locomotive engaged in interstate commerce, would be void.[152]

This contention was urged before the Supreme Court of the United States; but that court held that the Georgia statute was valid. In the course of the opinion reference was made to the different Federal Safety Appliance Acts, and it was stated that none of these acts referred to headlights, and said the court, "The intent to supersede the exercise of the state's police power with respect to this subject, can not be inferred from the restrictive action which thus far has been taken."[153] This appears a somewhat narrow view. Congress has prescribed certain regulations as to the equipment of railway locomotives used in interstate transportation. Presumably such regulations are all that in the opinion of Congress are necessary. The fact that Congress has not prescribed regulations for each part of the locomotive does not indicate that the "possession of the field" has not been taken. A state law should not lightly be set aside, every presumption should be indulged in favor of its validity, but state regulations of the same instrumentality of commerce that has been regulated by Congress, although of a different part of such instrumentality, does invade the field already occupied by federal regulation, and in which, as has so frequently been said by the Supreme Court, the national authority is paramount and indivisible. The decision of the Supreme Court holding void the statute of the state of Indiana requiring grab-irons and hand-holds on cars, seems to accord with the text.[154]

§ 32. **Laws Limiting or Enlarging the Common Law Liability of Carriers.**—The question of the right of a railroad com-

[152] Atlantic C. L. R. Co. *v.* State, 135 Ga. 545, 69 S. E. 725, 32 L. R. A. (N. S.) 20, citing People *v.* N. Y., etc., R. Co., 55 Hun. 409, 608 (8 N. Y. S. 673); N. Y., etc., R. Co. *v.* New York, 165 U. S. 628, 41 L. R. A. 853, 17 Sup. Ct. 418. See Safety Appliance Laws, Appendix, B et seq.

[153] Atlantic C. L. R. Co. *v.* Georgia, 234 U. S. 280, 58 L. Ed. 1312, 34 Sup. Ct. 829.

[154] So Ry. Co. *v.* Railroad Com. of Ind., 236 U. S. 439, 59 L. Ed. —, 35 Sup. Ct. 304.

pany to limit by contract its common law liability as a carrier is one of general law upon which the Supreme Court of the United States will exercise its judgment. It is none the less within the province of the states and any state may pass laws on the subject. Therefore, as to transportation within a state, the legislature of that state may provide that a contract of a common carrier by which it exempts itself from its common law liability is void.[155]

The statute of Virginia provides:

"When a common carrier accepts for transportation anything directed to a point of destination beyond his own line he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent."

Suit was brought against the carrier issuing the bill of lading to recover for the loss of goods shipped from Virginia to Louisiana. The carrier depended on a clause in its bill of lading, not signed by the shipper, exempting it from liability for loss beyond its own line. The shipper relied on the statute, which statute was sustained by the Supreme Court.[156] Section twenty of the act to regulate commerce, it will be remembered, contains a clause similar to the Virginia law, *supra*.

A law of Missouri similar to the Virginia law was also sustained by the Supreme Court of the United States.[157]

The refusal of a state court to hold valid a provision of a bill of lading limiting the carrier's liability to a stated sum does not violate any of the provisions of the interstate commerce act.[158]

A provision of the law of Georgia, applicable both to interstate and intrastate commerce, that a carrier, in order to exempt itself from liability beyond its own line, should inform the shipper, in writing, when, where and how and by which carrier the freight was lost or damaged was held invalid by the Supreme Court.[159] The Georgia case is distinguished from the Virginia

[155] Chicago, M. & St. P. Ry. Co. *v.* Solan, 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. 289. See notes L. Ed. cited.

[156] Richmond & A. R. Co. *v.* Patterson, 169 U. S. 311, 42 L. Ed. 759, 18 Sup. Ct. 335.

[157] Missouri, K. T. Ry. Co. *v.* McCann, 174 U. S. 580, 43 L. Ed. 1093, 19 Sup. Ct. 755.

[158] Penn. R. Co. *v.* Hughes, 191 U. S. 477, 48 L. Ed. 268, 24 Sup. Ct. 132.

case, note [159] *supra*, although the Virginia case required the carrier to show that the loss did not occur on its own line, when the shipper had signed a contract which limited the liability of the carrier to its own line. It would, therefore, seem that the Georgia law is just a little beyond the boundary line that marks the difference between a reasonable and an unreasonable regulation. In considering the Virginia case the court said:

"These views dispose of the substantial questions which the case presents, for the contention which arises on the concluding sentences of the statute, imposing upon a carrier a duty where the loss has not happened on the carrier's own line to inform the shipper of this fact, is but a regulation manifestly within the power of the state to adopt."

Subsequent to the decision of the Supreme Court of the United States, the Supreme Court of Georgia held that the Georgia statute applied only to intrastate commerce and so limited was valid.[160]

A law of Kansas requiring that weights be specified in bills of lading and that the weight so specified should be conclusive, was held not to violate the commerce clause of the Constitution of the United States, but to be void as denying due process of law.[161] As to shipments in interstate commerce, such law would be void since the legislation extending the acts to regulate commerce.

While prior to the Hepburn Act a legislative prohibition of any contract in a bill of lading limiting the time in which to sue to less than two years was held valid as to an interstate shipment, such state law it is believed is now invalid when applied to interstate commerce.[162]

[159] Cent. of Ga. R. Co. *v.* Murphey, 196 U. S. 194, 49 L. Ed. 444, 25 Sup. Ct. 218, reversing same case, 116 Ga. 863, 43 S. E. 265, 60 L. R. A. 817.

[160] So. Ry. Co. *v.* Ragsdale, 119 Ga. 773, 47 S. E. 179; Davis *v.* Seaboard A. L. Ry. Co., 136 Ga. 278, 71 S. E. 419; Seaboard A. L. Ry. Co. *v.* Davis, 139 Ga. 547, 77 S. E. 795.

[161] Missouri, K. & T. Ry. Co. *v.* Simonson, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765, citing Gulf, C. & S. F. Ry. Co. *v.* Dwyer, 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478.

[162] Reeves *v.* Tex. & P. R. Co., Tex. Civ. App., 32 S. W. 920; Gulf, C. &. S. F. Ry. Co. *v.* Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161; Missouri, K. & T. Ry. Co. *v.* Withers, 16 Tex. Civ. App. 506, 40 S. W. 1073.

It is true that the so-called Carmack Amendment contained in the Hepburn Act, relates to limitations of liability and not limitations as to time in which to sue, but the subject of the contract for interstate shipments is included within the amendment, and it may well be argued that now Congress has taken possession of the field. The question has not been determined, but it would seem that an "interstate contract of shipment * * * is withdrawn from the field of state law." [163]

§ 33. **Same Subject—Liability to Employees.**—The first Employers' Liability Act, that of June 11, 1906, chap. 3073, 34 Stat. L. 232, was declared by the Supreme Court of the United States to be unconstitutional, because, as construed, it applied not only to employees of carriers engaged in interstate, but also to employees of carriers engaged in intrastate commerce. Whether the act violated the Fourteenth Amendment was not decided, but reference was made to decisions of the court holding valid state laws making a special regulation as to a carrier's liability to its employees.

Later, on April 22nd, 1908, the present Employers' Liability Act was approved, and this act has been held valid by the Supreme Court.[164]

[163] Missouri, K. & T. R. Co. *v.* Harriman, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. 397; Kansas C. S. R. Co. *v.* Carl, 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. 391; Chicago R. I. & P. R. Co. *v.* Cramer, 232 U. S. 290, 58 L. Ed. 697, 34 Sup. Ct. 383, reversing same styled case, 153 Iowa 603, 133 N. W. 387. See Secs. 34 and 35, *post.*

[164] Employers' Liability Cases, Howard *v.* Illinois C. R. Co., 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. 141. Missouri P. R. Co. *v.* Mackay, 127 U. S. 205, 32 L. Ed. 107, 8 Sup. Ct. 1161; Minneapolis & St. L. R. Co. *v.* Herrick, 127 U. S. 210, 32 L. Ed. 109, 8 Sup. Ct. 1176; Chicago, K. & W. R. Co. *v.* Pontius, 157 U. S. 209, 39 L. Ed. 675, 15 Sup. Ct. 585. In Missouri P. R. Co. *v.* Castle, 224 U. S. 541, 56 L. Ed. 875, 32 Sup. Ct. 606, a State Employers' Liability Act passed prior to Act 1908 was held valid. See also Tullis *v.* Lake E. R. Co., 175 U. S. 348, 44 L. Ed. 192, 20 Sup. Ct. 136; Louisville & N. R. Co. *v.* Melton, 218 U. S. 36, 54 L. Ed. 921, 30 Sup. Ct. 676; Chicago, I. & L. Ry. Co. *v.* Kackett, 228 U. S. 559, 57 L. Ed. 966, 33 Sup. Ct. 581, and cases cited; Minnesota Rate Cases, 230 U. S. 352, at pp. 408, 409, 57 L. Ed. 1511, 33 Sup. Ct. 729. Mondou *v.* New York, N. H. & H. R. Co. (Second Employers' Liability Cases), 223 U. S. 1, 56 L. Ed. 327, 32 Sup Ct. 169, 38 L. R. A. (N. S.) 44. Act, 1906, *supra,* valid prior to 1908 as to territories: Gutierrez *v.*

In the labor laws of the United States, contained in the twenty-second annual report of the Commission of Labor, will be found all the state laws similar to the Federal Employers' Liability Act up to the time that report was prepared. Since then other states have passed laws applying to intrastate commerce substantially the same as that contained in the federal act. That the states may do this is clearly shown in Howard *v.* Illinois Central R. Co., note [164] *supra*. That these state laws are valid can, therefore, be safely assumed. It is always a question of fact, in each case, as to whether or not the commerce at the time an injury may occur is within the one or the other law. Questions of jurisdiction will also be determined upon the facts in each case. It tends, therefore, to harmony that the states are adopting the federal statute. The same carrier should not, in performing the same kind of service, be subjected to conflicting laws, merely because in one case the injury is caused by a car or train engaged in interstate commerce, while in the other such car or train is engaged in purely state commerce. In most cases, however, it will be found that the carrier is engaged in transporting interstate commerce. The act of Congress applies only to common carriers while engaged in interstate commerce and to employees while employed by such carriers in such commerce.[165]

§ 34. **Same Subject—Liability for Loss or Damage to Shipments.**—The carrier's contract to transport in interstate commerce is subject to regulation by the federal Government but, in the absence of Congressional action, may be regulated by the states.[166] Judge Powell, of the Court of Appeals of Georgia, in an opinion quoted by the Supreme Court of the United States, described the condition in apt language, as follows:[167]

El Paso N. E. R. Co., 215 U. S. 87, 54 L. Ed. 106, 30 Sup. Ct. 21. State law regulating hours of labor of interstate railroad employees invalid. Erie R. Co. *v.* New York, 233 U. S. 671, 58 L. Ed. 1149, 34 Sup. Ct. 756, but same law requiring payment of wages semi-monthly is valid: Erie R. Co. *v.* Williams, 233 U. S. 685, 58 L. Ed. 1155, 34 Sup. Ct. 761.

[165] Appendix K; Sec. 332, *post* discusses the scope of the federal statute.

[166] Penn. R. Co. *v.* Hughes, 191 U. S. 477, 48 L. Ed. 268, 24 Sup. Ct. 132.

[167] So. Pac. Co. *v.* Crenshaw, 5 Ga. App. 675, 687, 63 S. E. 865, quoted: Adams Ex. Co. *v.* Croninger, 226 U. S. 491, 505, 57 L. Ed. 314, 33 Sup. Ct. 148.

"Some states allowed carriers to exempt themselves from all or a part of the common law liability, by rule, regulation, or contract; others did not; the federal courts sitting in the various states were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from liability in another; hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own state, or for a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another."

To meet this situation Congress enacted what is called the Carmack Amendment,[168] which superseded all the regulations and policies of the states in so far as they related to interstate commerce. There is, however, a transportation which applies between points both within a state and which can be reached without going out of the state. As to such transportation Congress has not assumed to act, and contracts relating thereto are subject to state laws and regulations.[169] Therefore, states may legislate and the state commissions may make regulations relating to a carrier's liability on a contract of shipment in intrastate commerce.

[168] See Amendment, Sec. 439, *post*. Prior to a decision by the Supreme Court the state courts disagreed as to the construction of this amendment. See Post *v.* Atlantic C. L. R. Co., 138 Ga. 763, 76 S. E. 45, citing cases as follows: "On this subject there are two lines of authority. See Adams Ex. Co. *v.* Mellichamp, 138 Ga. 443, 75 S. E. 596; Hooker *v.* Boston & M. R. Co., 209 Mass. 598, 95 N. E. 945, 23 Ann. Cas. 699, and note; Travis *v.* Wells, Fargo & Co., 79 N. J. L. 83, 74 Atl. 444; Greenwald *v.* Weir, 130 N. Y. App. Div. 696, 115 N. Y. Supp. 311; In the matter of Released Rates, 13 I. C. C. 550, 552; Watkins on Shippers and Carriers, 1st. Ed., 267, Sec. 201; Galveston, etc., R. Co. *v.* Wallace, 223 U. S. 481, 491-2, 56 L. Ed. 516, 32 Sup. Ct. 205; St. Louis, etc., R. Co. *v.* Grayson, 89 Ark. 154, 115 S. W. 933.

[169] Simpson, et al, R. R. Com. of Minnesota *v.* Shepard, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729; see also Yazoo & M. V. R. Co. *v.* Jackson Vinegar Co., 226 U. S. 217, 57 L. Ed. 193, 33 Sup. Ct. 40; Johnson *v.* So. Ry. Co., 69 S. C. 322, 48 S. E. 260.

The Carmack Amendment being a valid law within the power of Congress to enact, the states can no longer legislate concerning the liability of carriers under interstate contracts of shipment.[170]

§ 35. **Penalties for Failure to Pay Claims.**—A law of South Carolina provided that should a carrier fail, within a time therein stated, to pay a claim for loss or damage, such carrier was subject to a penalty of fifty dollars. The law applied both to intrastate and interstate commerce, the time to settle being forty days in the former and ninety days in the latter. In a case in the Supreme Court of the United States involving an intrastate shipment where judgment had been entered for fifty dollars penalty and one dollar and seventy-five cents damages, the law was sustained.[171] Mr. Justice Brewer, delivering the opinion, said:

"Further, the matter to be adjusted is one peculiarly within the knowledge of the carrier. It receives the goods and has them in its custody until the carriage is completed. It knows what injury was done during the shipment, and how it was done. The consignee may not know what was in fact delivered at the time of the shipment, and the shipper may not know what was delivered to the consignee at the close of the transportation. The carrier can determine the amount of the loss more accurately

[170] Boston & M. R. Co. *v.* Hooker, 233 U. S. 97, 58 L. Ed. 868, 34 Sup. Ct. 526, reversing *contra* styled case, 209 Mass. 598, 95 N. E. 945, Ann. Cas. 1912B 669; Atchison T. & S. F. R. Co. *v.* Robinson, 233 U. S. 173, 58 L. Ed. 90, 34 Sup. Ct. 556, reversing same styled case, 36 Okla. 435, 129 Pac. 20; Charleston C. R. Co. *v.* Varnville Furniture Co., 237 U. S. 597, 59 L. Ed. —, 35 Sup. Ct. 715, reversing same styled case, 98 S. C. 63, 79 S. E. 700; American Brake Shoe & Foundry Co. *v.* Pere Marquette R. Co., 223 Fed. 1018.

[171] Seaboard A. L. Ry. Co. *v.* Seegers, 207 U. S. 73, 52 L. Ed. 108, 28 Sup. Ct. 28. Same case below, 73 S. C. 71; 52 S. E. 797. See also Best *v.* Seaboard A. L. Ry. Co., 72 S. C. 479, 52 S. E. 223; Yazoo & M. V. V. R. Co. *v.* Jackson Vinegar Co., 226 U. S. 217, 57 L. Ed. 193, 33 Sup. Ct. 40; So. Ry. Co. *v.* Love, 139 Ga. 362, 77 S. E. 44; Kansas C. S. Ry. Co. *v.* Anderson, 233 U. S. 825, 58 L. Ed. 993, 34 Sup. Ct. 599, affirming same styled case, 104 Ark. 500, 148 S. W. 58; Missouri K. & T. R. Co. *v.* Cade, 233 U. S. 642, 58 L. Ed. 113, 34 Sup. Ct. 678, following Missouri K. & T. R. Co. *v.* Mahaffey, 105 Tex. 394, 150 S. W. 881, and explaining Gulf C. & S. F. R. Co. *v.* Dennis, 224 U. S. 503, 56 L. Ed. 860, 32 Sup. Ct. 542.

and promptly and with less delay and expense than any one else, and for the adjustment of loss or damage to shipments within the state forty days can not be said to be an unreasonably short length of time."

The same statute was held valid when applied to an interstate shipment. The Supreme Court of South Carolina, discussing the statute thus sought to be applied, said:[172]

"The penalty imposed is for a delict of duty appertaining to the business of a common carrier, and in so far as it may affect interstate commerce, it is an aid thereto by its tendency to promote safe and prompt delivery of goods, or its legal equivalent —prompt settlement of proper claim for damages. No penalty can attach except upon the establishment in a court of a default of duty imposed by statute."

The Supreme Court of the United States quoted the language just copied in the opinion holding that the state statute was valid.

Such statutes when unreasonable are void, whether affecting interstate commerce or not, and so held of an Arkansas statute providing for heavy penalties, when the shipper recovered the amount for which he sued, although previous to his suit he had demanded a larger amount.[173]

In a case involving the validity of a Texas statute providing for attorneys' fees where judgments were rendered for loss of or damage to freight, it was urged that such statute affected interstate commerce, and was void because of conflict with the Carmack Amendment. This contention the Supreme Court met by saying: "But the Texas statute now under consideration does not in any way either enlarge or limit the responsibility of the carrier for the loss of property intrusted to it in transportation,

[172] Atlantic C. L. R. Co. *v.* Mazursky, 216 U. S. 122, 132, 54 L. Ed. 411, 30 Sup. Ct. 378, affirming same styled case, 78 S. C. 36, 58 S. E. 927, 125 Am. St. Rep. 762.

[173] St. Louis, I. M. & S. Ry. Co. *v.* Wynne, 224 U. S. 354, 56 L. Ed. 799, 32 Sup. Ct. 493. Followed in Chicago M. St. P. Ry. Co. *v.* Polt, 232 U. S. 165, 58 L. Ed. 554, 34 Sup. Ct. 301, reversing same styled case, 26 S. D. 378, 128 N. W. 472; Chicago M. & St. P. Ry. Co. *v.* Kennedy, 232 U. S. 626, 58 L. Ed. 762, 34 Sup. Ct. 463, reversing same styled case, 28 S. D. 94, 132 N. W. 802. Missouri K. & T. R. Co. *v.* Tucker, 230 U. S. 340, 57 L. Ed. 1507, 33 Sup. Ct. 961, reversing Tucker *v.* Mo. Kan. & Tex. R. Co., 82 Kan. 222, 108 Pac. 89.

and only indirectly affects the remedy for enforcing that responsibility." [174]

Congress has dealt with the contract in the Carmack Amendment. These penalty statutes, as stated by the Supreme Court, do not affect the contract but refer to the remedy for a breach thereof.[175]

This distinction must not be overlooked. In the Texas case *supra*, the loss for which suit was brought occurred on the line of the delivering carrier, and other than this presumption there was no evidence to show which of the carriers transporting the commodity caused the damage thereto. The Carmack Amendment gives a right of action against the initial carrier. So a later South Carolina judgment was reversed, [176] not because of the provision for the recovery of an attorney's fee, but because the right to recover both damages and attorney's fees was based upon a statute in conflict with the federal law. With this distinction in mind, the later South Carolina case is in harmony with the decision in the Texas case. In the South Carolina case, the Texas case and other cases are cited and the applicable principle stated as follows: [176] "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

§ 36. **Requiring Railroads to Perform Transportation Service.**—It is axiomatic that a common carrier is not at liberty to accept or decline shipments or to accept or decline the duty of transporting passengers. Reasonable rules as to the time, place and manner of receiving freight and passengers may be made by the carrier, but these are subject to the governmental power of regulation. The regulation of interstate transportation in this respect is for Congress, but the states have jurisdiction over intrastate transportation of persons and property.

[174] Missouri K. & T. R. Co. *v.* Harris, 234 U. S. 412, 58 L. Ed. 1377, 34 Sup. Ct. 790, and see cases cited affecting the question arising on state legislation and question arising under the Carmack Amendment.

[175] Sec. 32, *ante*.

[176] Charleston & W. C. Ry. Co. *v.* Varnville Furniture Co., 237 U. S. 597, 59 L. Ed. —, 35 Sup. Ct. 715.

These principles were stated by Mr. Justice Brewer, as follows:[177]

"The question we have to consider is the power of the state to enforce an equality of local rates as between all parties shipping for the same distance over the same road. That a state has such power can not be doubted, and it can not be thwarted by any action of a railroad company which does not involve an actual interstate shipment, although done with a view of promoting the business interests of the company. Even if a state may not compel a railroad company to do business at a loss and conceding that a railroad company may insist, as against the power of the state, upon the right to establish such rates as will afford reasonable compensation for the services rendered, yet when it voluntarily establishes local rates for some shippers it can not resist the power of the state to enforce the same rates for all."

Mr. Justice Hill, of the Supreme Court of Georgia, in holding valid a statute of that state preventing discrimination in the sale of passenger tickets by connecting carriers, showed how ancient is this right to regulate. He said:[178]

"The principle of the right of a state or government to regulate carriers and rates for public services performed is not new, but seems to date back to a very ancient period. So far as the writer's research extends, it goes at least as far back as 2250 years before the birth of Christ, to the reign of Hammurabi, the King of ancient Babylon, who had a complete code of laws for that time. Indeed, our laws of the present day have few underlying principles that do not seem to be contained in this primitive code."

§ 37. **Sale and Regulation of Passenger Tickets.**—The contract or ticket for transportation of a person over a railroad is subject, like the rate, to reasonable regulation. The power to regulate rests, as to travel among the states and with foreign countries, with the federal government; and, as to travel within one state, with the state government. As to those

[177] Ala. & V. R. Co. *v.* Mississippi R. R. Com., 203 U. S. 496, 501, 51 L. Ed. 289, 27 Sup. Ct. 163, affirming same styled case, 86 Miss. 667, 38 So. 356.

[178] Stephens *v.* Cent. of Ga. Ry. Co., 138 Ga. 625, 628, 629, 75 S. E. 1041, 42 L. R. A. (N. S.) 541, 1913E, Ann. Cas. 609.

contracts within their regulating power, the states may make all reasonable rules. What is a reasonable rule must depend upon the facts of each case. It is not unreasonable to require the carrier to redeem tickets or unused portions thereof.[179] Nor is a law which requires that tickets may not be sold except by authorized agents of the carrier unreasonable, and such a law applying to the acts of agents within a state has no direct effect on interstate commerce although the ticket sold may be a contract authorizing the purchaser to travel from one state to another. Congress has not, as yet, attempted to regulate relating to this subject.

Referring to a statute limiting the right to sell tickets to agents of the carrier, the Supreme Court of Illinois, in deciding that the statute referred to all tickets, accurately stated the reasons why interstate commerce was not interfered with as follows:[180]

[179] Missouri, K. & T. Ry. Co. *v.* Fookes, — Tex. Civ. App. —, 40 S. W. 858. And carriers may legally require the purchase of a ticket and in default charge a higher rate, Coyle *v.* So. Ry. Co., 112 Ga. 121, 37 S. E. 163.

[180] Burdick *v.* People, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. Rep. 329. To same effect, State *v.* Corbett, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498; State *v.* Thompson, 47 Oreg. 639, 84 Pac. 476, 4 L. R. A. (N. S.) 480; Commonwealth *v.* Keary, 198 Pa. St. 500, 48 Atl. 472. As to the validity of such legislation as to state transportation, see Samuelson *v.* State, 116 Tenn. 470, 95 S. W. 1012, 115 Am. St. Rep. 805; Fry *v.* State, 63 Ind. 552, Jannen *v.* State, 42 Tex. Cr. App. 631, 51 S. W. 1126, 62 S. W. 419 (right to regulate sustained); State *v.* Bernheim, 19 Mont. 512, 49 Pac. 441; Ex Parte O'Neil, 83 Pac. 104. The legislatures of many states have appreciated the unlawful and fraudulent character of the ticket scalpers' business, and statutes have been enacted making dealing in these tickets by others than an authorized agent of the carrier a violation of the criminal law, viz: Pennsylvania, New Jersey, Illinois, Indiana, Minnesota, Georgia, Maine, Texas, North Carolina, Tennessee, North Dakota, Oregon, Montana, Florida and New York. "Laws of New York, 1901, c. 639, prohibiting private individuals from selling railroad tickets, and forbidding the officers of a common carrier from supplying tickets for sale to any other than an authorized agent, has been declared by the New York Court of Appeals not a valid exercise of the power of the legislature to regulate the conduct of a railroad company's business because it is a creation of the legislature and a common carrier." People *v.* Caldwell, 71 N. Y. Supp. 654, 64 App. Div. 46, Musco *v.* United Surety Co., 132 App. Div. 300, 117 N. Y.

"State legislation, which is not an obstacle to interstate commerce, and imposes no burden upon it, and which comes within a proper exercise of the police power, is not unconstitutional, as infringing upon the powers of Congress. The act of 1875 is, we think, such a species of state legislation. The duties which it imposes upon the carriers therein named, and their agents can not interfere with the freedom of interstate travel. Such travel is not impeded because tickets are required to be purchased from agents of the carrier who are provided with certificates of their authority. The limitation of the sale of tickets to such agents may be a restraint upon the business of scalpers and ticket brokers, but can not be regarded as a burden upon interstate commerce."

The contract of interstate transportation can not be controlled by a state and a state law making an interstate ticket binding for six years and giving stop-over privileges, no such provision being in the contract, is void,[181] and so is a law requiring carriers to give shippers of live stock free transportation in interstate commerce.[182] A state, as to intrastate travel, may require carriers who have voluntarily issued commutation tickets to designate specifically both termini of such tickets.[183] This rule of law has support in the principle that although a special rate or privilege may not be compelled, if it should be voluntarily granted by the carrier, the privilege while existing is so far

Supp. 21, affirmed 196 N. Y. 459, 90 N. E. 171. Such a regulation was held invalid by the Court of Appeals of New York in People ex rel. Tyroler *v.* Warden of City Prison, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763, reversing the same case in 26 App. Div. 226, 50 N. Y. Supp. 56. The reversal was placed upon the contention that the statute violated the citizens' liberty to contract, and not upon the commerce clause of the federal constitution. The New York court is not in accord with the general and better rule announced in the cases *supra*.

[181] Delaware, L. & W. R. Co. *v.* Frank, 110 Fed. 689; Louisville & N. R. Co. *v.* Bitterman, 144 Fed. 34, 75 C. C. A. 192, affirmed by Supreme Court, Bitterman *v.* Louisville & N. R. Co., 207 U. S. 205, 52 L. Ed. 171, 28 Sup. Ct. 91.

[182] La Farier *v.* Grand Trunk Ry. of Canada, 84 Me. 284, 286, 24 Atl. 848.

[183] Delaware, L. & W. R. Co. *v.* Public Utility Comr's, 84 N. J. 619, 87 Atl. 801. For a discussion of a related subject see Rules and Regulations Governing Checking of Baggage, 35 I. C. C. 157.

subject to regulation as to prevent discrimination;[184] but the carrier may change its policy and withdraw the privilege.[185]

§ 38. **Same Subject—Mileage Books—Party Rate Tickets.**—It has become a general practice for railroads to sell mileage books which entitle passengers complying with the terms stated therein to transportation at a rate less than the rate where a single ticket is purchased. By a mileage ticket, one person gets a number of rides at less than the usual fare, by a party rate ticket a number of persons get one ride each at less for each one than would be the rate if each bought a single ticket. The Supreme Court has held that party rate tickets open to all are not discriminatory under the Act to Regulate Commerce;[186] and in the same case it was held that a party rate ticket was neither a mileage nor a commutation ticket. Section 22 of the Act to Regulate Commerce provides: "That nothing in this Act shall prevent * * * the issuance of mileage, excursion or commutation passenger tickets."[187] This provision indicates that there was a necessity therefor to prevent such a construction of the Act as would prohibit the issuance of these special contracts.

No room is left, if there ever were such, for the states to regulate or require the issuance of mileage tickets for interstate transportation. The Interstate Commerce Commission has held that, as to interstate transportation of passengers, "the issuance of mileage books is voluntary," but if they are issued there must be no discrimination, although the carrier may "attach to the contract such lawful conditions as it chooses."[188]

It is believed that the states may not require the issuance of these contracts and may not prescribe the terms thereof further than to prevent discrimination in their issuance and use. In 1891 the state of Michigan attempted to compel the sale by carriers

[184] Alabama & V. Ry. Co. *v.* R. R. Com. of Miss., 203 U. S. 496, 51 L. Ed. 298, 27 Sup. Ct. 163, affirming same styled cause, 86 Miss. 667, 38 So. 356.

[185] Cent. of Ga. Ry. Co. *v.* Augusta Brokerage Co., 122 Ga. 646, 50 S. E. 473, 69 L. R. A. 119.

[186] Baltimore & O. R. Co. *v.* Int. Com. Com., 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844.

[187] Sec. 444, *post.*

[188] Eschner *v.* Penn. R. Co., 18 I. C. C. 60, 63, 64; Re Practices Governing Sale and Exchange of Mileage Books, 28 I. C. C. 318, and cases cited. Rules and Regulations Governing Checking of Baggage, 35 I. C. C. 157, 160.

of mileage books under certain prescribed conditions and, the state court having sustained the statute limiting its operation to intrastate commerce,[189] the question was presented to the Supreme Court of the United States by writ of error to the state court. The questions raised in the Supreme Court, as stated in its opinion, were: "(1) whether the act violates the Constitution of the United States by impairing the obligation of any contract between the state and the railroad company; (2) if not, does it nevertheless violate the Fourteenth Amendment of the Constitution by depriving the company of its property or liberty without due process of law or by depriving it of the equal protection of the laws." Of these contentions the court, in holding the Michigan statute void,[190] said:

"In this case there is not an exercise of the power to fix maximum rates. There is not the exercise of the acknowledged power to legislate so as to prevent extortion or unreasonable or illegal exactions. The fixing of the maximum rate does that. It is a pure, bald and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road and permitting them to do so at a less expense than others, provided they buy a certain number of tickets at one time. It is not legislation for the safety, health or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who in the legislative judgement should be carried at a less expense than the other members of the community."

This decision would appear to be conclusive, although in an elaborate opinion the Supreme Court of Georgia has held valid a regulation of the Railroad Commission of Georgia requiring railroads, as to intrastate transportation from cities of a designated size, to honor mileage books on their trains and prohibiting the requirement in the contract that mileage shall be exchanged for a ticket.[191]

[189] Lake S. & M. S. Ry. Co. *v.* Smith, 114 Mich. 460, 72 N. W. 328.

[190] Lake S. & M. S. Ry. Co. *v.* Smith, 173 U. S. 684, 698, 43 L. Ed. 858, 19 Sup. Ct. 565.

[191] Louisville & N. R. Co. *v.* R. R. Com. of Georgia, 140 Ga. 817, 80 S. E. 327, Ann. Cas. 1915A, 1018, — L. R. A. (N. S.) —. As sustaining the Georgia court see Delaware, L. & W. R. Co. *v.* Board of Public Utility Comr's., 84 N. J. L. Vroom 619, 87 Atl. 801. See Beardsley *v.* New York, L. E. & W. R. Co., 162 N. Y. 232, 56 N. E. 488, holding that a statute requiring the issuance

§ 39. **Free Transportation.**—As to interstate transportation, Congress has so legislated as to prevent free transportation except as to certain designated persons and classes.[192] One purpose of governmental regulation of common carriers, if not the chief and most beneficient, is the prevention of favoritism, and that such purpose may be accomplished, states may, within the scope of the commerce subject to their regulation, prevent common carriers from discriminating by giving free transportation of persons or of property. Exceptions to the general rule may lawfully be made in favor of certain public or charitable

of mileage books was void and reversing same styled case, 17 Misc. Rep. 256, 40 N. Y. Supp. 1077, 15 App. Div. 251, 44 N. Y. Supp. 175. In Attorney General *v.* Old Colony R. Co., 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112, it was held that a similar statute was void, the court saying: "The objection that the statute authorizes one railroad to make conditions concerning the transportation of passengers which must be performed by other railroads seems to us valid. The objection is not that the legislature has itself attempted to declare the rights of passengers who have purchased mileage tickets. The legislature, by this statute, has not determined the conditions which shall be incident to the carriage of passengers under these tickets; nor has it left them to be determined by the railroad company transporting the passengers. One railroad is, in effect, authorized to make a contract for another, but the railroads are not in fact the agents of each other in issuing these tickets. It has been often said that the legislature can not make a contract between two or more persons which they do not choose to make, although it may sometimes impose duties which can be enforced as if they arose from contract. Without denying the power of the legislature to determine the form of the contracts which common carriers of persons or merchandise must make concerning transportation, and without considering the authority of the legislature to delegate this power to a board of public officers, we are of the opinion that this power can not be delegated to private persons or corporations." While the Supreme Court of Georgia has held that it could regulate the use of mileage books, the principles announced by the same court in other cases would permit the withdrawal by the carriers of such special contracts. See Central of Ga. Ry. Co. *v.* Augusta Brokerage Co., 122 Ga. 646, 50 S. E. 473, 69 L. R. A. 119; Southern Ry. Co. *v.* Atlanta Stove Works, 128 Ga. 207, 57 S. E. 429. For a discussion of the general question, see Chicago R. I. & P. Ry. Co. *v.* Ketchum, 212 Fed. 986.

[192] Secs. 182, 342, 442, *post*, and annotations.

purposes, and carriers may interchange transportation service.[193]

A state may not require free transportation to shippers of cattle in interstate commerce.[194]

A state statute authorizing state incorporated railroads to issue transportation in payment for printing and advertising is void as to interstate transportation.[195]

§ 40. **Routing Freight.**—The Railroad Commission of Arkansas passed this regulation: "In case of failure on the part of the shipper to give routing instructions, it shall be the duty of the railroad receiving the shipment to forward it via such route as will make the lowest rate."

As Congress has the exclusive, undivided and plenary power to regulate interstate commerce, such a rule as to that commerce is void, although as to an intrastate haul it would be reasonable and valid.[196]

§ 41. **When Interstate Transportation Begins and Ends.**—In determining the question as to the validity of a particular regulation made by the federal or state governments, it is necessary to decide whether the transportation affected by the regulation is interstate or intrastate transportation. If the transportation is to be interstate it is subject to federal

[193] State *v.* Martyn, 82 Neb. 225, 117 N. W. 719; Schulz *v.* Parker, 158 Iowa 42, 139 N. W. 173. Exchange of transportation for newspaper advertising violates Anti-Pass law. State *v.* Union Pac. R. Co., 87 Neb. 29, 126 N. W. 859. A valid contract for a pass not abrogated by Anti-Pass statute subsequently enacted, Emerson *v.* Boston & M. R. Co., 75 N. H. 427, 75 Atl. 529; but *contra* as to federal statute, Louisville & N. R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671. States may not compel free transportation to officials, Delaware, L. & W. R. Co. *v.* Public Utility Com'rs, 85 N. J. L. 28, 88 Atl. 849. Free transportation violates statute against discrimination, State *v.* Southern Ry. Co., 122 N. C. 1052, 30 S. E. 133, 41 L. R. A. 246. Purpose of Act to regulate commerce stated: Rates for Transportation of Anthracite Coal, 35 I. C. C. 220, 289.

[194] State *v.* Otis, 60 Kan. 248, 56 Pac. 14. See note, 182, *supra*.

[195] Chicago, I. & L. R. Co. *v.* United States, 219 U. S. 486, 55 L. Ed. 305, 31 Sup. Ct. 272, affirming United States *v.* Chicago, I. & L. R. Co., 163 Fed. 114. See also Louisville & N. R. Co. *v.* Mottley, 211 U. S. 149, 53 L. Ed. 126, 29 Sup. Ct. 42.

[196] St. Louis & S. F. R. Co. *v.* Allen, 181 Fed. 810; Porter *v.* St. Louis & S. F. R. Co., 78 Ark. 182, 95 S. W. 953. For other cases see Dec. Dig., Key No. Title Commerce, Secs. 8 and 61.

regulation and excluded from state regulation from the time it begins. It makes no difference that the particular service sought to be regulated is performed wholly in one state, if the transportation is interstate. In Coe *v.* Errol,[197] the Supreme Court stated negatively when the interstate transportation began by saying it did not begin until the goods "have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey." In another part of the opinion it was said that goods are in interstate commerce when they have "actually started in the course of transportation to another state, or delivered to a carrier for transportation."

In Covington Stock Yards Co. *v.* Keith,[198] the rule as to both the beginning and ending of the transportation was stated as follows: "The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee."

Freight tendered for through transportation is within the regulating power of the federal government, although a bill of lading can not be issued until the agent learns from his superiors the legal rate.[199]

A car containing interstate shipments is, prior to reaching its destination, engaged in interstate commerce, although stopped for repairs.[200] When, however, the transportation contract has been completed, the fact that such completed contract was one of interstate transportation will not make a subsequent shipment of the same goods to a point in the same state one of in-

[197] Coe *v.* Errol, 116 U. S. 517, 527, 29 L. Ed. 715; 6 Sup. Ct. 475, followed, Sou. Pac. Terminal Co. *v.* Interstate Com. Com., 219 U. S. 498, 527, 55 L. Ed. 310, 31 Sup. Ct. 279; and Ill. C. R. Co. *v.* Louisiana R. R. Com., 236 U. S. 157, 59 L. Ed. —, 35 Sup. Ct. Rep. 275.

[198] Covington Stock Yards Co. *v.* Keith, 139 U. S. 128, 136, 35 L. Ed. 73, 11 Sup. Ct. 416, quoted and followed, United States *v.* Union Stock Yard & Transit Co., 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83.

[199] Southern Ry. Co. *v.* Burlington Lumber Co., 225 U. S. 99, 56 L. Ed. 1001, 32 Sup. Ct. 657; and cases cited.

[200] Delk *v.* St. Louis & S. F. R. Co., 220 U. S. 580, 55 L. Ed. 590, 31 Sup. Ct. 617.

terstate transportation.[201] A shipment intended for a point in another state can not be billed to a point in the state in which the shipment originated and then rebilled to the destination point on the sum of the intermediate local rates. The through interstate rate must be applied. In discussing this question the Interstate Commerce Commission said:[202] "This commission, as hereinbefore stated, has steadfastly adhered to the proposition that on any through carriage of traffic between interstate points the lawfully published interstate rate must be applied by the carrier and paid by the shipper, and that where the through interstate rate in effect between two points is higher than the aggregate of the intermediate rates any plan of first billing to an intermediate point a shipment that is really intended to reach a destination beyond is simply a device for defeating the lawful through rate, and is unlawful."

§ 42. **Attachments and Garnishments.**—Interstate carriers must of necessity interchange cars, and from this interchange of cars and from the transaction of through business credits arise in favor of one carrier against another. Whether or not these cars and credits belonging to a railroad of another state may be reached by process of attachment and garnishment was a mooted question in the state courts. Where a railroad company of a state received the cars of a railroad company of another state under a contract by which the domestic company had the right to carry the loaded car to its destination and to reload and return the car to the owner in another state, it was held that garnishment served on the domestic company would not in the absence of a lien hold the foreign car. This decision was based upon the local law, and in the same case it was held that such garnishment was not illegal on the ground that it affected interstate commerce.[203] The same court subsequently held that

[201] Gulf, C. & S. F. Ry. Co. *v.* Texas 204 U. S. 403, 51 L. Ed. 540, 27 Sup. Ct. 360, cited and distinguished in Southern Pac. Terminal Co. *v.* Interstate Commerce Commission, *supra;* Chicago M. & St. P. Ry. *v.* Iowa, 233 U. S. 334, 58 L. Ed. 988, 34 Sup. Ct. 592.

[202] Kanotex Refining Co. *v.* A. T. & S. F. Ry. Co., 34 I. C. C. 271, 276.

[203] Southern Flour & Grain Co. *v.* Northern Pac. Ry. Co., 127 Ga. 626, 56 S. E. 742, 9 L. R. A. (N. S.) 853, 119 Am. St. Rep. 356; Southern Ry. Co. *v.* Brown, 131 Ga. 245, 62 S. E. 177. Agreeing with the Georgia court on the right growing out of the

where "the car was an empty freight car, and all use thereof by the claimant under the contract had ceased, and nothing remained to be done except to return it to the owner," that the levy of an attachment upon the car was valid.[204]

The questions of local law are not within the purview of this discussion and the differences between the state courts as to the federal question have as to the general right been settled by the Supreme Court of the United States.

A case arose where certain freight cars and certain credits of a corporation of Indiana and Ohio were sought to be reached by garnishment against a carrier in Iowa which had in its possession such cars and credits. The cars had moved to Iowa in interstate commerce and the credits arose from such commerce. The cars had been unloaded and had not started on the return trip. The trial federal judge denied effect to the garnishment in language which presents that view as forcibly as it can be expressed.[205] The Supreme Court reversed the lower court and held that under the circumstances of that case the garnishment was valid. The opinion of the court written by Mr. Justice McKenna indicates that there might be circumstances under which the attachment or garnishment would not be valid.[206]

contract but disagreeing as to the question of interstate commerce, see, Wall *v.* Norfolk & W. Ry. Co., 52 W. Va. 485, 44 S. E. 294, 64 L. R. A. 501, and see note, 94 Am. St. Rep. 948.

[204] Cent. of Ga. Ry. Co. *v.* Evans, 133 Ga. 639, 66 S. E. 788. For other authorities discussing the question see, Michigan C. R. Co. *v.* C. & M. L. S. R. Co., 1 Ill. App. 399, —; Connery *v.* R. R. Co., 92 Minn. 20, 99 N. W. 365; Shore & Bro. *v.* Baltimore & O. Ry. Co., 76 S. C. 472, 57 S. E. 526; Seibels *v.* Northern C. Ry. Co., 80 S. C. 133, 61 S. E. 435; Chicago & N. W. Ry. Co. *v.* Forest County, 95 Wis. 80, 70 N. W. 77. A negative answer has been given in the following cases: DeRochemont *v.* New York C. & H. R. Co., 75 N. H. 158, 71 Atl. 868; Cavanaugh Bros. *v.* Chicago, R. I. & P. Ry. Co., 75 N. H. 243, 72 Atl. 694. See also Humphries *v.* Hopkins, 81 Cal. 551, 22 Pac. 892; Montrose Pickle Co. *v.* Dodson, 76 Iowa 172, 40 N. W. 705, 2 L. R. A. 417, 14 Am. St. Rep. 213; Bates *v.* Chicago, M. & St. P. Ry. Co., 60 Wis. 296, 19 N. W. 72, 50 Am. St. Rep. 369.

[205] Davis *v.* Cleveland, C. C. & St. L. R. Co., 146 Fed. 403, 411, and see cases cited.

[206] Davis *v.* Cleveland, C. C. & St. L. R. Co., 217 U. S. 157, 54 L. Ed. 708, 30 Sup. Ct. 463, cited in Minnesota Rate Cases at pp. 409 and 410; and see Pullman Co. *v.* Linke, 203 Fed. 1017.

§ 43. **Rates.**—A common carrier is so far engaged in the performance of a public service that its rates or charges may, within certain limitations, be fixed by governmental agencies. This principle not only had its foundation in the earliest known laws,[207] but it is a principle which has been exercised and accepted with significant uniformity. The Supreme Court of the United States said: "State regulation of railroad rates began with railroad transportation;" and in the same opinion it was said:[208] "The authority of the state to limit by legislation the charges of common carriers within its borders was not confined to the power to impose limitations in connection with grants of corporate privileges. In view of the nature of their business, they were held subject to legislative control as to the amount of their charges unless they were protected by their contract with the state."

In the early history of state regulation of railroad rates, the Supreme Court used language that "went further than to sustain the state law with respect to rates for purely intrastate carriage" and "treated as being within the state power" rates on interstate transportation. This decision was very soon modified and the power of the state limited to regulating rates on intrastate transportation.[209]

It has been held, upon what seems inconclusive reasoning, that where a state, being the owner of an interstate railroad, leases the road with a provision reserving to the state the right to make

[207] Stephens *v.* Cent. of Ga. Ry. Co., 138 Ga. 625, 75 S. E. 1041, 42 L. R. A. 541, Ann. Cas. 1913E, 609.

[208] Simpson *v.* Shepard, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729. At page 412 of the original opinion is given a list of early state laws, which list is followed by a history of the decisions of the Supreme Court relating to rate regulation by the states. For a further summary of state legislation see, Interstate Com. Com. *v.* Cincinnati, N. O. & T. P. Ry. Co., 167 U. S. 479, 495, 496, 42 L. Ed. 243, 17 Sup. Ct. 896. A statute fixing a rate on one commodity, oil, was sustained by the Supreme Court of Kansas,—Tucker *v.* Missouri Pac. R. Co., 82 Kan. 222, 108 Pac. 89; and see German Alliance Ins. Co. *v.* Lewis, 233 U. S. 389, 58 L. Ed. 1011, 34 Sup. Ct. 612, sustaining a law of Kansas fixing the price of fire insurance.

[209] Simpson *v.* Shepard, 230 U. S. 352, citing as supporting the statement in the text, Peik *v.* Chicago & N. W. Ry. Co., 94 U. S. 164, 24 L. Ed. 97, and Wabash, St. L. & P. Ry. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 Sup. Ct. 4.

"just and reasonable rules, orders, schedules of freight and passenger tariffs," that such reservation, so far as concerns interstate rates, is void as in conflict with the commerce clause of the federal constitution. It would seem that as the state, as owner, like other owners, had the right to initiate rates intrastate or interstate, such right could be reserved in a lease of its road, and that in the first instance the state could require its lessee to comply with the lease. The Interstate Commerce Commission could control the interstate rate so fixed in like manner as other rates made by other owners of carriers, but that fact should not prevent the state from making the rate in the first instance.[210]

In the recent Minnesota Rate Case,[211] the power of the states to regulate railroad rates for transportation between points in the same state is reiterated and fully stated. This power is, therefore, under existing federal statutes, indisputable. The power is not, however, unlimited and must be exercised in such way as not to infringe the carrier's constitutional rights under the Fourteenth Amendment to the Constitution of the United States.

Classification of commodities is a necessary preliminary to any system of rates, and the right to prescribe a rate for the future includes the right to classify commodities. This classification must not be arbitrary or unreasonable but, in making a classification, the rate making body "is not precluded from the consideration of economic considerations recognized by the carriers in the conduct of their business," but "may consider and act on every economic or industrial factor potentially influencing the operation of a railroad in the transportation of freight."[212] Joint rates would, if the whole rate is intrastate, be within the regulating power of the states.[213] The right to prescribe reason-

[210] State of Georgia *v.* Western & A. R. Co., 138 Ga. 835, 76 S. E. 577.

[211] Simpson *v.* Shepard, *supra,* and Cent. of Ga. R. Co. *v.* R. R. Com. of Ala., 209 Fed. 75; Darneil *v.* Edwards, 209 Fed. 99; Chicago & N. W. R. Co. *v.* Smith, 210 Fed. 632; Southern Pac. Co. *v.* R. R. Com. of Oregon, 208 Fed. 926; Puget Sound Traction Light & Power Co. *v.* Reynolds, 223 Fed. 371.

[212] Southern Ry. Co. *v.* Atlanta Stove Works, 128 Ga. 207, 57 S. E. 429, an able opinion, in which is discussed the principles of regulation.

[213] Hill, et al, Com'rs. *v.* Wadley Sou. Ry. Co., 128 Ga. 705, 57 S. E. 795.

able rates includes the right to prohibit rates which are unjustly discriminatory.[214]

§ 44. **Intrastate Rates Which Affect Interstate Rates.**—A state may not regulate intrastate rates by the standard of interstate rates by basing a rate for a short haul within the state upon the carrier's rate for the long haul over the same line when the long haul is between states.[215] And when local rates are made for the purpose and have the effect of so regulating transportation that commerce which might be interstate is forced to move intrastate, and when the local rates discriminate against the interstate rates, the regulation making such local rates is invalid.

The Railroad Commission of Texas established rates between points in that state which the railroads accepted, and which discriminated in favor of localities in Texas and against localities in Louisiana. Upon petition on behalf of the localities in Louisiana against the carriers, the Interstate Commerce Commission held that this discrimination was unlawful and unjust.[216] Suit having been filed in the Commerce Court to set aside the order of the Commission, it was held that the carriers were guilty of unlawful and unjust discrimination, and that it was no defense that such discrimination resulted from the orders of the Texas Commission.[217] An appeal was taken from the Commerce Court to the Supreme Court,[218] and the order of the Commission was sustained in an opinion written by Mr. Justice Hughes. The opinion was based upon the right of Congress "to keep the highways of interstate communication open to interstate traffic upon fair and equal terms." The opinion of the Court is so clear and cogent that its correctness can but be acknowledged. To permit states to prescribe interstate rates under which citizens of the states may exclude from competition with themselves, shippers located in other states from whose locations the transportation conditions are similar to those from points in the state,

[214] Portland Ry. Light & P. Co. *v.* R. R. Com. of Oregon, 229 U. S. 397, 57 L. Ed. 1248, 33 Sup. Ct. 820, affirming same styled case, 56 Or. 468, 105 Pac. 709.

[215] Louisville & N. R. Co. *v.* Eubanks, 184 U. S. 27, 46 L. Ed. 416, 22 Sup. Ct. 277.

[216] Railroad Com. of Louisiana *v.* St. Louis S. W. Ry. Co., 23 I. C. C. 31.

[217] Texas & P. Ry. Co. *v.* United States, Commerce Court Reports No. 68, p. 655, 205 Fed. 380.

[218] Houston E. & W. T. Ry. Co. *v.* U. S., 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833.

would be to effectuate the purposes to prevent which was the principal object of the Constitution of the United States. Not only is the decision in the Shreveport case, cited in notes 216, 217 and 218, *supra*, in accord with the Constitution, any other rule would result in endless confusion and frequent injustice.[219]

§ 45. **Limitations on the Power of States to Regulate Intrastate Rates.**—When private property is devoted to a public use, organized society has the right to regulate the charges for such use. This right may be exercised by or under the authority of state laws when the use is within the state, and subject to the further limitation that the regulation does not extend to a taking of private property without due process of law or without a fair compensation. This principle as we have seen (Section 36 *supra*) is old, but the need in this country for its application is comparatively recent. The first of the important applications of the principle was made in Munn *v.* Illinois and the other Granger cases,[220] decided by the Supreme Court of the United States in 1877. Then follow; the Railroad Commission cases of 1886,[221] Dow *v.* Beidelman of 1888,[222] the Minnesota case[223] of 1890, the Texas Commission case of 1894,[224] the Turnpike case[225] in 1896, Smyth *v.* Ames[226] in 1898, the National City

[219] Corporation Com. of Okla. *v.* A. T. & S. F. Ry. Co., 31 I. C. C. 532; Trier *v.* C., St. P. M. & O. Ry. Co., 30 I. C. C. 352, 707; Rates on Beer, 31 I. C. C. 544; Freight Rates from Minnesota Points, 32 I. C. C. 361; Merchants Exchange of St. Louis, Mo. *v.* B. & O. R. Co., 34 I. C. C. 341.

[220] Munn *v.* Illinois, 94 U. S. (4 Otto.) 113, 24 L. Ed. 77; Chicago, B. & Q. R. Co. *v.* Iowa (*v.* Cutts), 94 U. S. 155, 24 L. Ed. 94; Peik *v.* Chicago & N. W. R. Co., 94 U. S. 164, 24 L. Ed. 97; Chicago, M. & St. P. R. Co. *v.* Ackley, 94 U. S. 179, 24 L. Ed. 99; Winona & St. Paul R. Co. *v.* Blake, 94 U. S. 180, 24 L. Ed. 99; Stone *v.* Wisconsin, 94 U. S. 181, 24 L. Ed. 102.

[221] Stone *v.* Farmers' Loan & Trust Co., 116 U. S. 307, 29 L. Ed. 636, 6 Sup. Ct. 334, 1191; Stone *v.* Ill. Cent. R. Co., 116 U. S. 347, 29 L. Ed. 650, 6 Sup. Ct. 348, 1191; Stone *v.* New Orleans & N. E. R. Co., 116 U. S. 352, 29 L. Ed. 651, 6 Sup. Ct. 349, 391.

[222] Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028.

[223] Chicago, M. & St. Paul R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462.

[224] Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047.

[225] Covington & L. Turnpike R. Co. *v.* Sandford, 164 U. S. 578, 41 L. Ed. 561, 17 Sup. Ct. 198.

[226] Smythe *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418.

case in 1899,[227] the Stock Yard case in 1901,[228] the Water Rates cases of 1903,[229] and the Water and Gas cases of 1909.[230] These and other cases will be found in a note hereto.[231]

In 1913,[232] the Supreme Court, in a series of cases involving

[227] San Diego Land & Town Co. *v.* National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804.

[228] Cotting *v.* Godard, 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30.

[229] Knoxville Water Co. *v.* Knoxville, 189 U. S. 434, 47 L. Ed. 887, 23 Sup. Ct. 531; San Diego Land & Town Co. *v.* Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571.

[230] Knoxville *v.* Knoxville Water Co., 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. 148; Wilcox *v.* Consolidated Gas Co., 212 U. S. 19, 53 L. Ed. 387, 29 Sup. Ct. 392.

[231] Budd *v.* New York, 143 U. S. 517, 36 L. Ed. 247, 4 I. C. R. 45, 12 Sup. Ct. 468; Brass *v.* North Dakota ex rel. Stoeser, 153 U. S. 391, 38 L. Ed. 757, 4 I. C. R. 670, 14 Sup. Ct. 857. See also the following cases in state and federal courts: People *v.* Budd, 117 N. Y. 1, 5 L. R. A. 599, 22 N. E. 670; Lake Shore & M. S. R. Co. *v.* Cincinnati, S. & C. R. Co., 30 Ohio St. 604; State ex rel. Attorney General *v.* Columbus Gaslight & Coke Co., 34 Ohio St. 572, 32 Am. Rep. 390; Davis *v.* State, 68 Ala. 58, 44 Am. Rep. 128; Baker *v.* State, 54 Wis. 368, 12 N. W. 12; Nash *v.* Page, 80 Ky. 539, 44 Am. Rep. 490; Girard Point Storage Co. *v.* Southwalk Foundry Co., 105 Pa. 248; Sawyer *v.* Davis, 136 Mass. 239, 49 Am. Rep. 27; Brechbill *v.* Randall, 102 Ind. 528, 52 Am. Rep. 695, 1 N. E. 362; Delaware, L. & W. R. Co. *v.* Central Stock-Yard & Transit Co., 45 N. J. Eq. 50, 6 L. R. A. 855, 17 Atl. 146; Spring Valley Waterworks *v.* Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. 48; Railroad Commission Cases, 116 U. S. 307, sub. nom. Stone *v.* Farmers' Loan & Trust Co., 29 L. Ed. 636, 6 Sup. Ct. 334, 388, 1191; Wabash, St. L. & P. R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 1 I. C. R. 31, 7 Sup. Ct. 4; Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 2 I. C. R. 56, 8 Sup. Ct. 1028; Chicago, M. & St. P. R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 3 I. C. R. 209, 10 Sup. Ct. 462, 702; Chicago & G. T. R. Co. *v.* Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400; Reagan *v.* Farmers' Loan & T. Co., 154 U. S. 362, 38 L. Ed. 1014, 4 I. C. R. 560, 14 Sup. Ct. 1047; St. Louis & S. F. R. Co. *v.* Gill, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484; Covington & L. Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 41 L. Ed. 560, 17 Sup. Ct. 198; Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418; San Diego Land & Town Co. *v.* National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804; Chicago, M. & St. P. R. Co. *v.* Tompkins, 176 U. S. 167, 44 L. Ed. 417, 20 Sup. Ct. 336; Atlantic C. L. R. Co. *v.* North Carolina Corp. Com., 206 U. S. 1, 51 L. Ed. 933, 27 Sup. Ct. 585, 11 Ann. Cas. 398.

[232] Minnesota Rate Cases, Simpson *v.* Shepard, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729;

state made rates relating to intrastate transportation, announced principles which are as important as those in the Granger and Railroad Commission cases, *supra*. These principles are but the logical application of prior decisions and Mr. Justice Hughes, in writing the opinions of the court, has ably and exhaustively discussed the question and vindicated the rights of the states to regulate rates of charges of public carriers within their respective borders. In the Minnesota case, the learned Justice said:

"If this authority of the state be restricted, it must be by virtue of the paramount power of Congress over interstate commerce and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a dormant federal power, that is, one which has not been exerted, but can only be found in the actual exercise of federal control in such measure as to exclude this action by the state which otherwise would clearly be within its province."

This right is in all cases subject to constitutional limitations, and there is a clear intimation, as shown in Sec. 6, *supra*, that the federal government has not exercised as yet all its powers under the commerce clause of the Constitution.

§ 46. **Property Basis for Returns.**—Investors are entitled to a reasonable return on the fair value of the property devoted to the public use. Until there shall be an authoritative determination of the value of railroad property, Commissioners and Courts must as best they may arrive at this value.

In applying the decisions of courts to the question, it is neces-

Missouri Rate Cases, Knott *v.* C. B. & Q. R. Co., 230 U. S. 474, 57 L. Ed. 1571, 33 Sup. Ct. 975; West Virginia Cases, Chesapeake & O. Ry. Co. *v.* Conley, 230 U. S. 513, 57 L. Ed. 1597, 33 Sup. Ct. 985; Oregon Cases, Oregon R. & N. Co. *v.* Campbell, 230 U. S. 525, 57 Fed. 1625, 33 Sup. Ct. 1011, 177 Fed. 318, 180 Fed. 253; Southern Pac. Co. *v.* Campbell, 230 U. S. 537; Arkansas Cases, Allen *v.* St. Louis I. M. & S. Ry. Co., 230 U. S. 553, 57 L. Ed. 1625, 33 Sup. Ct. 1030; Indiana Rate Cases, Wood *v.* Vandalia R. Co., 231 U. S. 1, 58 L. Ed. 97, 34 Sup. Ct. 7; Kentucky Rate Case, Louisville & N. R. Co. *v.* Garrett, 231 U. S. 298, 58 L. Ed. 229, 34 Sup. Ct. 48; Cent. of Ga. R. Co. *v.* R. R. Com. of Ala., 209 Fed. 75, 79; Chicago & N. W. Ry. Co. *v.* Smith, 210 Fed. 632; Cent. of Ga. R. Co. *v.* Georgia R. R. Com., 215 Fed. 421. For a continuation of the Arkansas Cases see Boyle *v.* St. Louis & S. F. Ry. Co., 222 Fed. 539.

sary to keep in mind the different functions performed by courts and by quasi-legislative tribunals.

The courts usually must determine the strictly legal question, Is the rate under investigation "so unreasonably low that the carriers are deprived of their property without due process of law and denied the equal protection of the law?" Minnesota Rate Cases, *supra*.

"The rate making power is a legislative power and necessarily implies a range of legislative discretion: and the question to be determined by a tribunal to which this power has been delegated is, Is the rate just and reasonable? (Id.)

Obviously a rate may be less than just and reasonable without being confiscatory. While a tribunal exercising the legislative function may not make a rate so low as to be violative of the constitutional restrictions and legal principles announced by courts of binding authority, such tribunal may not disregard its duty to exercise its "legislative discretion," the power to apply which, said Mr. Justice Moody, "Is a delicate and dangerous function, and ought to be exercised with a keen sense of justice." Knoxville *v.* Water Co., *supra*.

"Fair value" has been defined as "the reasonable value of the property *at the time*, it is being used for the public." San Diego Land Co. *v.* National City, *supra*.

This, excepting the fact that it fixes the time at which value is to be found, is more a restatement of the question than a definition of the term; "reasonable" being as inexact as "fair."

In the leading and much cited case of Smyth *v.* Ames, the court had for determination the *legal* question of whether or not a legislative act violated the constitutional rights of the carriers, and the opinion of the court must be understood as being limited by the question involved. The court held that the *law* demanded a "fair return" on the fair value of the property used * * * for the convenience of the public. What was the "fair value" and what would be a "fair return," were mixed questions of law and "legislative discretion." The court determined only the legal question and found that "the act, if enforced, would have deprived each of the railroad companies * * * of the just compensation secured to them by the Constitution." (p. 547.) In reaching this determination, however, the court stated

rules which should be considered in "all calculations as to the reasonableness of rates." (p. 546.) These rules must be followed by rate making bodies. In ascertaining "value" the court held that consideration must be given to the following facts:

(1) "The original cost of construction."
(2) "The amount expended in permanent improvements."
(3) "The amount and market value of its (the carrier's) bonds and stock."
(4) "The present as compared with the original cost of construction."
(5) "The probable earning capacity of the property under particular rates prescribed by statute."
(6) "The sum required to meet operating expenses."

All these to be "given such weight as may be just and right in each case." P. 547.

In the *Minnesota Rate Cases, supra,* p. 433 of the opinion, the "legislative discretion" is distinguished from the judicial question; has the state "overstepped the constitutional limit?" While the court in that case cited as correct "general principles" those announced in Smyth *v.* Ames (p. 434) Mr. Justice Hughes, who delivered the opinion of the court, said: "The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts." (p. 434.) He then applied somewhat more restricted rules than those stated in Smyth *v.* Ames. In so doing, however, he was careful to state that he was considering "a judicial finding" (p. 451); that the "judicial power to declare legislative action invalid upon constitutional grounds is to be exercised only in clear cases" (p. 452); and "that we are concerned with a charge of confiscation of property" (p. 458). So the court held that the Minnesota rates had not been proven to be confiscatory, but it was not found that such rates were just and reasonable.

In Pennsylvania the courts have authority upon complaint to determine whether or not existing rates are reasonable.[233]

In a Pennsylvania case[234] it was said: "The primary basis of any calculation as to the value of a water plant must be

[233] Brymer *v.* Butler Water Co., 179 Pa. St. 331, 36 Atl. 249.

[234] Wilkes-Barre *v.* Spring Brook Water Co., 4 Lack. Pa. Leg. News 367.

the money actually invested by the owners. If the earnings of the company have been used to improve the property, it is counted as so much more cash invested."

§ 47. **When Does a Rate Violate Rights under the Fourteenth Amendment?**—That "prescribing rates for the future is an act legislative, and not judicial, in kind" can not be disputed,[235] but whether or not a particular rate regulation takes property "without just compensation," is at least in part a question of law.

The legislative branch of the government must obey the constitution, and it has long been established by the Supreme Court of the United States that when it is called upon to determine whether or not an act of the legislative branch shall be enforced, it can and must decide whether the passage of such act was authorized by the fundamental law of the Union. What is just compensation is a flexible term, equally honest and equally competent men may materially disagree on this subject. Should the net income on the investment be 2, 3, 4, 5, 6, or 7 per cent? If the legislature, or a board duly created and acting in a perfectly legal way, fixes a particular amount as the maximum income which shall be earned by a public carrier, shall the courts annul such action, if in the opinion of the particular judge or judges trying the case, the amount fixed is not a just and fair compensation? That the courts in a clear case where there can be little or no doubt that the compensation is inadequate, must act under their obligation to support and enforce the Constitution of the United States, and in such cases declare the rate prescribed illegal will not, as has sometimes been intimated, make the Supreme Court of the United States the supreme legislative tribunal in this country. It must be a clear case to justify action by the courts, but as said by Mr. Justice Moody in Knoxville Water case, *supra:*

"The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind. Regulation of public service corporations, which perform their duties under conditions of necessary monopoly will occur with greater and greater frequency as time goes on. It is a delicate and dangerous func-

[235] Louisville & N. R. Co. *v.* Garrett, 231 U. S. 298, 58 L. Ed. 229, 34 Sup. Ct. 48, and cases cited.

tion, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated."

What percentage on the amount invested in the public use the investors are entitled to receive must, of course, depend upon many considerations. Some of which are stated in the Knoxville Water case and the New York Gas case. In the Knoxville case, where the proof indicated clearly that the earnings, after deducting two per cent for depreciation, would net four per cent, the court held that confiscation had not been proved. In the Gas case Mr. Justice Peckham, speaking for the court, said: "Taking all facts into consideration, we concur with the court below on this question, and think complainant is entitled to six per cent on the fair value of its property devoted to the public use."

The Circuit Judge, in the Minnesota Rate Cases,[236] held that a "net income of 7 per cent per annum on the value of a railroad property . . . is not more than the fair return to which a railroad company is entitled under the Fourteenth Amendment to the Constitution." The Supreme Court reversed the Circuit Judge, on the ground that confication had not been shown but did not determine what was a reasonable rate of return.

In discussing telephone rates, the Supreme Court declined to express an opinion as to whether or not 6 per cent on the investment was confiscatory.[237]

In another case where the property of the corporation was fixed at a value higher than the cost and a return of 6 per cent was fixed on such value, the Supreme Court refused to set aside the rate yielding such return. In this case, the question of the value of the franchise was discussed and Mr. Justice Holmes stated the difficulty of solving the problem in this language.[238]

"An adjustment of this sort under a power to regulate rates has to steer between Scylla and Charybdis. On the one side if the franchise is taken to mean that the most profitable return

[236] Shepard *v.* Northern Pac. Ry. Co., 184 Fed. 765, reversed, Simpson *v.* Shepard, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729.

[237] Louisville, City of, *v.* Cumberland Tel. & Tel. Co., 225 U. S. 430, 56 L. Ed. 1151, 32 Sup. Ct. 741.

[238] Cedar Rapids Gas Co. *v.* Cedar Rapids, 223 U. S. 655, 56 L. Ed. 594, 32 Sup. Ct. 389.

that could be got, free from compensation, is protected by the Fourteenth Amendment, then the power to regulate is null. On the other hand if the power to regulate withdraws the protection of the Amendment altogether, then the property is nought. This is not a matter of economic theory, but of fair interpretation of a bargain. Neither extreme can have been meant. A midway between them must be hit." In the Des Moines Gas case [239] the court said:

"Nor do we think that there was error in refusing an injunction upon the conclusion reached that a return of 6 per cent per annum on the valuation would not be confiscatory. This is especially true in view of the fact that the ordinance was attacked before there was opportunity to test its result by actual experience."

None of these cases announces a general rule, and it is obvious that what would be reasonable in one case might be unjust in another. A railroad which must from its very nature be more or less of a monopoly would not be entitled to as large a return as a more hazardous business. All these questions are primarily questions of policy for the legislature, and it is only when the rate prescribed violates the constitutional requirement that courts may act.

In San Diego Land & Town Co. *v.* National City, it was said that: [240] "What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public."

What is a "fair return" is primarily a legislative question, and Mr. Justice Hughes, in the Minnesota Rate cases, *supra*, stated

[239] Des Moines Gas Co. *v.* City of Des Moines, 238 U. S. 153, 59 L. Ed. —, 35 Sup. Ct. 811.

[240] San Diego Land & Town Co. *v.* National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804. See also San Diego Land & Town Co. *v.* Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571; Knoxville *v.* Knoxville Water Co., 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. 148; Wilcox *v.* Consolidated Gas Co., 212 U. S. 19, 53 L. Ed. 382, 29 Sup. Ct. 192; Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418. And see Atlantic C. L. R. Co. *v.* North Carolina Corp. Com., 206 U. S. 1, 26, 51 Fed. 933, 27 Sup. Ct. 585, when speaking of rate making the Chief Justice referred to the "flexible limit of judgment which belongs to the power to fix rates."

the power of the courts by saying: "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 matters within the province of either."

The question depending so largely upon the special facts of each case, it is unlikely that the Supreme Court will ever prescribe a hard and fast rule as to the percentage of income that will constitute a "fair return."

48. **Rates—Evidence That Rate Is Confiscatory—Rates on a Few Commodities.**—It is easy to say that a railroad is entitled to earn a fair return upon the property devoted to the business of common carriage, but it is difficult to determine in a concrete case what is a fair return. The cost of moving one commodity can not be definitely ascertained, much of such cost not being capable of allocation. When a rate on one or a few commodities is fixed by legislative act, and the rates are attacked in court, the presumption is that the rate is fair, and in ordinary cases the presumption can not be overcome by any definite proof, when the rate is prescribed by a commission.

It would, therefore, seem that when the commission, after a full hearing, and aided by the long experience and special training of its members, fixes a rate on one or a few commodities that represent in comparison a very small part of the traffic of the carrier, such rate would be binding on all courts, because no one could prove it did not yield a just compensation. This statement has reference to such orders as the commission will issue. Of course, a rate on even one commodity might be so low as to be clearly illegal. These views are expressed by Mr. Justice Brewer, in the Florida Phosphate Rate Case,[241] as follows:

"The order of the commission was not operative upon all local rates, but only fixed the rate on a single article, to wit, phosphate. There is no evidence of the amount of phosphates carried locally; neither is it shown how much a change in the rate of carrying them will affect the income, nor how much the rate fixed by the railroads for carrying phosphate has been changed by the order of the commission. There is testimony tending to show the gross income from all local freights and the value of the

[241] Atlantic C. L. R. Co. *v.* Florida, 203 U. S. 256, 51 L. Ed. 174, 27 Sup. Ct. 108. See also Seaboard A. R. Ry. Co. *v.* Florida, 203 U. S. 261, 51 L. Ed. 175, 27 Sup. Ct. 109.

railroad property, and also certain difficulties in the way of transporting phosphates, owing to the lack of facilities at the terminals. But there is nothing from which we can determine the cost of such transportation. We are aware of the difficulty which attends proof of the cost of transporting a single article, and, in order to determine the reasonableness of a rate prescribed, it may sometimes be necessary to accept as a basis the average rate of all transportation per ton per mile. We shall not attempt to indicate to what extent or in what cases the inquiry must be special and limited. It is enough for the present to hold that there is in the record nothing from which a reasonable deduction can be made as to the cost of transportation, the amount of phosphates transported, or the effect which the rate established by the commission will have upon the income. Under these circumstances it is impossible to hold that there was error in the conclusions reached by the Supreme Court of the state of Florida, and its judgment is affirmed."

Notwithstanding this presumption, rates on particular commodities may be shown to yield such a return as amounts to confiscation. The Supreme Court has said:[242] "While local interests serve as a motive for enforcing reasonable rates, it would be a very different matter to say that the state may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally be asserted—to carry gratuitously, in order to build up a local enterprise. That would be to go outside the carrier's undertaking, and outside the field of reasonable supervision of the conduct of its business, and would be equivalent to an appropriation of the property to public uses upon terms to which the carrier had in no way agreed." This principle, as was shown in the same case, does not deny the right to classify commodities; making rates thereon according to hazard, value of service which results in large part from the value of the commodity, and other well known considerations. The court said: "The legislature undoubtedly has a wide range of discretion in the exercise of power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities, or to secure the same percentage of profit on every sort of

[242] North. Pac. R. Co. *v.* North Dakota, 236 U. S. 585, 59 L. Ed. —, 35 Sup. Ct. 429; and to the same effect see Norfolk & W. Ry. Co. *v.* Conley, 236 U. S. 605, 59 L. Ed. —, 35 Sup. Ct. 437.

business. There are many factors to be considered—differences in the articles transported, the care required, the risk assumed, the value of the service, and it is obviously important that there should be reasonable adjustments and classifications." Rates voluntarily established by a common carrier may be considered in determining whether or not the same rates are reasonable when prescribed by a state rate-making body.[243]

§ 49. **Same Subject—Relative Cost of Different Kinds of Transportation.**—The same track, the same cars and, to a large extent, the same employees, are used or engaged in both interstate and intrastate commerce, and in passenger and freight transportation. When a state prescribes rates on intrastate transportation, and it is sought to show that such rates are confiscatory, to make proof thereof requires evidence as to the cost of the intrastate movement as well as of the value of the property devoted thereto. To a certain extent this cost may be allocated, but much of the cost of local or intrastate transportation relates to the use of property and the cost of service which are employed in both kinds of transportation.

The federal trial courts in the various rate cases which reached the Supreme Court in 1913 devoted much argument to this question, and the witnesses in the cases expressed widely different opinions with reference thereto. All agreed that the intrastate movement cost more than the interstate movement. Some placed this excess cost as low as fifty per cent and some as high as seven hundred per cent.[244] There is a difference between the cost, as related to the receipts of passenger and freight business; what this difference is, is a fact about which there are varying opinions. In the Minnesota Rate Cases, at page 432, Mr. Justice Hughes speaks of "the extreme difficulty and intricacy of the calculations which must be made in the effort to establish a segregation of intrastate business for the purpose of determining the return to which the carrier is properly entitled therefrom;" and in the course of the opinion in that and the related cases reported in Volumes 230 and 231 of the Supreme Court Reports, the methods adopted by the trial courts are rejected as unsatisfactory, and the conclusion as well as the true method is indi-

[243] Louisville & N. R. Co. *v.* Finn, 235 U. S. 601, 59 L. Ed. —, 35 Sup. Ct. 147. Sec. 102, *post.*

[244] Shepard *v.* Northern Pac. Ry. Co., 184 Fed. 765, 812, *et seq.*

cated by the statement in the opinion at page 465 of Volume 230, as follows:

"We are of the opinion that on an issue of this character involving the constitutional validity of state action, general estimates of the sort here submitted, with respect to a subject so intricate and important, should not be accepted as adequate proof to sustain a finding of confiscation. While accounts have been kept so as to show the relative cost of interstate and intrastate business, giving particulars of the traffic handled on through and local trains, and presenting *data* from which such extra cost, as there may be, of intrastate business may be suitably determined, it would appear to have been not impracticable to have had such accounts kept or statistics prepared at least during test periods properly selected. It may be said that this would have been a very difficult matter, but the company having assailed the constitutionality of the state acts and orders was bound to establish its case, and it was not entitled to rest on expressions of judgment when it had it in its power to present accurate data which would permit the court to draw the right conclusion." [245]

[245] For cases relating to methods to be adopted in determining the relative cost of different kinds of transportation see, Minneapolis & St. L. R. Co. *v.* Minnesota, 186 U. S. 257, 262, 46 L. Ed. 1151, 22 Sup. Ct. 900; St. Louis & S. F. R. Co. *v.* Hadley, 168 Fed. 317, 348; Ames *v.* Union Pac. R. Co., 64 Fed. 165; Chicago, M. & St. P. R. Co. *v.* Tompkins, 176 U. S. 167, 44 L. Ed. 417, 20 Sup. Ct. 336; Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418; Chicago, M. & St. P. R. Co. *v.* Keyes, 91 Fed. 47, 55; Re Arkansas Rates, 163 Fed. 141; Missouri, K. & T. R. Co. *v.* Love, 177 Fed. 493, 498, 499; Love *v.* Atchison, T. & S. F. R. Co., 185 Fed. 321, 330, 331, 218 U. S. 675, 220 U. S. 618; Shepard *v.* Northern Pac. R. Co., 184 Fed. 765, 810, 812; Re Arkansas Rates, 187 Fed. 290, 320, 344; Cedar Hill Coal and Coke Co. *v.* Colorado & Southern Ry. Co., 16 I. C. C. 387, 393; Gustin *v.* Atchison, T. & S. F. R. Co., 8 I. C. C. 277; Wilcox *v.* Consolidated Gas Co., 212 U. S. 19, 53 L. Ed. 382, 29 Sup. Ct. 192, 15 Am. Cas. 1034; Atlantic C. L. R. Co. *v.* North Carolina Corp. Com., 206 U. S. 1, 51 L. Ed. 933, 27 Sup. Ct. 585; St. Louis & S. F. R. Co. *v.* Gill, 156 U. S. 649, 665, 39 L. Ed. 567, 15 Sup. Ct. 484; Southern Ry. Co. *v.* Atlanta Stove Works Co., 128 Ga. 207, 233, 234, 57 S. E. 429; Wisconsin M. & P. R. Co. *v.* Jacobson, 71 Minn. 519, 7 N. W. 893, 40 L. R. A. 389, 70 Am. St. Ry. 358, 179 U. S. 287, 302, 45 L. Ed. 194, 21 Sup. Ct. 115; State *v.* Missouri P. Ry. Co., 76 Kan. 467, 92 Pac. 606; Pensacola & A. R. Co. *v.* Flor-

Seeking to conform to the rule stated above in the quotation from the opinion in the Minnesota Rate cases, carriers serving the state of Arkansas have from data carefully obtained formulated rules which appear to be more nearly accurate than any previously published, and which rules were adopted by the trial court in an opinion holding that the Arkansas intrastate rates were confiscatory.[246]

The Interstate Commerce Commission requires carriers to make a separation of operating expense between freight and passenger service.[247]

ida, 25 Fla. 310, 5 So. 833; Morgan's R. & S. Co. *v.* R. R. Commission, 109 La. 247, 33 So. 214; People *v.* St. Louis A. & T. H. R. Co., 176 Ill. 512, 52 N. E. 292; Chicago Union Traction Co. *v.* Chicago, 199 Ill. 579, 65 N. E. 470; Reagan *v.* Farmer's L. & T. Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047; San Diego Land Co. *v.* National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804; Covington & L. Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 596, 597, 41 L. Ed. 560, 17 Sup. Ct. 198; Jerome Hill Cotton Co. *v.* Missouri, K. & T. Ry. Co., 6 I. C. C. 601; Southern Pac. Co. *v.* Bartine, 170 Fed. 725. Following the suggestion of the Supreme Court quoted in the text, the Commission has prescribed rules relating to the separation of expenses. Separation of Operating Expenses, 30 I. C. C. 676. For cases construing the powers of State Commissions generally, see, Steenerson *v.* Great N. Ry. Co., 69 Minn. 353, 375, 376, 67 N. W. 207; State *v.* Chicago, M. & St. P. Ry. Co., 38 Minn. 281, 298, 37 N. W. 782; Foreman *v.* Board, 64 Minn. 371, 67 N. W. 207; State *v.* Young, 29 Minn. 474, 9 N. W. 737; Southern Pac. Co. *v.* R. R. Com. of Oregon, Ore., 119 Pac. 727; Minneapolis, St. P. & S. Ste. M. R. Co. *v.* R. R. Com. of Wisconsin, 136 Wis. 146, 116 N. W. 905; Chicago, R. I. & P. Ry. Co. *v.* Railway Com., 85 Neb. 818, 824-5, 124 N. W. 477; Spring Valley Water Works *v.* San Francisco, 82 Cal. 286, 306, 22 Pac. 910, 1046; Jacobson *v.* Wisconsin Ry. Co., 71 Minn. 519, 529, 74 N. W. 893; 40 L. R. A. 389, 70 Am. St. 358; Morgan's L. & T. R. & S. S. Co. *v.* R. R. Com. of Louisiana, 109 Ga. 247, 265, 33 So. 214; In Re Amsterdam, 33 N. Y. Supp. 1009; People *v.* Board of R. R. Com'rs, 53 App. Div. 61; Pensacola & A. R. Co. *v.* State, 25 Fla. 310, 5 So. 833; Storrs *v.* Pensacola Ry. Co., 29 Fla. 617, 11 So. 226; State *v.* Seaboard A. L. Ry. Co., 48 Fla. 114, 150, 152, 37 So. 652, 658.

[246] Boyle *v.* St. Louis & S. F. R. Co., 222 Fed. 539.

[247] Separation of Operating Expenses, 30 I. C. C. 676 and rules adopted by the Commission June 15, 1915.

§ 50. **Testing a Rate by Use to Determine Whether or Not It Is Confiscatory.**—Circuit Judge Woods, in 1881, first applied the test to a rate. What he there said applies with great force to a rate fixed by an administrative commission. He said:[248]

"The officers of the railroad company declare that the rates fixed by the commission will so reduce its income that it will not suffice to pay the running expenses of the road and the interest on its bonded debt, leaving nothing for dividends to its stockholders. The railroad commissioners assert that their schedule was framed to produce 8 per cent. income on the value of the road after paying cost of maintenance and running expenses. Which view is the correct one, it is impossible to decide from the evidence submitted. There is, however, a conclusive way, and it seems to me it is the only one, by which this controversy can be settled, and that is by experiment. A reduction of railroad charges is not always followed by a reduction of either gross or net income. It can soon be settled which is right—the railroad company's officers or the railroad commission—in their view of the effect of the commission's tariff of rates, by allowing the tariff to go into operation. If it turns out that the views of the railroad company are correct, and that the schedule fixed by the commission is too low to afford a fair return upon the value of the road, the remedy is plain; for the law makes it the duty of the commissioners 'from time to time, and as often as circumstances may require, to change and revise said schedules.'"

This test was followed by District Judges McPherson and Newman and commended by Circuit Judge Shelby and by the Interstate Commerce Commission,[249] and the principle has been applied by the Supreme Court.[250] The Supreme Court, in the 1913 North Dakota case, referred to in note, [250] *supra,* gave as a

[248] Tilley *v.* Railroad Co., 5 Fed. 641, 662, 4 Woods 427.

[249] St. Louis S. W. Ry. Co. *v.* Hadley, 155 Fed. 220; Cent. of Ga. Ry. Co. *v.* McLandon, 157 Fed. 961, 978; R. R. Com. of Alabama *v.* Cent. of Ga. Ry. Co., 170 Fed. 225, 232, 233; Loftis *v.* Pullman Co., 19 I. C. C. 102; City of Spokane *v.* Northern Pac. Ry. Co., 19 I. C. C. 162; see Shepard *v.* Northern Pac. Ry. Co., 184 Fed. 765, 807; Des Moines Gas Case quoted *supra,* sec. 46.

[250] Ex Parte Young, 209 U. S. 123, 52 L. Ed. 714, 28 Sup. Ct. 441; Knoxville *v.* Knoxville Water Co., 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. 148; Wilcox *v.* Con-

reason for a test, "the great difficulty in the attempt to measure the reasonableness of charges by reference to the cost of transporting the particular class of freight concerned." On the second appeal of this case the result of this test is shown.[251]

Another reason for the test and why great care should be observed in enjoining an order fixing a rate is that the shipper can not be protected by a bond, should the lower rate be finally held valid. This is clearly and unanswerably shown by Circuit Judge Shelby in the Alabama Rate case,[252] where he says:

"It is argued that the injunction should be issued because the rights of the defendants and all interested are secured by bonds. It is true that the courts have held that the fact that the defendants' rights may be secured by bond is sometimes a sound reason, in cases where the final result is doubtful, for exercising judicial discretion in favor of granting the preliminary injunction. But that rule is not always controlling, and clearly it should not be applied in cases where the bond does not afford adequate protection. Here the bonds given are intended to secure innumerable passengers and shippers or consignees. It is not at all probable that the claims of the tenth of them, on breach of the bonds, would ever be presented, or, if presented, would be paid, and to enforce payment in the courts, unless those injured combined in their efforts, would cost more than the claim is worth. Those familiar with the Tift case know that the bond proved ineffectual as complete indemnity in that case, although the parties sought to be protected were large shippers of lumber. Tift et al. *v.* Southern Railway Company et al. (C. C.) 123 Fed. 789; Id., 10 I. C. C. 548; Id. (C. C.) 138 Fed. 753; Southern Railway Company et al. *v.* Tift et al. (C. C. A.) 148 Fed. 1021; Id. 206 U. S. 428, 27 Sup. Ct. 709; 51 L. Ed. 1124; Tift et al. *v.* Southern Railway Company et al. (C. C.) 159 Fed. 555. Where the injunction is granted, the bonds should of

solidated Gas Co., 212 U. S. 19, 53 L. Ed. 382, 29 Sup. Ct. 192; Northern Pac. Ry. Co. *v.* North Dakota, 216 U. S. 579, 54 L. Ed. 624, 30 Sup. Ct. 423, affirming North Dakota *v.* Northern Pac. Ry. Co., 17 N. Dak. 223, 116 N. W. 92; Louisville N. R. Co. *v.* & Cumberland Tel. & Tel. Co., 225 U. S. 430, 56 L. Ed. 1151, 32 Sup. Ct. 741.

[251] North. Pac. R. Co. *v.* North Dakota, 236 U. S. 585, 59 L. Ed. —, 35 Sup. Ct. 429.

[252] R. R. Com. of Alabama *v.* Cent. of Ga. Ry. Co., 170 Fed. 225, 232, 233.

course, be required, but the court can not safely exercise its discretion upon the theory that the bond in a case like this gives complete indemnity."

The fact that the railroad has voluntarily applied the test will not estop it from enjoining the rate where the test shows confiscation.[253]

§ 51. **Issuance of Stocks and Bonds.**—Because unfaithful financiers have caused to be issued stocks and bonds of public service corporations without adequate security and sometimes with the intention of using the proceeds for personal rather than corporate purposes, and because the amount of the corporate securities of such corporations is a fact to be considered in determining rates to be charged, a number of the states have passed laws regulating the issuance of stocks and bonds. Some of the reasons for such statutes are given by the Court of Appeals of Maryland in this language:[254]

"That issues of stocks and bonds have been made fraudulently and palmed off on a credulous public to their ultimate serious loss is matter of common knowledge. Facts in relation to such issues, especially with regard to local public utilities, have been difficult, if not impossible, to obtain, leaving it to the stimulated imagination of some broker or syndicate who, actuated by a heavy commission to be realized by creating a market until such stock or bonds could be unloaded, have reaped a reward in dollars and cents at the cost of those who were induced to give full faith and credit to their representations. The legislatures of many states have therefore, through the media of public service commissions, seen fit to establish a quasi guardianship over prospective investors."

These laws are valid in so far as they restrict the issuance of corporate securities to purposes authorized by the law of the corporation, and in so far as they restrict the issuance of such securities to the proper corporate purposes; but such laws do not empower the states or state commissions to assume the management of the business of the corporation to the exclusion of its directors. Such legislation, as was said by the Court of Appeals of

[253] Love *v.* Atchison, T. & S. F. Ry. Co., 185 Fed. 321, 107 C. C. A. 403, and note 251, *supra*.

[254] Laird *v.* Baltimore & O. R. Co., 88 Atl. 348, 350, 121 Md. 193.

New York, was not [255] "designed to make the commissioners the financial managers of the corporation, or that it empowered them to substitute their judgment for that of the board of directors or stockholders of the corporation as to the wisdom of a transaction, but that it was designed to make the commissioners the guardians of the public by enabling them to prevent the issue of stock and bonds for other than the statutory purposes."

No state can regulate or prohibit the issuance of stock and bonds by an interstate railroad, when the stocks and bonds are issued against lines extending beyond the limits of the state. The power of the state being limited to bonds and stocks on property situated in the state. It would seem, however, that even as to these, a state might require the interstate railroad to give information as to such issue.[256]

Acting on this principle and in accord with an able and exhaustive opinion of its special attorney, the Railroad Commission of Georgia refused to assume jurisdiction of the question of the issuance of bonds by the Atlantic Coast Line Railroad Company on its interstate lines.[257]

§ 52. **Long and Short Haul.**—The law of the state of Kentucky provided that it shall be unlawful for any person or corporation owning or operating a railroad in the state to charge or receive any greater compensation in the aggregate for the transportation of passengers or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line, in the same direction, the shorter being included in the longer distance.

The Kentucky court [258] having affirmed a judgment against the Louisville & Nashville Railroad Company for a violation of that law, an appeal was taken to the Supreme Court of the United States, where the decision of the Kentucky court was affirmed.[259] In this case both the long and the short haul were within the state of Kentucky. In holding that the Kentucky law did not illegally affect interstate commerce, the court said:

[255] People ex rel. Delaware & H. Co. *v.* Stevens, 197 N. Y. 1, 90 N. E. 60.

[256] Laird *v.* Baltimore & O. R. Co., 88 Atl. 348, 121 Md. 193.

[257] Report of Railroad Com. of Ga. 1912, p. 222, *et seq.*

[258] Louisville & N. R. Co. *v.* Kentucky, 21 Ky. Law Rep. 232, 51 S. W. 164, 1012, 106 Ky. 633.

[259] Louisville & N. R. Co. *v.* Kentucky, 183 U. S. 503, 46 L. Ed. 298, 22 Sup. Ct. 95.

"It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the state, and the long and short distances mentioned are evidently distances upon the railroad line within the state. The particular case before us is one involving only the transportation of coal from one point in the state of Kentucky to another by a corporation of that state.

"It may be that the enforcement of the state regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commerce power of the general government, to be unlawful, must be direct, and not the merely incidental effect of enforcing the police powers of a state."

In another case where the state court held that the law applied where the long haul was interstate commerce, the Supreme Court reversed the state court and held that the Kentucky law so construed was invalid. The court, Mr. Justice Peckham delivering the opinion (and Mr. Justice Brewer and Mr. Justice Gray, dissenting), said: [260]

"Congress does not directly or indirectly interfere with local rates by adopting their sum as the interstate rate.

"In the case at bar the state claims only to regulate its local rates by the standard of the interstate rate, and says the former shall be no higher than the latter, but the direct effect of that provision is, as we have seen, to regulate the interstate rate, for to do any interstate business at the local rate is impossible, and if so, it must give up its interstate business or else reduce the rate in proportion. That very result is a hindrance to, an interference with, and a regulation of, commerce between the states, carried on, though it may be, by only a single company."

[260] Louisville & N. R. Co. *v.* Eubank, 184 U. S. 27, 46 L. Ed. 416, 22 Sup. Ct. 277. See Louisville & N. R. Co. *v.* Com. of Ky., 106 Ky. 633, 51 S. W. 164, 1012, 90 Am. St. Rep. 236, 183 U. S. 503, 46 L. Ed. 298, 22 Sup. Ct. 95; Louisville & N. R. Co. *v.* Garrett, 231 U. S. 298, 58 L. Ed. 229, 34 Sup. Ct. 48, 51.

In the Minnesota Rate Cases,[261] at pages 428 and 429, the Supreme Court reviewed the Kentucky decisions and held that the first case was not affected by the later or Eubanks case. The review of the two decisions concludes with this statement:

"The authority of the former decision upholding the state law, as applied to places all of which were within the state, was in no way impaired and the court fully recognized the power of the state to prescribe maximum charges for intrastate traffic although carried over an interstate road to points on the state line."

§ 53. **Ferries.**—The Supreme Court quotes as a definition of an ordinary ferry the following:[262]

"A ferry is a continuation of the highway from one side of the water over which it passes to the other, and is for transportation of passengers or of travellers with their teams and vehicles and such other property as they may carry or have with them."

At page 468 the opinion distinguishes such a ferry from one used by a railroad as a means of transporting cars, passengers and freight. Whatever doubt there may have been on the subject of the right of regulation by a state of a railroad ferry across a stream which is the boundary between two states, has been set at rest by a recent decision of the Supreme Court. In this decision the court quotes the definition of "railroad" contained in the Act to Regulate Commerce,[263] and says:[264]

"The inclusion of railroad ferries within the text is so certain

[261] Simpson, et al., R. R. Com. of Minnesota *v.* Shepard, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729. See also Chicago, B. & Q. R. Co. *v.* Anderson, 72 Neb. 586, 101 N. W. 1019. For a full discussion of the general subject and of discrimination in general, see McGrew *v.* Missouri Pac. Ry. Co., 230 Mo. 496, 132 S. W. 1076.

[262] St. Clair County *v.* Interstate Transp. Co., 192 U. S. 454, 466, 48 L. Ed. 518, 24 Sup. Ct. 300, citing Mayor of New York *v.* Starin, 106 N. Y. 1, 12 N. E. 631; Brodnax *v.* Bake, 94 N. C. 675; see also Mayor of New York *v.* New England Transp. Co., 14 Blatch. 159, Fed. Cas. 10197.

[263] *Post*, sec. 337.

[264] New York Cent. & H. R. R. Co. *v.* Board, etc., of Hudson County, 227 U. S. 248, 263, 264, 57 L. Ed. 499, 33 Sup. Ct. 269, reversing same styled case, 76 N. J. Law 664, 74 Atl. 954. This case and the St. Clair case, note 262, *supra*, cites and discusses many authorities. To the same effect see Port Richmond & B. P. F. Co. *v.* County of Hudson, 234 U. S. 317, 58 L. Ed. 1330, 34 Sup. Ct. 821; reversing same styled case, 82 N. J. L. 536, 82 Atl. 729.

and so direct as to require nothing but a consideration of the text itself. Indeed, this inevitable conclusion is not disputed in the argument for the defendant in error, but it is insisted that as the text only embraces railroad ferries and the ordinances were expressly decided by the court below only to apply to persons other than railroad passengers, therefore the action by Congress does not extend to the subject embraced by the ordinances. But as all the business of the ferries between the two states was interstate commerce within the power of Congress to control and subject in any event to regulation by the state as long only as no action was taken by Congress, the result of the action by Congress leaves the subject, that is, the interstate commerce carried on by means of the ferries, free from control by the state. We think the argument by which it is sought to limit the operation of the act of Congress to certain elements only of the interstate commerce embraced in the business of ferriage from state to state is wanting in merit. In the absence of an express exclusion of some of the elements of interstate commerce entering into the ferriage, the assertion of power on the part of Congress must be treated as being coterminous with the authority over the subject as to which the purpose of Congress to take control was manifested."

While the language above was used with reference to a railroad ferry, it would seem to be broad enough to include an ordinary ferry, and the law is that states have no greater power to regulate a ferry between two states than they have to regulate an interstate railroad.[265] Nor can a state close navigation.[266]

[265] See Gloucester Ferry Co. *v.* Penna., 114 U. S. 196, 29 L. Ed. 158, 5 Sup. Ct. 826; Covington Bridge Co. *v.* Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 Sup. Ct. 1087; St. Clair County *v.* Interstate Transp. Co., 192 U. S. 454, 48 L. Ed. 518, 24 Sup. Ct. 300; Lake Shore & M. S. Ry. Co. *v.* Ohio, 165 U. S. 365, 41 L. Ed. 747, 17 Sup. Ct. 357; United States *v.* Union Bridge Co., 143 Fed. 377, affirmed, 204 U. S. 364, 51 L. Ed. 523, 27 Sup. Ct. 367; Manigault *v.* S. M. Word & Co., 123 Fed. 707, affirmed, Manigault *v.* Springs, 199 U. S. 473, 50 L. Ed. 274, 26 Sup. Ct. 227.

[266] Levy *v.* United States, 92 Fed. 344, 34 C. C. A. 392, reversed, Levy *v.* United States, 177 U. S. 621, 44 L. Ed. 914, 20 Sup. Ct. 797, holding that the evidence was insufficient to show that the waters were used in interstate commerce.

Fish, sponges, oysters, etc., in local waters belong to the states and are subject to their control.[267]

A municipality, and by parity of reasoning a state, can not lawfully require a Canadian corporation operating a ferry over a boundary stream lying between Canada and the state in which the municipality is located to take out a license and pay a fee as a condition precedent to receiving and landing passengers and property in said municipality.[268] The rates for ferriage between two ports in the same state may be regulated by the state, notwithstanding the transportation is over a course which traverses the open sea.[269]

§ 54. **Bridges.**—Bridges across a stream which is a boundary between two states accommodate interstate commerce, and like ferries, are included in the definition of railroads in the Act to Regulate Commerce.[270] The rules of law stated in the preceding section as applicable to ferries, apply equally to such bridges. There are, however, bridges across navigable streams which are wholly within the boundaries of a state. As to these, Mr. Justice Field said that the states had full power[271] "to regulate within their limits matters of internal police, which embraces among other things the construction, repair and maintenance of roads and bridges, and the establishment of ferries; that the states are more likely to appreciate the importance of these means of internal communication and to provide for their proper management, than a government at a distance; and that, as to bridges over navigable streams, their power is subordinate to that of Congress, as an act of the latter body is, by the Constitution, made the supreme law of the land; but that until Con-

[267] The Abby Dodge, 223 U. S. 166, 56 L. Ed. 390, 32 Sup. Ct. 310, and cases cited and discussed in the opinion.

[268] Sault Ste. Marie *v.* International Transit Co., 234 U. S. 333, 58 L. Ed. 1337, 34 Sup. Ct. 826.

[269] Wilmington Trans. Co. *v.* R. R. Com. of Calif., 236 U. S. 151, 59 L. Ed. —, 35 Sup. Ct. 276.

[270] Note 263, *supra*.

[271] Cardwell *v.* American Bridge Co., 113 U. S. 205, 208, 209, 28 L. Ed. 959, 5 Sup. Ct. 423. See also Wilson *v.* Blackbird Creek Marsh Co., 2 Pet., 27 U. S. 245, 7 L. Ed. 412; Pennsylvania *v.* Wheeling Bridge Co., 13 How., 54 U. S. 518, 564, 14 L. Ed. 249; Gilman *v.* Philadelphia, 3 Wall., 70 U. S. 713, 18 L. Ed. 96; Pound *v.* Turck, 95 U. S. 459, 24 L. Ed. 525; Escanaba Co. *v.* Chicago, 107 U. S. 678, 27 L. Ed. 442, 2 Sup. Ct. 185; Miller *v.* Mayor of New York, 109 U. S. 385, 27 L. Ed. 971, 3 Sup. Ct. 270.

gress acts on the subject their power is plenary. When Congress acts directly with reference to the bridges authorized by the state, its will must control so far as may be necessary to secure the free navigation of the streams."

The same principle is announced by Mr. Justice Hughes in the Minnesota Rate Cases, as follows:[272]

"A state is entitled to protect its coasts, to improve its harbors, bays and streams, and to construct dams and bridges across navigable rivers within its limits, unless there is conflict with some act of Congress. Plainly, in the case of dams and bridges, interference with the accustomed right of navigation may result. But this exercise of the important power to provide local improvements has not been regarded as constituting such a direct burden upon intercourse or interchange of traffic as to be repugnant to the federal authority in its dormant state."

Where, under authority of a state, a bridge has been erected over a navigable stream within the state, the owners having erected such bridge with full knowledge of the paramount authority of Congress can not complain when, under authority of the federal government, such bridge is required to be removed as an obstruction to navigation.[273] Nor is this rule different

[272] Simpson *v.* Shepard, 230 U. S. 352, 403, 58 L. Ed. 151, 33 Sup. Ct. 729, citing authorities.

[273] Union Bridge Co. *v.* United States, 204 U. S. 364, 51 L. Ed. 523, 27 Sup. Ct. 367, followed in Monongahela Bridge Co. *v.* United States, 216 U. S. 177, 54 L. Ed. 435, 30 Sup. Ct. 306. See also, The Brig Aurora, 7 Cranch, 11 U. S. 382, 3 L. Ed. 378; Wayman *v.* Southard, 10 Wheat. 23 U. S. 1, 6 L. Ed. 253; Field *v.* Clark, 143 U. S. 649, 36 L. Ed. 294, 12 Sup. Ct. 495; C. W., etc., R. Co. *v.* Com'rs, 1 Ohio St. 77; Moers *v.* City of Reading, 21 Pa. St. 188; Locke's Appeal, 72 Pa. St. 491, 498; Buttfield *v.* Stranahan, 192 U. S. 470, 48 L. Ed. 525, 24 Sup. Ct. 349; Gibbons *v.* Ogden, 9 Wheat. 22 U. S. 1, 6 L. Ed. 23; Gibson *v.* United States, 166 U. S. 269, 41 L. Ed. 996, 17 Sup. Ct. 578; Scranton *v.* Wheeler, 179 U. S. 141, 45 L. Ed. 126, 21 Sup. Ct. 48; New Orleans Gas Light Co. *v.* Drainage Com., 197 U. S. 453, 49 L. Ed. 831, 25 Sup. Ct. 471; Chicago, B. & Q. R. Co. *v.* Drainage Com'rs, 200 U. S. 561, 50 L. Ed. 590, 26 Sup. Ct. 341; West Chicago Street R. Co. *v.* Chicago, 201 U. S. 506, 50 L. Ed. 845, 26 Sup. Ct. 518; Dugan *v.* Bridge Co., 27 Pa. St. 303; Cooke *v.* Boston & L. R. Co., 133 Mass. 185; Lake Erie & W. R. Co. *v.* Cluggish, 143 Ind. 347; Lake Erie & W. R. Co. *v.* Smith, 61 Fed. 885; State of Indiana *v.* Lake Erie & W. R. Co., 83 Fed.

when the bridge has been erected under authority of an Act of Congress.[274]

A state court may not compel the removal of a bridge over a navigable stream, such bridge being used in interstate commerce.[275]

§ 55. **Regulating Charges for Transportation by Water.** —The Act to Regulate Commerce applies,[276] "to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment,)" and since the enactment of the Panama Canal Act to interstate transportation by water.

There is a transportation service which is performed by vessels over inland waters wholly within one state. When this transportation service is open to all who apply therefor, that those engaged therein are common carriers is too well settled to justify extensive citation of authorities.[277] Being common carriers, the rates on intrastate transportation to be charged by them are subject to the same regulation by the states as rates for transportation by railroads.

The Constitution of the United States extends the judicial power of the courts of the United States "to all cases of admiralty and maritime jurisdiction," [278] and boats plying between

284, 287; St. L. & I. M. & S. R. Co. *v.* Taylor, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. 610; Northern Pac. R. Co. *v.* Duluth, 208 U. S. 583, 52 L. Ed. 630, 28 Sup. Ct. 341.

[274] Hannibal Bridge Co. *v.* United States, 221 U. S. 194, 55 L. Ed. 699, 31 Sup. Ct. 603. The rule as to bridges would apply to dams, Wilson *v.* Black Bird Creek Marsh Co., 2 Pet., 27 U. S. 245, 7 L. Ed. 412; Pound *v.* Turck, 95 U. S. 459, 24 L. Ed. 525.

[275] Kansas City S. R. Co. *v.* K. W. Valley Drainage District, 233 U. S. 75, 58 L. Ed. 837, 34 Sup. Ct. 564.

[276] Sec. 335, *post*, and the power granted by the Panama Act, *post*, 377.

[277] Moses *v.* Bettes, 4 Heisk. (Tenn.) 661, 13 Am. Rep. 1; Propeller Niagara *v.* Cordes, 21 How. 62 U. S. 7, 22, 23, 16 L. Ed. 41; Brown *v.* Clayton, 12 Ga. 564. In Hale *v.* New Jersey Navigation Co., 15 Conn. 539, 39 Am. Dec. 398, citing Judge Kent, the opinion classes inland carriers as "carriers by land or water."

[278] Art. III, Sec. 2, Constitution United States.

points in the same state are within this jurisdiction.[279] This, however, does not exclude the states from regulating rates on intrastate transportation, although the transportation may be by water.[280] There is nothing in the decision in the Daniel

[279] The Belfast, 7 Wall., 74 U. S. 624, 19 L. Ed. 266; Aldrich *v.* Ætna Co., 8 Wall., 75 U. S. 491, 19 L. Ed. 473; Tucker on the Constitution, Sec. 370.

[280] State legislation regulating or prescribing methods of regulating common carriers show in many states a legislative construction supporting the text. As some states have no navigable streams, their failure to refer to water transportation is only natural. *Alabama:* carrier includes doing business "over any navigable stream in whole or in part within the state or partly by rail and partly by water; but nothing in this article shall be construed as a regulation of or interference with interstate commerce;" Code 1907, sec. 5648. *Arizona* laws make no reference to water carriers; Sessions Laws 1912, chap. 90. The same is true in *Arkansas:* Kirby's Digest 1904, secs. 6002, 6280. *California:* "canal" companies are mentioned, and the Act includes "every common carrier," and common carrier comprehends owners of "any vessels regularly engaged in the transportation of persons or property for compensation upon the waters of this state or upon the high seas, over regular routes between points in this state;" Stat. 1911, 1st Ex. Sess., chap. 14. *Colorado*: no mention of water carriers; Laws 1910, Sp. Sess., chap. 5. *Connecticut:* includes all "common carriers" though no specific reference is made to water carriers; Acts 1911, chap. 128. *Delaware* has no commission. *Florida:* includes in the definition of common carriers, "all companies and any person or persons owning and operating steamships engaged in the transportation of freight or passengers from and to ports within this state; all companies and any person or persons owning and operating steamboats used in the transportation of freight or passengers upon the rivers or inland waters of this state;" Gen. Stat. 1906, chap. 5, Tit. 4, Div. 4. *Georgia:* "common carriers." No specific mention of water carriers; Code 1910, secs. 2660, et seq. *Idaho:* no commission. *Illinois:* transportation by "rail or water;" Revisal 1909, chap. 114, sec. 368. *Indiana:* no reference to water carriers; Acts 1907, chap. 241, sec. 18. *Iowa:* id.; Laws 1907, chap. 98, sec. 1. *Kansas:* id.; Laws 1911, chap. 238. *Kentucky:* id.; Carroll's Stat. 1909, sec. 821, et seq. *Louisiana:* "steamboat and other water craft;" Stat. 1906, no. 36, sec. 1. *Maine:* no reference to water carriers; Revised Stat. 1903, chap. 1. *Maryland:* includes "steamboat, powerboat and vessel-boat and ferry companies, canal companies;" Laws 1910, chap. 180, sec. 1; Laird *v.* Baltimore & O. R. Co., 121 Md. 193, 88 Atl. 348. *Massachusetts:* same power over

Ball [281] that militates against this rule. In that case, the commerce was interstate and the language of the opinion must be construed with reference to that fact, and Mr. Justice Field, in the course of the opinion, was careful to say that there was an

steamship companies as railroads; Acts 1906, chap. 433, pt. 1, sec. 6. *Michigan:* "wholly by rail or partly by rail and partly by water;" Pub. Acts 1909, no. 300, sec. 3. *Minnesota:* id.; Rev. Laws 1905, chap. 28, sec. 1953. *Mississippi:* no mention of water carriers; Const., Art. 7, secs. 184, 195; Laws 1908, chap. 82, sec. 1. *Missouri:* id.; Acts 1909, secs. 3189, 3251, 3252. *Montana:* id.; Rev. Codes 1907, secs. 4373, 4375. *Nebraska:* id.; Stat. 1907, sec. 10650 (b). *Nevada:* "wholly by rail or partly by rail and partly by water." *New Hampshire:* "all common carriers;" public utilities, includes ferry and toll bridge; Laws 1909, chap. 126, sec. 1; Laws 1911, chap. 164, sec. 1. *New Jersey:* canal companies; Laws 1911, chap. 195, sec. 15. *New Mexico:* no mention of water carriers; Const., Art. XI, sec. 7. *New York:* common carriers; no specific mention of water carriers; Laws 1910, chap. 480, sec. 2. *North Carolina:* all common carriers, steamboat companies mentioned; Const., Art. VII, sec. 142; Pell's Revisal 1908, sec. 1094 (2), 1099. *Ohio:* "wholly by rail or partly by rail and partly by water or wholly by water; Code 1910, sec. 502; Laws 1911, No. 325, sec. 1. *Oklahoma:* "canal, steamboat line;" Const., Art. IX, sec. 34. *Oregon:* "wholly by rail or partly by rail and partly by water;" Gen. Laws 1907, chap. 53, sec. 11. *Pennsylvania:* "by water or partly by railroad and partly by water;" Laws 1907, No. 250, sec. 6. *Rhode Island:* "steamboat, powerboat and ferry companies;" Acts 1912, chap. 795, sec. 2. *South Carolina:* "railroad companies;" Gen. Stat. 1902, sec. 2082; Const., Art. IX, sec. 14. *South Dakota:* no mention of water carriers; Rev. Pol. Code 1903, secs. 431, 450; Laws 1911, chap. 207, secs. 1, et seq. *Tennessee:* no mention of water carriers; Laws 1897, chap. 10, sec. 3; Acts 1907, chap. 390. *Texas:* id.; Sayles' Civ. Stats. 1897, Art. 4562, et seq. *Utah:* no commission. *Vermont:* no mention of water carriers; Pub. Stat. 1906, sec. 4602. *Virginia:* "canal, steamboat or steamship line;" Const., sec. 153. *Washington:* "steamboat companies;" Laws 1911, chap. 117, sec. 8. *West Virginia:* no commission. *Wisconsin:* "wholly by rail or partly by rail and partly by water;" Laws 1905, chap. 362, sec. 2; Amended Laws 1907, chap. 582. *Wyoming:* no commission. The foregoing references to state laws relating to regulation of common carriers are inserted to show where specific statements are made giving power to regulate water carriers. The full extent of the power to regulate is not attempted to be set forth.

[281] The Daniel Ball *v.* United States, 10 Wall., 77 U. S. 557, 19 L. Ed. 999.

intrastate commerce over which Congress had no control. He said: [282]

"There is undoubtedly an internal commerce which is subject to the control of the states. The power delegated to Congress is limited to commerce 'among the several states,' with foreign nations, and with the Indian tribes. This limitation necessarily excludes from federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a state, and does not extend to or affect other states."

§ 56. **Regulating Pilotage, Ports, Harbors and Vessels.** —Although state laws concerning pilotage are regulations of commerce, such laws fall within that class of powers which may be exercised by the states until Congress shall see fit to act.

The first act of Congress on the subject left this right in the states and, although there have been other acts of Congress relating to pilots, there is yet power in the states to make regulations concerning pilots in their domestic ports.

A law of California requiring certain vessels entering and departing from her ports to take on a resident bar pilot was held valid by the Supreme Court for the reason that the law did not conflict with any federal statute or regulation, although the federal power to regulate was stated to be "unquestioned." [283]

[282] The Daniel Ball is cited in the Minnesota Rate Cases (Simpson *v.* Shepard, 230 U. S. 352, 399), and the location in the opinion of the citation indicates that the decision was considered by Mr. Justice Hughes as not excluding intrastate commerce. For a further discussion of the case see sec. 67, *post.* The question of the jurisdiction of the federal courts under the constitutional provision quoted in the text is not involved in fixing a rate. As to jurisdiction, see The Belfast, 7 Wall., 74 U. S. 624, 19 L. Ed. 266; The Robert W. Parsons, 191 U. S. 17, 35, 48 L. Ed. 73, 24 Sup. Ct. 8. See as to whether commerce is interstate or intrastate, citing The Daniel Ball, Diamond Match Co. *v.* Ontonagon, 188 U. S. 82, 95, 47 L. Ed. 394, 23 Sup. Ct. 266; Pennsylvania R. Co., State of New York ex rel. *v.* Knight, 192 U. S. 21, 27, 48 L. Ed. 325, 24 Sup. Ct. 202; and Wilmington Transp. Co. *v.* R. R. Com. of Cal., 236 U. S. 151, 59 L. Ed. —, 35 Sup. Ct. 276. An ordinance fixing a rate of speed for boats in the Chicago river, was held not to interfere with the rights of navigation or with interstate commerce, Canada Atlantic Transit Co. *v.* City of Chicago, 210 Fed. 7, 125 C. C. A. 587.

[283] Anderson *v.* Pacific C. S. Co., 225 U. S. 187, 56 L. Ed.

A Louisiana statute prohibiting other than a duly licensed pilot from piloting vessels on the Mississippi river within the borders of the state was held to be a valid law.[284]

While states may establish harbor lines on navigable waters, such lines have no permanent force as against the will of Congress and, therefore, Congressional action supersedes prior state action.[285]

A law of the state of Alabama requiring the owners of steamboats navigating the waters of the state to file with a state officer certain information relating to the ownership of the boat and residence of the owners was held void, in so far as the law was brought to bear upon a vessel engaged in interstate commerce and licensed and enrolled under the Act of Congress for conducting the coasting trade.[286] In this case, Mr. Justice Nelson stated the applicable principle as follows:

"The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, are therefore but the exercise of an undisputed power. When, therefore, an act of the Legislature of a state prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the state law must give way; and this, without regard to the source of power whence the state Legislature derived its enactment.

1047, 32 Sup. Ct. 526, citing authorities, stating and giving the history of the federal laws on the subject. See also Cooley *v.* Board of Wardens, 12 How., 53 U. S. 299, 13 L. Ed. 996. The Queen, 206 Fed. 148, 124 C. C. A. 214, reversing same styled case, 184 Fed. 537.

[284] State *v.* Leech, 119 La. 522, 44 So. 285, 129 Am. St. Rep. 336; Leech *v.* Louisiana, 214 U. S. 175, 53 L. Ed. 956, 29 Sup. Ct. 552.

[285] Philadelphia Co. *v.* Stimson, Secy. of War, 223 U. S. 605, 56 L. Ed. 570, 32 Sup. Ct. 340.

[286] Sinnot *v.* Davenport, 22 How., 63 U. S. 227, 16 L. Ed. 243; Foster *v.* Davenport, 22 How., 63 U. S. 244, 16 L. Ed. 248. For further statement of the principle controlling the questions discussed in the text and for citation of authorities see, Simpson *v.* Shepard, 230 U. S. 352, 403, 57 L. Ed. 1511, 33 Sup. Ct. 729; and holding that tugs used in lightering vessels engaged in interstate commerce were themselves instrumentalities of interstate commerce, see United States *v.* Great Lakes Towing Co., 208 Fed. 733, 217 Fed. 657.

"This paramount authority of the act of Congress is not only conferred by the Constitution itself, but is the logical result of the power over the subject conferred upon that body by the states. They surrendered this power to the General Government; and to the extent of the fair exercise of it by Congress, the act must be supreme.

"The power of Congress, however, over the subject does not extend further than the regulation of commerce with foreign nations and among the several states. Beyond these limits the states have not surrendered their power over the subject, and may exercise it independently of any control or interference of the General Government."

Wharfage charges and tolls for the use of artificial facilities may be exacted "where Congress has not acted," although the payment is required of those engaged in interstate or foreign commerce;[287] and states may by statute give a lien upon all vessels, whether domestic or foreign and whether engaged in interstate or intrastate commerce, for injuries committed to persons and property within the state, and the statute may provide that for non-maritime torts, relief may be had in the state courts.[288]

§ 57. **Boards of Trade and Exchanges.**—A statute of the state of Missouri provided among other things that it should be "unlawful for any corporation, association, copartnership or person to keep, or cause to be kept, in this state, any office, store or other place wherein is permitted the buying or selling the shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other commodities, either on margins or

[287] Simpson *v.* Shepard, 230 U. S. 352, 405, 57 L. Ed. 1511, 33 Sup. Ct. 729; Keokuk Packet Co. *v* Keokuk, 95 U. S. 80, 24 L. Ed. 377; Cincinnati, etc., Packet Co. *v.* Cattletsburg, 105 U. S. 559, 26 L. Ed. 1169; Parkersburg & O. R. T. Co. *v.* Parkersburg, 107 U. S. 691, 27 L. Ed. 584, 2 Sup. Ct. 732; Huse *v.* Glover, 119 U. S. 543, 30 L. Ed. 487, 7 Sup. Ct. 313; Ouachita Packet Co. *v.* Aiken, 121 U. S. 444, 30 L. Ed. 976, 7 Sup. Ct. 907; Sands *v.* Manistee River Improvement Co., 123 U. S. 288, 295, 31 L. Ed. 149, 8 Sup. Ct. 113.

[288] Martin *v.* West, 222 U. S. 191, 56 L. Ed. 159, 32 Sup. Ct. 42, 36 L. R. A. (N. S.) 592; Johnson *v.* Chicago & P. Elevator Co., 119 U. S. 388, 400, 30 L. Ed. 447, 7 Sup. Ct. 509; Davis *v.* Cleveland, C. C. & St. L. Ry. Co., 217 U. S. 157, 179, 54 L. Ed. 708, 30 Sup. Ct. 463.

otherwise, where the same is not at the time actually paid for and delivered, without at the time of the sale the seller shall cause to be made a complete record of the thing sold, the purchaser and the time of delivery in a book kept for that purpose; and at the time the seller shall deliver to the purchaser a written or printed memorandum of said sale, on which he shall place, or cause to be placed, a stamp of the value of twenty-five cents." It was urged that this law was invalid because it affected sales of grain, provisions and other commodities which were at the time of sale in the course of transportation in interstate commerce. The Supreme Court held that the statute related to the *place* of sale and did not interfere with interstate commerce.[289]

§ 58. **Inspection—Quarantine, Game, Food, Liquor and Lottery Laws.**—"State inspection laws and statutes designed to safeguard the inhabitants of a state from fraud and imposition are valid when reasonable in their requirements and not in conflict with federal statutes, although they may affect interstate commerce in their relation to articles prepared for export or by including incidentally those brought into the state and held for sale in the original imported packages." [290] "And for the protection of its game and the preservation of a valuable food supply, the state may penalize the possession of game during the closed season whether obtained within the state or brought from abroad." [291]

[289] Brodnax *v.* Missouri, 219 U. S. 285, 55 L. Ed. 219, 31 Sup. Ct. 238, affirming State *v.* Brodnax, 228 Mo. 225, 128 S. W. 177, 137 Am. St. Rep. 613. See also Hatch *v.* Reardon, 204 U. S. 152, 51 L. Ed. 415, 27 Sup. Ct. 188, and House *v.* Mayes, 219 U. S. 270, 55 L. Ed. 213, 31 Sup. Ct. 234.

[290] Simpson *v.* Shepard, 230 U. S. 352, 408, 57 L. Ed. 1511, 33 Sup. Ct. 729, 744; Red "C" Oil Co. *v.* North Carolina, 222 U. S. 380, 56 L. Ed. 240, 32 Sup. Ct. 152, affirming Red "C" Oil Co. *v.* Board of Agriculture, 172 Fed. 695; Patapsco Guano Co. *v.* North Carolina, 171 U. S. 345, 43 L. Ed. 191, 18 Sup. Ct. 862.

[291] Simpson *v.* Shepard, 230 U. S. 352, 408, 57 L. Ed. 1511, 33 Sup. Ct. 724, 744; Silz *v.* Hesterberg, 211 U. S. 31, 53 L. Ed. 75, 29 Sup. Ct. 10; Geer *v.* Connecticut, 161 U. S. 519, 40 L. Ed. 793, 16 Sup. Ct. 600; Manufacturers' Gas & Oil Co. *v.* Indiana Natural Gas & Oil Co., 155 Ind. 547, 58 N. E. 706, 53 L. R. A. 135; Adams *v.* Mississippi Lumber Co., 84 Miss. 29, 36 So. 68; Re Deininger, 108 Fed. 623; McDonald *v.* Southern Exp. Co., 134 Fed. 284; State *v.* Mallory, 73 Ark. 249, 83 S. W. 955, 67 L. R. A. 778; State

Statutes of this nature, however, must not directly affect interstate commerce and must not, under the guise of an inspection fee, be a tax on such commerce.[292]

The subject affects only incidentally the questions discussed in this chapter, and it is not within the purview of this book to treat of the subject of interstate commerce except as affecting carriers. Food and liquors are commodities, and it has been held that a lottery ticket is a commodity in such a sense that its transportation is commerce. In a note are given decisions which illustrate the holding of the courts showing the extent of the police power of the states.[293]

v. Harbourne, 70 Conn. 492; 40 Atl. 179, 66 Am. St. Rep. 126, 40 L. R. A. 610; Westheimer *v.* Weisman, 8 Kan. App. 78, 54 Pac. 332; People *v.* O'Neill, 110 Mich. 328, 88 N. W. 227, 33 L. R. A. 697; Selkirk *v.* Stephens, 72 Minn. 336, 75 N. W. 386, 40 L. R. A. 760; Ames *v.* Kirby, 71 N. J. L. 446, 59 Atl. 558; People *v.* A. Booth & Co., 42 Misc. 327, 86 N. Y. Supp. 272; People *v.* Buffalo Fish Co., 164 N. Y. 105, 58 N. E. 34, 79 Am. St. Rep. 622, 52 L. R. A. 807; People *v.* Bootman, 180 N. Y. 9, 72 N. E. 505.

[292] Note 291 *supra;* Savage *v.* Jones, 225 U. S. 501, 56 L. Ed. 1182, 32 Sup. Ct. 715; McLean *v.* Denver & R. G. R. Co., 203 U. S. 38, 51 L. Ed. 78, 27 Sup. Ct. 1; New Mexico *v.* Denver & R. G. R. Co., 12 N. M. 425, 78 Pac. 74.

[293] *Quarantine Laws:* Reid *v.* Colorado, 187 U. S. 138, 47 L. Ed. 108, 23 Sup. Ct. 92; Asbell *v.* Kansas, 209 U. S. 251, 52 L. Ed. 778, 28 Sup. Ct. 485, 14 Ann. Cas. 1101; United States *v.* Baltimore & O. S. W. R. Co., 222 U. S. 8, 56 L. Ed. 68, 32 Sup. Ct. 6; Minnesota *v.* Barber, 136 U. S. 313, 34 L. Ed. 455, 10 Sup. Ct. 862; Simpson *v.* Shepard, 230 U. S. 352, 406, 57 L. Ed. 1511, 33 Sup. Ct. 729; Morgan's S. S. Co. *v.* Louisiana, 118 U. S. 455, 30 L. Ed. 237, 6 Sup. Ct. 1114; Missouri, K. & T. Ry. Co. *v.* Haber, 169 U. S. 613, 42 L. Ed. 878, 18 Sup. Ct. 488; Louisiana *v.* Texas, 176 U. S. 1, 44 L. Ed. 347, 20 Sup. Ct. 251; Rasmussen *v.* Idaho, 181 U. S. 198, 45 L. Ed. 820, 21 Sup. Ct. 594; Compagnie Francaise, etc. *v.* Board of Health, 186 U. S. 380, 46 L. Ed. 1209, 22 Sup. Ct. 811; Midland Valley R. Co. *v.* State, 35 Okla. 672, 130 Pac. 803. Such laws, however, can not be made a cover for discriminations and arbitrary enactments having no reasonable relation to health, Hannibal & St. J. R. Co. *v.* Husen, 95 U. S. 465, 472, 473, 24 L. Ed. 527. *Pure Food:* McDermott *v.* Wisconsin, 228 U. S. 115, 57 L. Ed. 754, 33 Sup. Ct. 431, reversing same case, 143 Wis. 18, 126 Mo. 888, 21 Am. Cas. 1315; Texas & P. Ry. Co. *v.* Abilene Cot Oil. Co., 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Am. Cas. 1075; Northern Pac. Ry. Co. *v.* Washington, 222 U. S. 370, 56

§ 59. **Taxation. Including License Taxes.**—The states may not burden interstate commerce by taxing the business, nor

L. Ed. 237, 32 Sup. Ct. 160; Southern Ry. Co. *v.* Reid, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. 140; Second Employers' Liability Cases, Mondou *v.* N. Y. N. H. & H. R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 38 L. R. A. (N. S.) 44; Savage *v.* Jones, 225 U. S. 501, 56 L. Ed. 1182, 32 Sup. Ct. 715; Hipolite Egg Co. *v.* United States, 220 U. S. 45, 55 L. Ed. 364, 31 Sup. Ct. 364, construing federal statute. Laws of Congress supreme, High *v.* Kirkwood, 237 U. S. 52, 59 L. Ed., 35 Sup. Ct. 501. *Liquors:* Sale of in original packages imported to state in interstate or foreign commerce not subject to prohibitory laws of state, Leisy *v.* Hardin, 135 U. S. 100, 34 L. Ed. 128, 10 Sup. Ct. 681. See application of principle, Bowman *v.* Chicago & N. W. R. Co., 125 U. S. 465, 31 L. Ed. 700, 8 Sup. Ct. 689; Rhodes *v.* Iowa, 170 U. S. 412, 42 L. Ed. 1088, 18 Sup. Ct. 664; Vance *v.* Vandercook Co., 170 U. S. 438, 42 L. Ed. 1100, 18 Sup. Ct. 674; Scott *v.* Donald, 165 U. S. 58, 95, 41 L. Ed. 632, 17 Sup. Ct. 265; May *v.* New Orleans, 178 U. S. 496, 44 L. Ed. 1165, 20 Sup. Ct. 976; Austin *v.* Tennessee, 179 U. S. 343, 45 L. Ed. 224, 21 Sup. Ct. 132; American Exp. Co. *v.* Iowa, 196 U. S. 133, 49 L. Ed. 417, 25 Sup. Ct. 182; Cook *v.* Marshall County, Iowa, 196 U. S. 261, 49 L. Ed. 471, 25 Sup. Ct. 233; Pabst Brewing Co. *v.* Crenshaw, 198 U. S. 17, 49 L. Ed. 925, 25 Sup. Ct. 552; Heyman *v.* Southern Ry. Co., 203 U. S. 270, 51 L. Ed. 178, 27 Sup. Ct. 104; Rearick *v.* Pennsylvania, 203 U. S. 507, 51 L. Ed. 295, 27 Sup. Ct. 159; Adams Exp. Co. *v.* Kentucky, 206 U. S. 129, 51 L. Ed. 987, 27 Sup. Ct. 606; Adams Exp. Co. *v.* Kentucky, 214 U. S. 218, 53 L. Ed. 972, 29 Sup. Ct. 633, construing Wilson Act of Aug. 8, 1890, chap. 728, 26 Stat. 313; Ex Parte Oklahoma, 220 U. S. 191, 55 L. Ed. 431, 31 Sup. Ct. 426, dispensary law. Louisville & N. R. Co. *v.* Cook Brewing Co., 223 U. S. 70, 56 L. Ed. 355, 32 Sup. Ct. 189 affirming same case, 172 Fed. 117, 96 C. C. A. 322, 40 L. R. A. 798, and holding that a railroad will be enjoined from refusing beer for shipment in interstate commerce, even though the shipment is to a prohibition district. Purity Extract Co. *v.* Lynch, 226 U. S. 192, 57 L. Ed. 84, 33 Sup. Ct. 44, discussing effect of Wilson Act and affirming Purity Extract Co. *v.* Lynch, 100 Miss. 650, 56 So. 316. De Bary *v.* Louisiana, 227 U. S. 108, 57 L. Ed. 441, 33 Sup. Ct. 739, affirming State *v.* Frederick De Bary & Co., 130 La. 1090, 58 So. 892; McDermott *v.* Wisconsin, 228 U. S. 115, 134, 57 L. Ed. 754, 33 Sup. Ct. 431, discussing the meaning of "original package," and reversing McDermott *v.* State, 143 Wis. 18, 126 N. W. 888; State *v.* Intoxicating Liquors, 104 Me. 502, 71 Atl. 758; State *v.* 18 Casks of Beer, 24 Okla. 786, 104 Pac. 1093; American Exp. Co. *v.* Miller, 104 Miss. 247, 61 So. 306, 45 L. R. A. (N. S.) 120; Crescent Brewing Co. *v.* Oregon S. L. R.

by taxing the receipts of such commerce.[294] But the fact that a

Co., 24 Idaho 106, 132 Pac. 975; Kirkpatrick *v.* State, 138 Ga. 794, 76 S. E. 53; State *v.* Miller, 66 W. Va. 436, 66 S. E. 522. By Act of Congress passed over the President's veto by the Senate February 28, 1913, and by the House March 1, 1913, known as the Webb-Kenyon Act, it was enacted,—"That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited." Appendix N, *post.* For discussion of this Act see Atkinson *v.* Southern Exp. Co., 94 S. C. 444, 78 S. E. 516, 48 L. R. A. (N. S.) 349; Atkinson *v.* Southern Exp. Co., 94 S. C. 457, 78 S. E. 520; Adams Exp. Co. *v.* Commonwealth, 154 Ky. 462, 157 S. W. 908, 48 L. R. A. (N. S.) 342; State *v.* Grier, 88 Atl. 579; United States *v.* Oregon & W. R. & Nav. Co., 210 Fed. 378. *Lotteries:* Carriage of lottery tickets by a common carrier in interstate commerce may be prohibited by Congress, Lottery case, Champion *v.* Ames, 188 U. S. 321, 47 L. Ed. 492, 23 Sup. Ct. 321. See also, Francis *v.* United States, 188 U. S. 375, 47 L. Ed. 510, 23 Sup. Ct. 334; Northern Securities Co. *v.* United States, 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. 436; United States *v.* Northern Securities Co., 120 Fed. 721; United States *v.* Whelpley, 125 Fed. 617; State *v.* Lowry (Ind.), 166 Ind. 372, 77 N. E. 728, 4 L. R. A. (N. S.) 532; People *v.* A. Booth & Co., 42 Misc. 331, 86 N. Y. Supp. 272; Re Gregory, 219 U. S. 210, 55 L. Ed. 184, 31 Sup. Ct. 143. For a discussion by the Supreme Court of the principles of the text and citing authorities, see Slight *v.* Florida, 237 U. S. 52, 59 L. Ed. —, 35 Sup. Ct. 501. *Blue Sky Law* held invalid, Alabama & N. O. Transp. Co. *v.* Doyle, 210 Fed. 173; Compton *v.* Allen, 216 Fed. 537; citing cases. *Inspection Laws.* Oyster inspection law held invalid as an interference with interstate commerce. Foote *v.* Stanley, 232 U. S. 494, 58 L. Ed. 698, 34 Sup. Ct. 377; peddler's license law invalid, Stewart *v.* Michigan, 232 U. S. 665, 58 L. Ed. 786, 34 Sup. Ct. 476.

[294] Galveston, H. & S. A. Ry. Co. *v.* Texas, 210 U. S. 217, 52 L. Ed. 1031, 28 Sup. Ct. 638; Western Union Tel. Co. *v.* Kansas, 216 U. S. 1, 54 L. Ed. 355, 30 Sup. Ct. 190; Pullman Co. *v.*

corporation is engaged in interstate commerce does not exempt its property located in a state from taxation by the state.[295] "It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive federal authority over it. A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the state, has been sustained." [296]

States may not regulate interstate commerce, nor may they prohibit such commerce. They can, subject to this limitation, prohibit a foreign corporation from doing business in the state, although a state "may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law, or you may transact business in intrastate commerce subject to the regulatory power of the state. To allow a state to exercise such authority would permit it to deprive of fundamental rights those entitled to the protection of the Constitution in every part of the Union."

These general principles are stated and cases cited by Mr. Justice Day in Baltic Mining Co. *v.* Massachusetts, note 296, *supra*.

Charging a license fee to automobiles using the roads of a state is analogous to levying a tax, and in the absence of Congressional action it is legal to charge such fee even as to automobiles moving in interstate commerce.[297]

Kansas, 216 U. S. 56, 54 L. Ed. 378, 30 Sup. Ct. 282; Minnesota Rate Cases, 230 U. S. 352, 400, 57 L. Ed. 1511, 33 Sup. Ct. 729, and previous cases therein cited.

[295] United States Exp. Co. *v.* Minnesota, 223 U. S. 335, 56 L. Ed. 459, 32 Sup. Ct. 211.

[296] Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68, 83, 58 L. Ed. 127, 34 Sup. Ct. 15, affirming Baltic Mining Co. *v.* Commonwealth, 207 Mass. 381, 93 N. E. 831, Am. Cas. 1913 C. 805; S. S. White Dental Mnfg. Co. *v.* Commonwealth, 212 Mass. 25, 98 N. E. 1056, 28 Am. & E. Ann. Cas. 805; Maine *v.* Grand Trunk Ry. Co., 142 U. S. 217, 35 L. Ed. 994, 12 Sup. Ct. 121; Provident Institution *v.* Massachusetts, 6 Wall., 73 U. S. 632, 18 L. Ed. 904; Flint *v.* Stone-Tracy Co., 220 U. S. 107, 162-5, 55 L. Ed. 389, 31 Sup. Ct. 342; United States Exp. Co. *v.* Minnesota, 233 U. S. 335, 56 L. Ed. 459, 32 Sup. Ct. 211. See also Ohio R. & W. R. Co. *v.* Dittey, 232 U. S. 576, 58 L. Ed. 737, 34 Sup. Ct. 372, affirming same styled case, 203 Fed. 537.

[297] See Sec. 58, *supra*, and notes, and Hendrick *v.* Maryland, 235 U. S. 610, 59 L. Ed. —, 35 Sup. Ct. 140 and cases cited.

§ 60. **Procedure to Test the Validity of State Regulations.**—Neither the act of a state legislature nor the order of a state administrative body can be final and conclusive as to what are equal and reasonable charges, rules and regulations. The carrier is entitled to have a judicial hearing as to the reasonableness of such rates, rules and regulations.[298] Making rates and prescribing regulations for the government of carriers for the future is, however, a legislative act,[299] and courts may not set aside such rates or regulations unless they violate the Constitutional rights of the carrier.[300]

When it is sought to avoid a rate or other requirement made by a state or under its authority, in the absence of a prescribed method of procedure, the carrier affected may resort to a court of equity and ask for appropriate relief. The court resorted to may be a state court, or, when diverse citizenship exists or a federal question is involved, the United States District Court. On this subject, Mr. Justice Field said:[301]

"Nor can it be said in such a case that relief is obtainable only in the courts of the state. For it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state can not tie up a citizen of another state, having property rights

[298] Chicago, M. & St. P. R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462.

[299] Prentis *v.* Atlantic C. L. R. Co., 211 U. S. 210, 53 L. Ed. 150, 29 Sup. Ct. 67.

[300] Sec. 47, *supra*.

[301] Reagan *v.* Farmers L. & T. Co., 154 U. S. 362, 391, 38 L. Ed. 1014, 14 Sup. Ct. 1047; Platt *v.* Lecocq, 158 Fed. 723, 85 C. C. A. 621, where Judge Sanborn says: "Rights created and remedies provided by the statutes of a state to be pursued in the state courts may be enforced and administered in the national courts, either at law or in equity, as the nature of the rights and remedies may require. 'A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality.' Davis *v.* Gray, 16 Wall. 83 U. S. 203, 21 L. Ed. 447; Darragh *v.* H. Wetter Mnfg. Co., 23 C. C. A. 609, 617, 78 Fed. 7, 14; National Surety Co. *v.* State Bank, 56 C. C. A. 657, 667, 120 Fed. 593, 603, 61 L. R. A. 394; Barber Asphalt Co. *v.* Morris, 66 C. C. A. 55, 59, 132 Fed. 945, 949, 67 L. R. A. 761."

within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts."

If resort be had to a District Court of the United States, and application for an interlocutory injunction is presented, the hearing must be had before three Judges "of whom at least one shall be a Justice of the Supreme Court or a Circuit Judge," and a direct appeal may be taken to the Supreme Court of the United States from an order granting or denying after notice and hearing an interlocutory injunction.[302]

A state officer whose duty it is to enforce the statute or administrative regulation claimed to be invalid, is a proper party to a proceeding for injunction.[303]

Some states provide for a review of the action of their Commissions, and when there is such provision a suit for injunction should not be commenced until the rate or regulation has been fixed by the body having the last word.[304]

Suit may be filed by the states for penalties or mandamus may be brought to compel obedience to the orders of the state regulating body.[305] To such suits defense may be made and, where a right claimed under the Constitution or laws of the United States is denied, "and the decision is against the title, right, privilege or immunity especially set up or claimed," ultimate appeal may be taken to the Supreme Court of the United States.[306]

[302] Judicial Code, sec. 266, amended by Act March 4, 1913, chap. 160, 37 Stat. L. 1013; Louisville & N. R. Co. *v.* R. R. Com. of Alabama, 208 Fed. 35. *Post*, sec. 465.

[303] Ex parte Young, 209 U. S. 123, 52 L. Ed. 714, 28 Sup. Ct. 441; Cent. of Ga. Ry. Co. *v.* McLendon, 157 Fed. 961.

[304] Prentis *v.* Atlantic C. L. R. Co., 211 U. S. 210, 53 L. Ed. 150, 29 Sup. Ct. 67.

[305] Southern Ry. Co. *v.* Atlanta Stove Works, 128 Ga. 207, 57 S. E. 429.

[306] Judicial Code, sec. 237.

CHAPTER II.

VALIDITY AND SCOPE OF THE ACT TO REGULATE COMMERCE.

§ 61. Common Law Obligations of Common Carriers.
62. Power of Congress over Interstate Commerce.
63. Constitutionality of the Act to Regulate Commerce.
64. Reasons for the Act to Regulate Commerce.
65. Carriers Included in the Act.
66. Carriers' Duties under the Act.
67. What Transportation Included in the Act.
68. Transportation Included in the Act, continued.
69. Same Subject.
70. Powers and Procedure of the Interstate Commerce Commission.
71. Same Subject.
72. Switch Connections.
73. Damages and Penalties for Misquoting a Rate.
74. Penalties.
75. Investigations by the Interstate Commerce Commission.
76. Additional Power Given the Interstate Commerce Commission.
77. Commission May Suspend an Advance in Rates.
78. Reports of Carriers.
79. Court Procedure with Reference to the Orders of the Commission.

§ 61. **Common Law Obligations of Common Carriers.**— The duty of a common carrier to transport at reasonable rates existed at common law.[1] This was and is true because the business of carriage for the public is one of a *quasi* public nature and the charges therefor are subject to regulation by the public. In the Abilene case,[2] Mr. Justice White, delivering the opinion of the court, said:

"Without going into detail, it may not be doubted that at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond con-

[1] Tift *v.* Southern Ry. Co., 123 Fed. 789.

[2] The Abilene Case, Texas & Pacific Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350. See also 9 Ann. Cas. 1075. Penn. R. Co. *v.* Preston, 237 U. S. 121, 59 L. Ed. —, 35 Sup. Ct. 484.

troversy that when a carrier accepted goods without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that even where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the overcharge. 2 Kent. Comm. 599, and note A; 2 Smith Lead. Cas., pt. 1, 8th Ed., Hare & Wallace Notes, p. 457."

The principle of the right of organized society to regulate the rates and practices of carriers was recognized at least as early as the date of the laws of Hammurabi, King of ancient Babylon,[3] and the same principle appears in the common law. The application of the principle is traced in the opinion of Chief Justice Waite in Munn *v.* Illinois,[4] wherein the reason therefor is stated to be that where "one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use."

It has been held by the Supreme Court of the United States that rates charged in contracts of fire insurance may be regulated by state laws, the basis for the decision being that when a business by its circumstances and nature rises from a private to a public concern, such business becomes subject to governmental regulation.[5]

Unjust discrimination was also illegal at common law. The Supreme Court has approved a charge substantially to the effect that not every discrimination in rates is unjust, and that in order to constitute an unjust discrimination, there must be a difference in rates under substantially similar conditions as to service. All rates must be reasonable; and, under like conditions,

[3] Stephens *v.* Central of Ga. Ry. Co., 138 Ga. 625, 628, 75 S. E. 104, 42 L. R. A. (N. S.) 541, 1913 E. Ann Cas. 609.

[4] Munn *v.* Illinois, 94 U. S. 4 Otto 113, 24 L. Ed. 77. For summary of state legislation regulating public utility corporations, see Interstate Com. Com. *v.* C. N. O. & T. P. Ry. Co., 167 U. S. 479, 495, 496, 42 L. Ed. 243, 17 Sup. Ct. 896, and Simpson *v.* Shepard, 230 U. S. 352, 412-417 inc., 57 L. Ed. 1511, 33 Sup. Ct. 729.

[5] German Alliance Ins. Co. *v.* Lewis, 233 U. S. 389, 58 L. Ed. 1011, 34 Sup. Ct. 612.

all patrons must be served on equal terms. While there is no body of federal common law separate and distinct from the common law existing in the several states, the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment.[6]

§ 62. **Power of Congress over Interstate Commerce.**— Paragraph 3, Section 8, Article 1, of the Constitution of the United States contains the grant of power to Congress over interstate commerce and gives Congress the power "to regulate commerce with foreign nations, among the several states, and with the Indian tribes."

The limitation of the scope of this book and a general statement of the extent of the regulatory power of the federal government have been stated in Chapter 1, *supra*. There it was shown that the power of Congress over interstate commerce was plenary and indivisible.

That the power to regulate interstate commerce is complete in Congress has never been doubted. Mr. Chief Justice Marshall stated this power in language which has frequently been cited with approval. He said:[7]

"We are now arrived at the inquiry, What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. . . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

This broad statement of the power of Congress has been repeatedly affirmed and the principle applied. Congress, in the

[6] Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561.

[7] Gibbons *v.* Ogden, 9 Wheat., 22 U. S. 1, 6 L. Ed. 23, 70. See, also, Howard *v.* Illinois Cent. R. Co., 207 U. S. 463, 492, 493, 52 L. Ed. 297, 307, 28 Sup. Ct. 141.

Act to Regulate Commerce, and the acts amendatory thereof and supplementary thereto, has not, as was shown in Chapter 1 hereof, as yet exercised its full constitutional power. In the laws regulating the liability of employers in interstate transportation Congress has fully occupied the field, and the decisions with reference to the scope of these laws are not always applicable to the statutes regulating interstate transportation generally.[8]

The proviso to Section 1 of the act to regulate commerce exempts from the provisions of that act intrastate transportation.[9] This exemption, however, does not leave the states free so to regulate intrastate transportation as to affect interstate transportation. This question was presented to the Interstate Commerce Commission, which held that certain Texas intrastate rates prescribed under authority of the statutes of Texas and maintained by carriers serving both Texas and Louisiana, were violative of Section 3 of the Act to Regulate Commerce, in that such rates constituted undue and unreasonable prejudice against shippers in Louisiana and gave an unreasonable preference to shippers in Texas. The Commission ordered the carriers to desist from this discrimination.[10] This order was sustained by the Commerce Court, and an appeal taken to the Supreme Court.[11] Both in the opinion of the Commission and in that of the Commerce Court, mention was made of the fact that the carriers had not resisted in the courts the rates prescribed by the Texas Railroad Commission. This fact seems not to have been regarded as material by the Supreme Court, which Court upheld the order of the Commission on the broad ground that any unjust discrimination however caused was prohibited by Congress, and that no state could lawfully require the maintenance of transportation rates within the state which unjustly discriminated against interstate shippers. The Court in a convincing opinion held that where injurious discrimination resulted from state made intrastate rates, Congress is not bound to reduce interstate rates below what it may deem to be a proper standard.

[8] Sec. 332 *post*, as to Employers' Liability Laws.

[9] Sec. 336, *post*.

[10] Railroad Com. of La. *v.* St. L. S. W. Ry. Co., 23 I. C. C. 31.

[11] Tex. & Pac. R. Co. *v.* U. S., 205 Fed. 380, Op. Com. Ct. No. 68, p. 655; Houston E. & W. T. R. Co. *v.* U. S., 205 Fed. 391, Op. Com. Ct. No. 67, p. 653.

fair to the carrier and to the public; but that Congress, and by Congress is included tribunals authorized to act in prescribing rates, is entitled to maintain its own standard of interstate rates.[12]

Oklahoma, Arkansas and Missouri, maintaining intrastate passenger rates of two cents a mile, though their Commission brought complaint before the Interstate Commerce Commission alleging that the interstate passenger rates of three cents a mile into and through these states were unreasonable and discriminatory. The Interstate Commerce Commission, having found that the evidence failed to show that the interstate rates were unreasonable, dismissed the complaint. In the course of the opinion it was said:[13]

"That rates established by state laws or state authorities, prescribing the charge for intrastate transportation of persons and property, are facts that we consider, and that we respect the authority establishing such rates constitute no valid reason relieving us from performing the duties devolving upon this Commission under the Constitution and laws of the United States. The Constitution of the United States reserves to Congress the power to regulate interstate commerce, and Congress, under this grant of authority, has imposed upon this Commission certain duties. If any rate for transportation wholly within a state may be made the measure of the rates when that transportation moves from one state through or into another, the interstate rate so resulting would not be regulation of interstate commerce by the authority prescribed by the Constitution, but by the state. If the function of this Commission be to compute the sum of intrastate rates and prescribe the result as a measure of the interstate rates, actual and direct regulation of interstate commerce by the states would be the result. That in the regulation of interstate commerce by the general government and of intrastate commerce by the state governments there result inconveniences and anomalies, such as is contended to exist here, might be conceded; but such facts, if they exist, neither deprive us of the power nor relieve us from the duty of performing the obligations

[12] Houston E. & W. T. R. Co. *v.* U. S., 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833.

[13] Corp. Com. of Okla. et al. *v.* A. T. & S. F. Ry. Co. et al., 31 I. C. C. 532, 540, 541. See also Rates on Beer and Other Malt Products, 31 I. C. C. 544.

imposed upon us by laws of Congress authorized by the Constitution of the United States.

Were we at liberty and inclined to abdicate the authority and abandon the duty imposed upon us by accepting the sum of state rates as a measure of interstate rates, the difficulty would not be removed."

§ 63. **Constitutionality of the Act to Regulate Commerce.**—The constitutional grant of power to regulate commerce with foreign countries and between the states is plenary. The absence of this power was, as is well known, one of the principal reasons for dissatisfaction with the confederacy existing prior to the adoption of our constitution. Just what powers could be constitutionally delegated or given to the commission was the question to be determined by the framers of the acts to regulate commerce. It has been held that to prescribe rates for the future is a legislative power, to determine whether or not a rate is reasonable is a judicial question.[14] The legislature of a state may directly prescribe maximum rates, or such power may be delegated to a commission.[15] Prior to the amendment known as the Hepburn Act the Interstate Commerce Commission was a mere administrative body, with no power to fix rates. It could make findings and declare a particular rate unreasonable, these findings were *prima facie* true and were entitled to the "strength due to the judgment of a tribunal appointed by law and informed by experience."[16] The original act was held to be valid by the Supreme Court.[17] The court in the course of the opinion said:

"Interpreting the Interstate Commerce Act as applicable, and as intended to apply, only to matters involved in the regulation of commerce, and which Congress may rightfully subject to investigation by a commission established for the purpose of en-

[14] Chicago, M. & St. P. R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462, 702. Prentis *v.* Atlantic C. L. Co., 211 U. S. 210, 53 L. Ed. 150, 29 Sup. Ct. 67.

[15] Munn *v.* Illinois, 94 U. S. 4 Otto 113, 24 L. Ed. 77; Stone *v.* Farmers L. & T. Co., 116 U. S. 307, 29 L. Ed. 636, 6 Sup. Ct. 334, 1191; Georgia R. & B. Co. *v.* Smith, 70 Ga. 694, 128 U. S. 174, 32 L. Ed. 377, 9 Sup. Ct. 47.

[16] Illinois Cent. R. Co. *v.* Interstate Com. Com., 206 U. S. 441, 454, 51 L. Ed. 1128, 1134, 27 Sup. Ct. 700.

[17] Interstate Com. Com. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 Sup. Ct. 1125.

forcing that act, we are unable to say that its provisions are not appropriate and plainly adapted to the protection of interstate commerce from burdens that are or may be, directly or indirectly imposed upon it by means of unjust and unreasonable discriminations, charges, and preferences. Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of objects within the scope of the powers granted to it. It is a settled principle of constitutional law that 'the government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.' McCullough *v.* Maryland, 17 U. S. 4 Wheat. 316 (4 L. Ed. 579, 602). The test of the power of Congress is not the judgment of the courts that particular means are not the best that could have been employed to effect the end contemplated by the legislative department. The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the constitution. It cannot go beyond that inquiry without entrenching upon the domain of another department of government. That it may not do with safety to our institutions. Union Pac. R. Co. *v.* United States ("Sinking Fund Cases") 99 U. S. (9 Otto.) 700, 718, 25 L. Ed. 496, 501."

In United States *v.* Delaware & Hudson Co.,[18] it was contended that the so-called commodity clause of section one of the present act was unconstitutional, one of the grounds for such contention being that the penalties prescribed by the amended act brought it within the decision of the Supreme Court in Ex parte Young, 209 U. S. 123, 52 L. Ed. 714, 28 Sup. Ct. 441. The clause as construed by the Supreme Court, was held valid. On the question of the effect of the penalties, at page 417 of the opinion, the court said:

"With reference to the contention that the commodities clause is void because of the nature and character of the penalties which it imposes for violations of its provisions, within the ruling in Ex parte Young, 209 U. S. 123, we think it also suffices

[18] United States *v.* Delaware & Hudson Co., 213 U. S. 366, 53 L. Ed. 836, 29 Sup. Ct. 527.

to say that even if the delay which the clause provided should elapse between its enactment and the going into effect of the same does not absolutely exclude the clause from the ruling in Ex parte Young, a question which we do not feel called upon to decide, nevertheless the proposition is without merit, because (a) no penalties are sought to be recovered in these cases, and (b) the question of the constitutionality of the clause relating to penalties is wholly separate from the remainder of the clause, and, therefore, may be left to be determined, should an effort to enforce such penalties be made."

Subsequently the right to enforce this clause as construed was upheld by the Supreme Court.[19] The constitutionality of the act generally was interestingly and accurately stated by Judge Severens at circuit in an opinion wherein he shows the necessity for Congress to adopt some such scheme as the Act to Regulate Commerce, and in which opinion he says:[20]

"It would have been impossible for Congress to have foreseen the multitude of questions depending upon the special facts presented sometimes in one complication and sometimes in another, and declare a single rule applicable to each."

The Supreme Court has held that Section 20 of the provision of the Act to Regulate Commerce as amended by the Act of June 29, 1906[21] is valid and not unconstitutional as a delegation of legislative power, and that the requirement that carriers doing

[19] United States *v.* Lehigh V. R. Co., 220 U. S. 257, 55 L. Ed. 458, 31 Sup. Ct. 387; Delaware L. & W. R. Co. *v.* United States, 231 U. S. 363, 58 L. Ed. 269, 34 Sup. Ct. 65; United States *v.* Delaware L. & W. R. Co., 238 U. S. 511, 59 L. Ed. —, 35 Sup. Ct. 873. For a further history of litigation under this clause, see United States *v.* Lehigh Valley R. Co. (221 Fed. 399).

[20] Louisville & N. R. Co. *v.* Interstate Com. Com., 184 Fed. 118, 122. For opinion of the Interstate Commerce Commission in this case see New Orleans Board of Trade *v.* L. & N. R. Co., 17 I. C. C. 231. The Commerce Court set aside the order of the Commission, without however disagreeing with the circuit judges as to the validity of the Act to Regulate Commerce, Louisville & N. R. Co. *v.* Interstate Com. Com., 195 Fed. 541, Opinions Commerce Court Nos. 4, 325 and 375. For opinion reversing the Commerce Court: Interstate Com. Com. *v.* Louisville & N. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185. See also United States *v.* Great N. R. Co., 157 Fed. 288, 291.

[21] *Post*, Sec. 1432, 432.

both interstate and intrastate business should render to the Interstate Commerce Commission accounts of all their business, was not beyond the power of Congress,[22] and the provision subjecting corporations to criminal prosecution are valid.[23]

In Honolulu R. T. Co. *v.* Hawaii [24] the Supreme Court said:

"The business conducted by the transit company is not purely private. It is of that class so affected by a public interest that it is subject, within constitutional limits, to the governmental power of regulation. This power of regulation may be exercised to control, among other things, the time of the running of cars. It is a power legislative in its character and may be exercised directly by the legislature itself. But the legislature may delegate to an administrative body the execution in detail of the legislative power of regulation. Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362, 393, 394, 38 L. Ed. 1014, 14 Sup. Ct. 1047; Interstate Commerce Com. *v.* Cincinnati, New Orleans & Texas Pacific Railway Company, 167 U. S. 479, 494, 42 L. Ed. 243, 17 Sup. Ct. 896."

What effect the penalties prescribed in the act may have on its constitutionality in view of the Young case *supra*, is a question that the act itself answers. The danger of incurring ruinous penalties pointed out in the Young case does not exist in the act to regulate commerce. In this act the rates prescribed by the commission become effective only after thirty days' notice, during which time the order fixing the rates may "be suspended or set aside by a court of competent jurisdiction," if the rate prescribed be unlawful. The venue of suits "to enjoin, set aside, annul, or suspend any order or requirement of the commission" is fixed; and suits "may be brought at any time after such order

[22] Interstate Com. Com. *v.* Goodrich Transit Co., 224 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436, reversing the Commerce Court in Goodrich Transit Co. *v.* Interstate Com. Com., Nos. 21, 22, 23, 24 Opinions of Commerce Court 95, 190 Fed. 943. See also Kansas City Sou. Ry. Co. *v.* United States, 231 U. S. 423, 58 L. Ed. 296, 34 Sup. Ct. 125, affirming same styled case Opinions Commerce Court No. 56, p. 641, 204 Fed. 641.

[23] New York C. R. Co. *v.* United States, 212 U. S. 481, 492, 53 L. Ed. 613, 29 Sup. Ct. 304, cited in United States *v.* Adams Exp. Co., 229 U. S. 381, 390, 57 L. Ed. 1237, 33 Sup. Ct. 878.

[24] Honolulu R. T. Co. *v.* Hawaii, 211 U. S. 282, 53 L. Ed. 186, 29 Sup. Ct. 55.

is promulgated.[25] It would seem that the carriers have full opportunity to test an order before feeling compelled by the possibility of penalties to obey it.

The validity of the amended fourth section of the act was sustained in a forcible opinion of the Supreme Court.[26]

§ 64. **Reasons for the Act to Regulate Commerce.**— Prior to the act of February 4, 1887,[27] carriers were free to make such rates on interstate transportation as they saw fit, subject only to the power of the courts under the common law, at the suit of individuals to prevent irreparable damage or give redress for unreasonable or unjustly discriminatory rates.[28]

In Tex. & Pac. R. Co. *v.* Interstate Commerce Commission,[29] the Supreme Court, speaking of this act, said:

"It may be well to advert to the causes which induced its enactment. They chiefly grew out of the use of railroads as the principal modern instrumentality of commerce. While shippers of merchandise are under no legal necessity to use railroads, practically they are. The demand for speedy and prompt movement virtually forbids the employment of slow and old-fashioned methods of transportation, at least in the case of the more valuable articles of traffic. At the same time, the immense outlay of money required to build and maintain railroads, and the necessity of resorting, in securing the rights of way, to the power of eminent domain, in effect disable individual merchants and shippers from themselves providing such means of carriage. From the very nature of the case, therefore, railroads are monopolies, and the evils that usually accompany monopolies soon began to show themselves, and were the cause of loud complaints. The

[25] Secs. 15, 16, of act to regulate commerce. See *post*, 396 and 411.

[26] United States *v.* A. T. & S. F. Ry. Co., 234 U. S. 476, 58 L. Ed. 1408, 34 Sup. Ct. 986, reversing A. T. & S. F. Ry. Co. *v.* U. S., 191 Fed. 856, Op. Com. Ct. Nos. 50, 51, p. 229, and sustaining orders of the Commission in Railroad Com. of Nev. *v.* So. Pac. Co., 21 I. C. C. 329; Spokane, City of *v.* N. P. Ry. Co., 21 I. C. C. 400.

[27] Chapter 9, *post*.

[28] Texas & P. R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Ann. Cas. 1075; Tift *v.* Southern Ry. Co., 123 Fed. 789, 138 Fed. 753; Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561; United States *v.* Michigan Cent. R. Co., 122 Fed. 544.

[29] Texas & P. R. Co. *v.* Interstate Com. Com., 162 U. S. 197, 210, 211, 40 L. Ed. 940, 944, 945, 16 Sup. Ct. 666, 5 I. C. R. 405.

companies owning the railroads were charged, and sometimes truthfully, with making unjust discriminations between shippers and localities, with making secret agreements with some to the detriment of other patrons, and with making pools or combinations with each other, leading to the oppression of entire communities.

"Some of these mischiefs were partially remedied by special provisions inserted in the charters of the companies and by general enactments by the several states, such as clauses restricting the rates of toll and forbidding railroad companies from becoming concerned in the sale or production of articles carried and from making unjust preferences. Relief, to some extent, was likewise found in the action of the courts in enforcing the principles of the common law applicable to common carriers—particularly that one which required uniformity of treatment in like conditions of service.

"As, however, the powers of the states were restricted to their own territories, and did not enable them to efficiently control the management of great corporations whose roads extend through the entire country, there was a general demand that Congress, in the exercise of its plenary power over the subject of foreign and interstate commerce, should deal with the evils complained of by a general enactment, and the statute in question was the result."

Amendatory and supplemental acts have enlarged the powers of the Commission, but these additions to the Commission's powers under the Interstate Commerce Act have had in view the purpose to prevent discrimination and to require certainty and stability in the rates charged. The amendment authorizing the supervision and standardization of the accounts of carriers[30] had for its purpose to enable the Commission better to perform its duties respecting the regulation of carriers.[31]

In the Minnesota Rate Cases,[32] the fact that the purpose of

[30] Sec. 433, *post.*

[31] Kansas City S. Ry. Co. *v.* United States, 231 U. S. 423, 58 L. Ed. 296, 34 Sup. Ct. 125.

[32] Simpson *v.* Shepard, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729. For statement as to the purpose of the acts original and amendatory, see Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. 428; United States *v.* Pacific & A. Ry. & Nav. Co., 228 U. S. 87, 108, 57 L. Ed. 742, 33 Sup. Ct. 443.

the Act was not to include intrastate transportation was definitely stated.

The Minnesota Rate Cases dealt with the question of the constitutionality of rates prescribed by state authority applicable only within the state. A different question is presented when there is involved the relationship of interstate rates with intrastate rates. When such a question is presented, as was held in the Shreveport case (*supra* Sec. 62), the state rates must not unlawfully discriminate against interstate shippers, and when they do the Interstate Commerce Commission may grant relief.

§ 65. **Carriers Included in the Act.**—The original act applied only to transportation wholly by railroad, or partly by railroad and partly by water. Included in the definition of railroads are bridges and ferries used or operated in connection therewith, the line in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and all instrumentalities of shipment or carriage. The present act extends the law to apply to the transportation of oil or other commodities, except water and gas, by means of pipe lines or partly by pipe lines and partly by rail or water, and includes express companies, telegraph, telephone and cable companies, whether wire or wireless; all switches, spurs, tracks and terminal facilities of every kind used or necessary in the transportation of the persons or property designated, and also all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any of said property; cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported.

Under the act, foreign carriers engaged in transporting between points within and points without the United States are subject to the regulations prescribed;[33] water carriers are sub-

[33] Re Investigation of Acts Grand Trunk Ry. of Canada, 3 I. C. C. 89, 2 I. C. R. 496. A rate, however, made by the Canadian Commission applicable in Canada—though part of the through rate from the United States to Canada—is not within the jurisdiction of the Commission. International Paper Co. *v.* D. & H. Co., 33 I. C. C. 270. For a full discussion of this subject, see Carey Mfgr. Co. *v.* G. T. W. Ry. Co., 36 I. C. C. 203.

ject thereto when the transportation is partly by rail and partly by water, when both being under a common contract, management or arrangement for a continuous carriage or shipment.[34] Under the Panama Canal Act,[35] of August 24, 1912, the Commission is given jurisdiction over the transportation of rail and water carriers when property is transported from point to point in the United States by rail and water, through the Panama Canal *or otherwise*. The extent of this jurisdiction is stated in the act, and the Commission has exercised the jurisdiction thus conferred.[36] A corporation organized to construct and maintain a bridge across a river running between two states, and which corporation owns no cars, but merely furnishes a highway over which common carriers and others may transport goods, was held not to be within the provisions of the act.[37]

Carriers by water between ports of different states under joint rates with railroads, which rates are filed with the Interstate Commerce Commission, are within the purview of the Act to Regulate Commerce, although such carriers are incorporated under the laws of a particular state.[38]

In the Pipe line cases[39] the Supreme Court sustained the jurisdiction of the Commission over pipe line carriers transporting oil in interstate commerce.

A terminal company, part of a railroad and steamship system, is within the act,[40] and so is a rate which includes delivery on boat for interstate transportation.[41]

[34] Sec. 335, *post*.

[35] Sec. 375, *post*.

[36] Sec. 224, *post*, Augusta & Savannah S. S. Co. *v.* O. S. S. Co., 26 I. C. C. 380.

[37] Kentucky & I. Bridge Co. *v.* Louisville & N. R. Co., 37 Fed. 567, 617, 2 L. R. A. 289, 2 I. C. R. 351.

[38] Interstate Com. Com. *v.* Goodrich Transit Co., 224 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436, reversing Goodrich Transit Co. *v.* Interstate Com. Com., 190 Fed. 943, Commerce Court Opinions 21 to 24, p. 95. Within the meaning of the Anti-Trust statutes, tugs employed in towing vessels engaged in interstate commerce are themselves instrumentalities of such commerce, United States *v.* Great Lakes Towing Co., 208 Fed. 733. Where there is no common or joint arrangement, water carriers held not within the Act, Mutual Transit Co. *v.* United States, 178 Fed. 664.

[39] United States *v.* Ohio Oil Co., 234 U. S. 548, 58 L. Ed. 1394, 34 Sup. Ct. 956.

[40] Southern Pacific Terminal Co. *v.* Interstate Com. Com., 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279.

[41] R. R. Com. of Ohio *v.* Worthington, 187 Fed. 965, 110 C. C. A. 85. See also, Note 58, *post*.

A stock yard company, owning and operating a railroad system which transports cars to and from trunk lines which operate cars in interstate transportation, is within the act.[42]

That street railways were not included within the law prior to the amendatory Act of June 18, 1910,[43] has been determined by the Supreme Court, although the effect of that act on the question was left undecided.[44]

The commission has frequently acted under the power granted it over express companies, which are now specially included.[45]

The Act to Regulate Commerce is, however, not so broad as the safety Appliance and Employers' Liability Acts, and Congress has expressly, by the proviso to Section 1, excluded intrastate Commerce.[46]

§ 66. **Carriers' Duties under the Act.**—It is the duty of every carrier subject to the provision of the law to provide and furnish transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the trans-

[42] United States *v.* Union Stock Yards, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; Union Stock Yard & Transit Co. *v.* United States, 192 Fed. 330, Commerce Court Opinion No. 15, pp. 189 and 225. See also Manufacturers Ry. Co. *v.* St. Louis I. M. & S. Ry. Co., 21 I. C. C. 304 and cases cited.

[43] *Post*, Sec. 337.

[44] Omaha & C. B. Street Ry. Co. *v.* Interstate Com. Com., 230 U. S. 324, 57 L. Ed. 1501, 33 Sup. Ct. 890, 40 L. R. A. (N. S.) 385 reversing same styled case, 191 Fed. 40, Commerce Court Opinion No. 25, p. 147, and affirming same styled case, 179 Fed. 243, and setting aside order of Interstate Commerce Commission in West End Improvement Club *v.* Omaha & C. B. Street Ry. Co., 17 I. C. C. 239. See also Wilson *v.* Rock Creek Ry. Co., 7 I. C. C. 83, and see South Covington R. Co. *v.* Covington, 235 U. S. 537, 59 L. Ed. —, 35 Sup. Ct. 158.

[45] American Exp. Co. *v.* United States, 212 U. S. 522, 53 L. Ed. 635, 29 Sup. Ct. 315; Barrett *v.* New York City, 183 Fed. 793. Nor does it make any difference that the company is not a corporation, United States *v.* Adams Exp. Co., 229 U. S. 381, 57 L. Ed. 1237, 33 Sup. Ct. 878.

[46] Pacific C. Ry. Co. *v.* United States, 173 Fed. 448; United States *v.* Union Stock Yards Co., 192 Fed. 330, 339, Commerce Court Opinion No. 15, p. 189, 225; Simpson *v.* Shepard, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729; Sec. 61, *supra*.

mission of messages by telegraph, telephone or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Just and reasonable regulations and practices affecting classification of commodities must be established, observed and enforced.

Railroads are prohibited from transporting certain commodities in which they are interested. Switch connections, under certain circumstances, must be made with other carriers and with shippers. Rebates and other forms of discrimination are prohibited. Undue and unreasonable preferences to persons, places or particular kinds of traffic are illegal; and, under substantially similar circumstances and conditions, no greater charge shall be made for a shorter than a longer haul, the shorter being included in the longer. Transportation of freight must be continuous, pooling is prohibited, and rates are required to be published, posted and maintained.

Carriers included in the Act must keep accounts according to requirements prescribed by the Commission, and must make reports to the Commission as required.[47]

The Supreme Court, speaking of the Act, has said:[48]

"It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve."

The Act, while repeating and adopting the common-law rule

[47] *Post* chapter 9. And see, Interstate Com. Com. *v.* Goodrich Transit Co., 224 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436; United States *v.* Adams Exp. Co., 229 U. S. 381, 57 L. Ed. 1237, 33 Sup. Ct. 878; Kansas City So. Ry. *v.* United States, 231 U. S. 423, 58 L. Ed. 296, 34 Sup. Ct. 125.

[48] New York N. H. & H. R. Co. *v.* Interstate Com. Com., 200 U. S. 361, 391, 50 L. Ed. 515, 521, 26 Sup. Ct. 272.

that rates should be reasonable, had as its principal purpose the prevention of unjust discrimination and undue and unreasonable preference. The shipper could protect himself more easily from unreasonable rates than he could from secret and ruinous discrimination against him and preferences to his competitor. Equality of treatment and the "open gateway policy"[49] are sought to be obtained by the act.

All the provisions of the original, amendatory and supplemental acts regulating interstate transportation have as their purpose reasonable and non-discriminatory charges. To effectuate these purposes the law prescribes rules and authorizes the Commission to make other rules and regulations by which the purposes may be accomplished.

§ 67. **What Transportation Included in the Act.**—The transportation included in the act is that "from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia, or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country * * * and carried from such place to a port of trans-shipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country." The above quotation is taken from section one of the original act, except the phrase applying to transportation between places in the same territory was added by the amendment of June 29, 1906.[50]

By the Act of 1910, telegraph, telephone and cable companies and the transportation of oil were included in the act.[51] The Panama Canal Act extended jurisdiction to water carriers.

The proviso of section one of the original act was retained

[49] Rahway V. R. Co. *v.* Delaware, L. & W. R. Co., 14 I. C. C. 191, 194. And, see, also, Rates for Transportation of Anthracite Coal, 35 I. C. C. 220, 289.

[50] Common control, etc., discussed, Standard Oil Co. *v.* United States, 179 Fed. 614. For a discussion of the provision relating to transportation of oil, see Prarie Oil & Gas. Co. *v.* United States, 204 Fed. 798, Commerce Court Opinion. Act held valid and Commerce Court reversed; the Pipe Line Cases, U. S. *v.* Ohio Oil Co., 234 U. S. 548, 58 L. Ed. 1394, 34 Sup. Ct. 956.

[51] *Post,* Sec. 335.

in its original form [52] until the Act of 1910, when it was stated in this language:

"*Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one state and not transmitted to or from a foreign country from or to any state or territory as aforesaid."

That this provision leaves to the states the regulation of intrastate commerce has already been shown.[53]

The Daniel Ball [54] is a case frequently cited and sometimes given a construction that is of doubtful correctness. The libel was brought by the United States for penalties under the act of July 7, 1838, 5 Stat. L. 304, requiring a license for vessels "to transport any merchandise or passengers upon the bays, lakes, rivers or other navigable waters of the United States." Two questions were presented, one being that the waters upon which the steamer plied were not "navigable waters of the United States." This question being answered by the court's holding that such waters were navigable waters within the meaning of the act, it was further contended that the steamer was engaged wholly in internal commerce. It was admitted that she received freight originating beyond the state destined to points in the state and also received freight in the state destined to points beyond. The language of Mr. Justice Field must be construed in connection with the facts of the case, and it will be noticed that he stresses the fact that the transportation was "on the navigable waters of the United States." In the further course of the opinion it was said:

"It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a state; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a state on which grain or fruit is transported to a distant market.

[52] *Post,* Sec. 336.

[53] *Supra,* Sec. 43.

[54] The Daniel Ball *v.* United States, 10 Wall., 77 U. S. 557, 19 L. Ed. 999.

"We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the states, when that agency extends through two or more states, and when it is confined in its action entirely within the limits of a single state. If the authority does not extend to an agency in such commerce when the agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a state, and leaving it at the boundary line at the other end, the federal jurisdiction would be entirely ousted, and the constitutional provision would be a dead letter."

In Gulf C. & S. F. Ry. Co. *v.* Texas [55] there were involved two independent shipments, and the fact that the first was interstate did not make the second, moving between points both of which were in Texas, an interstate shipment.

The Commission held that an indispensable element of a through shipment was a contract therefor; [56] but while this statement may be correct generally, it disregards the principle that substance and not mere form controls. In the Social Circle case [57] an intrastate movement that was part of an interstate movement under a through bill of lading, was held subject to the supervision of the Commission.

§ 68. **Transportation Included in Act, Continued.**—As stated in the preceding section, the general rule that a contract for through shipment determines whether or not the shipment is interstate or intrastate, and the decision in Gulf, Colorado &

[55] Gulf, C. & S. F. R. Co. *v.* Texas, 204 U. S. 403, 51 L. Ed. 540, 27 Sup. Ct. 360.

[56] Re Alleged Unlawful Rates and Practices, 7 I. C. C. 240, 247.

[57] Cincinnati, N. O. & T. P. R. Co. *v.* Interstate Com. Com., 162 U. S. 184, 192, 40 L. Ed. 935, 938, 16 Sup. Ct. 700. See also, United States *v.* Wood, 145 Fed. 405, 411; United States *v.* Colorado & N. W. Ry. Co., 157 Fed. 321, 85 C. C. A. 48; Chicago, B. & Q. R. Co. *v.* United States, 157 Fed. 830, 85 C. C. A. 194.

Sante Fe Ry. Co. *v.* Texas must be limited by the principle that the substance and not the mere form controls. In the Galveston Terminal Case[58] it was held that where goods were intended for export, the fact that the first bill of lading was issued to a terminal within the state, the commodity there to be delivered to a carrier for a foreign destination, did not make the movement an intrastate one, and that such transportation was subject to regulation by the Interstate Commerce Commission. In this case emphasis was laid upon the fact that the Terminal Company was controlled by the Railroad Company, and in the course of the opinion it was said:

"Verbal declarations can not alter the facts. The control and operation of the Southern Pacific Company of the railroads and the Terminal Company have united them into a system of which all are necessary parts, the Terminal Company as well as the railroad companies."

And the conclusion of the Court is shown by this language:

"The Terminal Company is part and parcel of the system engaged in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all of their terminals from our regulating authority."

This case was followed and the Santa Fe case distinguished in a subsequent case,[59] where it was held that, although continuity of movement might be conceded as necessary to make the shipment, the court could look behind the mere billing and deter-

[58] Southern Pac. Term. Co. *v.* Interstate Com. Com., 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279, citing Coe *v.* Errol, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. 475, sustaining the Commission in Eichenberg *v.* Southern Pac. Co., 14 I. C. C. 250.

[59] Texas & N. O. R. Co. *v.* Sabine Tram Co., 227 U. S. 111, 57 L. Ed. 442, 33 Sup. Ct. 229, citing The Galveston Terminal Case and R. R. Com. of Ohio *v.* Worthington, 225 U. S. 101, 56 L. Ed. 1004, 32 Sup. Ct. 653. And see Texas & P. R. Co. *v.* R. R. Com. of Louisiana, 183 Fed. 1005; Re Discrimination in Wharfage at Pensacola, 27 I. C. C. 252. For cases like the Santa Fe Case, see United States *v.* Wood, 145 Fed. 405, 411; Oregon R. & Nav. Co. *v.* Campbell, 180 Fed. 253, same styled case, 173 Fed. 957, 177 Fed. 318.

mine the real character of the transportation. In Railroad Companies of Louisiana *v.* Texas Pac. R. Co.,[60] the principles established by former decisions were stated: "The principle enunciated in the cases were that it is the essential of the character of the commerce, not the accident of local or through bills of lading, which determines federal or state control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country." The delivery of cars for interstate shipment is within the act.[61]

In the Iowa case[62] the shipments of coal moved to Davenport, Iowa, in interstate commerce. Upon the arrival of the coal at Davenport, all transportation charges thereto were paid; and, without unloading the cars, the consignee tendered written billing for reshipment to local points in Iowa; the carrier refused to accept such reshipment in foreign cars, claiming that the shipment should be unloaded and reloaded into its own cars. The commodity when shipped from the original point of origin in a state other than Iowa, was destined to Davenport, at which place the consignee could unload and there sell or reconsign the coal to another place. It being found as a fact that, "The certainty in regard to the shipments of coal ended at Davenport," the Supreme Court of the United states sustained the Supreme Court of Iowa in holding that this reshipment into Iowa was an intrastate movement. The carrier had contended that the method adopted was a device to secure a lower than the through rate; the local rate from Davenport added to the interstate rate thereto being less than the through rate from the original point of origin to the final point of destination. This contention of the carrier presented a question of fact, and on the question of fact the Supreme Court of the United States said: "We are unable to

[60] R. R. Com. of Louisiana *v.* Texas & P. R. Co., 229 U. S. 336, 57 L. Ed. 1215, 33 Sup. Ct. 837.

[61] Chicago, R. I. & P. Ry. Co. *v.* Hardwick Farmers Elevator Co., 226 U. S. 426, 57 L. Ed. 284, 33 Sup. Ct. 174.

[62] Chicago M. & St. P. R. Co. *v.* Iowa, 233 U. S. 334, 58 L. Ed. 988, 34 Sup. Ct. 592; State *v.* Chicago M. & St. P. R. Co., 152 Iowa 317, 130 N. W. 802. See also Kanotex Refining Co. *v.* A. T. & S. F. R. Co., 34 I. C. C. 271; Railroad Com. *v.* Worthington, 225 U. S. 101, 56 L. Ed. 1004, 32 Sup. Ct. 653; and the quotation from the Daniel Ball Sec. 67 supra.

say upon this record that the state court has improperly characterized the traffic in question here." The state court having held that the second movement was an intrastate movement subject to regulation by the state authorities, its judgment was affirmed by the Supreme Court. The criticisms that have been directed at this opinion fail to give proper consideration to the finding of facts involved. The Supreme Court adopted the facts as found by the state court, but took occasion to say: "It is undoubtedly true that the question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract." Whether assent be granted or withheld from the conclusions of fact found by the state court and accepted by the Supreme Court, the law as announced by the latter court is entirely consistent with the decisions in the cases cited in notes 59-61 *supra*.

In the Shreveport case the Commerce Court held that discrimination which was the result of a purely intrastate rate was not justified because the result of a State Commission-made-rate, and that as to interstate commerce such discrimination could be prohibited by the Interstate Commerce Commission.[63] This case was affirmed by the Supreme Court, the conclusion being that Sec. 3 of the Act to Regulate Commerce was intended to, and does, make illegal all unjust discrimination, even though the discrimination be caused by an intrastate rate prescribed by or under authority of a state law, and that Congress is not required to remove the discrimination by lowering an interstate rate not found to be too high.[64]

When a combination rate is in force from the United States to a point in Canada, the Interstate Commerce Commission has held that it has no jurisdiction of that part of the combination rate "applicable only in Canadian territory."[65] Alaska is a territory within the meaning of the act.[66]

[63] Texas & P. R. Co. *v.* Interstate Com. Com., 205 Fed. 380, sustaining the Commission in R. R. Com. of La. *v.* St. Louis & S. W. Ry. Co., 23 I. C. C. 31.

[64] Houston E. & W. Ry. Co. *v.* U. S., 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833. See also Corp. Com. of Okla. *v.* A. T. & S. F. Ry. Co., 31 I. C. C. 532.

[65] Fullerton Lumber & Shingle Co. *v.* Bellingham Bay & British Columbia R. Co., 25 I. C. C. 376.

[66] Interstate Com. Com. *v.* United States ex rel. Humbolt S. & Co., 224 U. S. 474, 56 L. Ed. 849, 32 Sup. Ct. 556.

§ 69. **Same Subject.**—If a transportation movement beginning and ending in a state passes for a substantial part of the distance through another state, the state in which such transportation begins and ends can not regulate the rate.[67] The decision in which this holding was made has been distinguished in subsequent cases but not to limit the principle as here stated.[68] But where such shipment moves through another state when it could have moved intrastate at a lower rate, reparation will be awarded.[69]

Speaking of Water Carriers, the Supreme Court has said:[70]

"Certain it is that, when engaged in carrying on traffic under joint rates with railroads, filed with the Commission, the carriers are bound to deal upon like terms with all shippers who seek to avail themselves of such joint rates, and are subject to the general requirements of the act preventing and punishing the giving of rebates, the making of unjust discriminations, the showing of favoritism and other practices denounced in the various sections of the act."

And it was held that such carriers were subject to sections 12, 15, 20, and 21 of the Act to Regulate Commerce. Prior to the passage of the Panama Canal Act, water carriers not joining in a through route or common arrangement with rail carriers were not subject to the provisions of the act.[71] Since the passage of this act the Commission has jurisdiction "when property may be or is transported from point to point in the United States, through the Panama Canal or otherwise."[72]

[67] Hanley *v.* Kansas C. S. R. Co., 187 U. S. 617, 47 L. Ed. 333, 23 Sup. Ct. 214, distinguishing Lehigh Valley R. Co. *v.* Pennsylvania, 145 U. S. 192, 36 L. Ed. 672, 12 Sup. Ct. 806, 4 I. C. C. 87.

[68] Cincinnati, Portsmouth, etc., Packing Co. *v.* Bay, 200 U. S. 179, 50 L. Ed. 428, 26 Sup. Ct. 208; Ewing *v.* City of Leavenworth, 226 U. S. 464, 468, 57 L. Ed. 303, 33 Sup. Ct. 157. The Hanley case was cited as authority in Simpson *v.* Shepard, 230 U. S. 352, 401, 57 L. Ed. 1511, 33 Sup. Ct. 729.

[69] Lathrop Lumber Co. *v.* Alabama G. S. R. Co., 27 I. C. C. 250.

[70] Interstate Com. Com. *v.* Goodrich Transit Co., 224 U. S. 194, 208, 56 L. Ed. 729, 32 Sup. Ct. 436, reversing the Commerce Court in Goodrich Transit Co. *v.* Interstate Com. Com., 190 Fed. 943.

[71] Re Jurisdiction over Water Carriers, 15 I. C. C. 205.

[72] Panama Canal Act August 12, 1914, Sec. 64 *supra*. See Sec. 379, *post*.

§ 70. **Powers and Procedure of the Commission.**—In the first seven sections of the act are stated the rights of the shipper and the duties of the carrier. Sections six, eight, nine, thirteen, fourteen, fifteen, sixteen, sixteen-a and twenty relate to the remedies of shippers, and the administration of the act by the commission. Section ten relates to public penalties, section eleven to the appointment of the commissioners, sections twelve, eighteen, twenty-one, twenty-two, and twenty-four apply to the commission's purely administrative duties. Section seventeen relates to forms of procedure. Section twenty-two expressly retains existing common law and statutory remedies, and section twenty-three provides for cumulative remedies in the courts of the United States. Section sixteen also provides a period of limitation in which to bring complaints for damages. Section twenty makes the receiving carrier liable for loss, damage, or injury to property which it has received for transportation, whether caused by it or a connecting carrier to whom it may have delivered the shipment. Section 19a, added by the Amendment of March 1, 1913, invests the Commission with power after investigation to make a valuation of the property of common carriers subject to the act, and prescribes the effect of such valuations when made.

The duties prescribed in the act to regulate commerce are not in substance broader than such duties at common law. It is in the remedies to enforce such duties that the act possesses its real importance. When a common carrier has violated the act it is "liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation," and, in addition to this common law damage, to "a reasonable counsel or attorney's fee." Suit for such damages the act says may be brought by "complaint to the commission," or by suit "in any district or circuit court of the United States of competent jurisdiction."

The Supreme Court of the United States, speaking of the provision of section nine, just quoted, says[73] "We think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts

[73] Texas & P. Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Ann. Cas. 1075. See also Sec. 383, post.

to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the commission." This case was a suit brought in a state court to recover damages for an alleged illegal rate charged, the rate being that prescribed in a legally filed tariff which had never been declared by the commission to be in violation of the law. While this suit was brought in a state court, and while express authority to sue in the United States courts is granted by section nine, the reasoning of the court would demand the same decision had the suit been brought in a "Court of the United States of competent jurisdiction."

§ 71. **Same Subject.**—Section 15 as amended by the act of June 18, 1910,[74] gives to the Commission power to suspend advances in rates.

Prior to the Hepburn Act the commission might determine whether a particular rate was just or unjust, but could not prescribe rates to control in the future. The amendment of June 29, 1906, gave power to the commission, upon the complaint of natural or corporate persons, including mercantile, agricultural, or manufacturing societies, public corporations and state railroad commissions, or on its own motion, to make investigations with reference to rates or practices of interstate carriers, to make reports stating its conclusions, together with its decision, order or requirement, and when damages are awarded, such report should include the findings of fact on which the award was made; power and authority was granted to the commission and it was made its duty whenever, after full hearing upon a complaint made as provided in section thirteen of this act, or under an order for investigation and hearing on its own motion, it shall be of the opinion that any of the individual or joint rates, or charges whatsoever, demanded, charged, or collected by any carrier or carriers, subject to the provisions of this act, for the transportation of persons or property as defined in the first section of this act, or for the transmission of messages by telegraph or telephone, or that any individual or joint regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; to make an order that

[74] *Post*, Sec. 398.

the carrier shall cease and desist from such violations, to the extent to which the commission might have found the same to exist, and further to require that the carrier should not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and should conform to the regulation or practice so prescribed. The power was also given the commission to require the establishment of through routes and to fix joint rates and prescribe an allowance which must be reasonable for a service or instrumentality furnished by the owner of property transported.

All awards of the commission, except orders for the payment of money, take effect within a reasonable time, not less than thirty days, and continue in force as prescribed not exceeding two years unless suspended, set aside, or modified by the commission or a court of competent jurisdiction; and it is the duty of every common carrier, its agents and employees, to observe and comply with such orders under penalty. The Commission is by section nine of the Act of 1910, amending section six of the old law, given power to reject schedules under certain circumstances, and schedules so rejected are void, and the failure to comply with regulations adopted and promulgated by the Commission, is a criminal offense.

§ 72. **Switch Connections.**—Under section one of the Act of March 4, 1887, as amended by the Act of June 29, 1906, the Supreme Court held that the Interstate Commerce Commission had power to compel switch connections with lateral branch roads only at the instance of shippers and that it had no power to compel switch connections on the application of a branch railroad. This decision of the Supreme Court would not be applicable to the Act of 1910, as the "owner" of such lateral branch road has now the same rights as a shipper.

§ 73. **Damages and Penalties for Misquoting a Rate.**—Prior to the Act of 1910, a shipper, who had been damaged by the error of a common carrier in misquoting a rate, had no remedy. The Act of 1910 amends section six of the prior Act by providing a penalty against the carrier for giving a shipper the wrong rate. As the statute in section eight gives a shipper the right to recover damages for any violation of the Act, it is believed that upon requesting a quotation of a rate as the statute requires, the shipper suffering damage in consequence of an

erroneously stated rate, may recover such damages by suit against the carrier in any court of competent jurisdiction.

§ 74. **Penalties.**—Section ten of the old law is amended by the Act of 1910; paragraphs one, two and four of the old section are unchanged. Paragraph three of the original section ten is amended and enlarged, in line one, by adding after "person" the words "corporation or company;" after the word "package" in the old law, the new law adds "or the substance of the property;" "officer" is added to "agent" in the new law; and an "attempt" to obtain transportation at less than the legal rate is now illegal. Imprisonment is specifically made inapplicable to artificial persons, and this new language making illegal other acts is added: "or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer or otherwise, by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates than established and in force on the line of transportation."

§ 75. **Investigations by the Interstate Commerce Commission.**—Section thirteen of the original Act is enlarged by the Act of 1910, the principal change being to extend the power of the Interstate Commerce Commission to make investigations on its own initiative. The language of this amendment would seem to be broad enough to meet the decision of the Supreme Court in the Harriman case,[75] because after giving power to investigate "any matter or thing concerning which a complaint is authorized," this is added: "or concerning which any question may arise under any of the provisions of this Act."

[75] Harriman v. Interstate Com. 253, 29 Sup. Ct. 115.
Com., 211 U. S. 407, 53 L. Ed.

§ 76. **Additional Power Given the Interstate Commerce Commission.**—Section fifteen, added by the Act of June 29, 1906, is amended by the Act of 1910 to enlarge and more definitely state the powers of the Interstate Commerce Commission. The amendment gives the Commission "on its own initiative," "in extension of any pending complaint or without any complaint," power over "individual or joint rates," and over "individual or joint classifications." While the words "any regulations or practices whatsoever" affecting rates, contained in the Act of 1906, may have been sufficiently broad to include regulations affecting classifications and joint rates, if any doubt existed as to such Act being so inclusive, such doubt is removed by the Act of 1910.

§ 77. **Commission May Suspend an Advance in Rates.**—Heretofore the carriers could make any increase in rates or any change in regulations however unjust, and the Interstate Commerce Commission could not stay the advance or prohibit the regulation until after a long delay, during which an investigation was had. Some of the Circuit Courts and Circuit Courts of Appeals held that an illegal advance could be enjoined, other courts held the contrary and the Supreme Court has never determined the question. The amendment of 1910 provides that the operation of such advance or regulation may be suspended or deferred by the Interstate Commerce Commission until after an investigation by the Commission. These provisions of the Act are entirely new. A Senate Committee had in 1906 reported against giving such power to the Commission, and it must be admitted that this power in the Commission makes a fundamental departure in the regulation of common carriers. Heretofore the right of the carrier to initiate rates was not subject to the control of the Commission; now, while the carrier can yet initiate a rate or regulation such right is subject to the control of the Commission. The new law will prevent the delay and injury which shippers suffered, who had heretofore to file their complaint against an illegal advance and rely on the tiresome, expensive and inadequate remedy by reparation. Section fifteen, as amended, gives the shipper certain rights with reference to through routes and prohibits carriers and their agents from giving information with reference to shipments. Under the new Act, the burden of proof to show the justness and rea-

sonableness of an advance is on the carrier. This burden was on the carrier prior to the Act of 1910, when a rate long in existence was advanced, although there have been some opinions expressed to the contrary. The Interstate Commerce Commission in the case of Memphis Cotton Oil Co. *v.* Illinois Cent. R. Co., 17 I. C. C. 313, while not repudiating the doctrine above, states it less clearly than some of the prior decisions of the Commission. It is a fundamental law that acts of an individual are presumptively not contrary to his interests, and as said by Wallace, Judge, in Menacho *v.* Ward, 27 Fed. 529, 532: "The estimate placed by a party upon the value of his own services or property is always sufficient, against him, to establish the real value; but it has augmented probative force, and is almost conclusive against him, when he has adopted it in a long-continued and extensive course of business dealings."

§ 78. **Reports of Carriers.**—Paragraph two of section twenty of the Act of 1906 is stricken by the Act of 1910, and in lieu thereof a new paragraph is enacted, giving the Commission power to require annual reports for the year ending either June thirtieth or December thirty-first of each year, instead of June thirtieth only as was provided by the old law, and also giving power to the Commission in addition to the annual and monthly reports, to require of carriers "periodical or special" reports.[75]

§ 79. **Court Procedure with Reference to the Orders of the Commission.**—The Commission is given power to apply to the courts to enforce its orders. Writs of mandamus may issue from the circuit and district courts of the United States to compel the movement and transportation of freight without undue discrimination, and to compel the furnishing of cars and other facilities of transportation. Suits to enforce orders for reparation, after an order therefor has been granted by the Commission, may be brought in the Federal or the State courts. Under certain circumstances, courts may suspend or set aside the orders of the Commission. What these circumstances are will be discussed hereinafter in Chapter VII.

[75] *Post*, Sec. 432.

CHAPTER III.

ALL CHARGES FOR SERVICES RENDERED BY COMMON CARRIERS IN THE TRANSPORTATION OF PERSONS OR PROPERTY OR IN CONNECTION THEREWITH MUST BE JUST AND REASONABLE.

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112. Establishing Car Load Rates.
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126. Same Subject. Some Statements of the Commission as to Such General Principles.
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128. Same Subject. Discussion of Principles in Chicago Live Stock Exchange Case.
129. Same Subject. Rate Considered in and of Itself.
130. Same Subject. Commission Not Bound by Technical Rules.
131. Same Subject. Summary.

§ 80. **All Charges Must Be Reasonable.**—At common law and under the Interstate Commerce Act all charges made by common carriers for any service rendered, or to be rendered, in the transportation of persons or property, or in connection therewith, are required to be just and reasonable, and every unjust and unreasonable charge for such service, or any part thereof, is prohibited and declared unlawful.[1] This principle of law necessarily arises from the franchises and practical monopoly incident to the business of common carriage. The principle is not new, but as has been held by the courts for over two hundred years when private property is "affected with a public interest, it ceases to be *juris privati* only." Mr. Chief Justice Waite, speaking of governmental regulation of public carriers, said:[2]

[1] *Post*, Sec. 339. Interstate Com. Com. *v.* Cincinnati, N. O. & T. Ry. Co., 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Sup. Ct. 896. The transmission of messages by telegraph, telephone and cable are also subject to the rule of reasonableness.

[2] Munn *v.* Illinois, 94 U. S. 4 Otto 113, 24 L. Ed. 77, 84. Mr.

"This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the constitution protects, we find that when private property is affected with a public interest, it ceases to be *juris privati* only. This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris, 1 Harg. L. Tr., 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

What is a "just and reasonable" charge is not always easily determinable, but that is the *desideratum* sought by the law. It will be noted that the charges "in connection" with transportation are included within the requirement of reasonableness. The same reason applies to charges for demurrage,[3] refrigeration,[4] delivery,[5] terminal charges,[6] as well as other charges made for any service connected with transportation. The Supreme Court however has held, reversing the commission and the lower courts, that carriers are entitled, for a service and expense in stopping goods in transit, to compensation in addition to the

Justice Hill of the Supreme Court of Georgia traced the principle of regulation back to Hammurabi; see Stephens *v.* Central of Ga. Ry. Co., 138 Ga. 625, 75 S. E. 1041, 42 L. R. A. (N. S.) 541. 1913E, Ann. Cas. 609.

[3] Penn Millers' Asso. *v.* Philadelphia & R. R. Co., 8 I. C. C. 531, 558.

[4] Re Charges for Transportation and Refrigeration of Fruit, 11 I. C. C. 129, Knudson-Ferguson Fruit Co. *v.* Mich. Cent. R. Co., 148 Fed. 968, 79 C. C. A. 483.

[5] St. Louis Hay & Grain Co. *v.* Chicago, B. & Q. R. Co., 11 I. C. C. 82, 87.

[6] Int. Com. Com. *v.* Chicago, B. & Q. R. Co., 186 U. S. 320, 342, 46 L. Ed. 1182, 22 Sup. Ct. 824; Cattle Raisers' Asso. *v.* Chicago, B. & Q. R. Co., 12 I. C. C. 507.

actual expense incurred.[7] Whether or not a particular rate on a single commodity is in and of itself just and reasonable can not be demonstrated.[8] Certain principles and presumptions have been made use of by the courts and commission in determining cases that came before them, but it can not be claimed that rate making is a science. Very early in its history, the commission expressed the difficulty of determining what constituted a just rate as follows:

"The question of the reasonableness of rates is always a perplexing one. A great variety of considerations are necessarily involved in each instance. Theory and conjecture merely are not enough. A comparison of one isolated rate with another is not sufficient. The whole field must be considered in order to approximate justice, and at best the result can not be regarded as other than an approximation." [9]

In the 1910 Western Rate Advance Case [10] Mr. Commissioner Lane discussed the principles from which could be determined what is a reasonable rate and in concluding the opinion of the Commission in that case said: "We are dealing here with a difficult problem, involving multitudinous facts and an infinite variety of modifying conditions, which make the establishment of principles and the framing of policies a matter of slow evolution."

Some of the principles announced by the courts and the commission will be stated in the next succeeding sections.

§ 81. **Classification.**—Classification of commodities for rate making is adopted in prescribing rates. Most traffic, especially the more valuable articles, moves under classified rates; the heavier articles are given what is called commodity rates. There are in the United States several different classifications. Confusion and sometimes unjust discrimination result from these different classifications when the traffic moves through territory where different classification rules and descriptions apply. Efforts have been made by representatives

[7] Southern Ry. Co. *v.* St. Louis Hay & Grain Co., 214 U. S. 297, 53 L. Ed. 1004, 29 Sup. Ct. 678.

[8] National Hay Asso. *v.* Lake Shore & M. S. R. Co., 9 I. C. C. 264, 303, 304, 305.

[9] Howell *v.* New York, L. E. & W. R. Co., 2 I. C. C. 272, 2 I. C. R. 162.

[10] Advance in Rates, Western Case, 20 I. C. C. 307, 379.

of the carriers and commissions, national and state, to remedy this condition by the adoption of a uniform system of classification. Little progress has been made so far towards the accomplishment of this object. In some sections there are commodities which do not exist in others. Long existing systems in reliance upon which business has been established and prospered, are facts which make difficult a solution of the problem. But it is not, as said by Mr. Commissioner Lane, "fanciful to say" that a solution may be arrived at. The learned Commissioner in the same connection stated some principles which must be considered. He said: "Supplement cost with scientific classification of freight * * * and we have something certainly more nearly akin to reason than the hazard of a traffic manager, no matter how benevolently inclined." [11]

It is the duty of carriers subject to the act to regulate commerce "to establish, observe and enforce reasonable classification of property for transportation," [12] and the commission may "enter upon a hearing concerning the propriety of such * * * classification." "May determine and prescribe what will be the just and reasonable. * * * individual or joint classification." [13] Classification like the other details in rate making is not an exact science.[14] "In framing classifications and rates, no one consideration is controlling. Bulk, value, liability to waste or injury in transit, weight, form in which tendered, etc., must be taken into consideration." [15] All classifications must be made with due regard to these and kindred considerations. Market conditions and the promotion of competition are also facts which are considered. Classification must not, of course, be made to benefit one or a few shippers and must be without discrimination.[16] The Interstate Commerce Commis-

[11] Advance in Rates, Western Case, 20 I. C. C. 307, 362.

[12] Sec. 341, *post.*

[13] Sec. 395, *post.* Re Advances on Coal to Lake Ports, 22 I. C. C. 604, 623, 624.

[14] Forest City Freight Bureau *v.* Ann Arbor R. Co., 18 I. C. C. 205, 206.

[15] Ford Co. *v.* Michigan Central R. Co., 19 I. C. C. 507, 509, Yawman & Erbe Mnfg. Co. *v.* Atchison, T. & S. F. R. Co., 15 I. C. C. 260, 262.

[16] McClung & Co. *v.* Southern Ry. Co., 22 I. C. C. 582, 584; Sutherland Bros. *v.* St. Louis & S. F. R. Co., 23 I. C. C. 259, 262. The difficulties encountered in making rates between different

sion in the Western Classification Case [17] dealt at length with the general subject. The opinion of the Commission, written by Mr. Commissioner Meyer, begins with the statement that classification is a public function, and that committees engaged in making or changing classifications should conduct their business as public, giving full information to shippers and Commissioners, state and national, that there may be opportunity for public hearings. Further principles were stated: "For years past the Western Classification Committee has compiled to a certain extent what are designated classification units. These units as compiled are a combination or sum of unlike parts, but may be expressed with equal propriety as a product composed of unlike factors. They are intended to express the relation to one another of weight, space, and value. While a unit test of this character may not finally determine the classification of an article, it constitutes a basis for comparison with other articles. When all the modifying conditions and facts are known, a fair classification relation may be established among articles through the aid of this classification unit. A compilation of classification units just as far as practicable for every item in the classification would doubtless be of substantial value in the present formative work. The classification is in an inchoate state. Perhaps every classification must remain so. Constant change appears to be inherent in industrial life." In discussing the rules which should apply in making a uniform classification, it was said: "The uniform classification must be worked out without an attempt to affect revenues. Classification and rates and revenues should be kept entirely separate. There will doubtless be many coincidences in which the present rate applied to the new classification will bring about the exact transportation charge which results from the old rate applied to the old classification. In other cases the rate must be advanced or reduced, depending upon the change in the classification of the article in order to protect existing revenues. This is entirely without reference to the sufficiency or insufficiency of present revenues, which is a distinct and very different question. It would only

classification territories are discussed in Interior Iowa Cites Case, 28 I. C. C. 64, 72, and in Memphis v. Chicago R. I. & P. R. Co., 37 I. C. C.

[17] Western Classification Case, 25 I. C. C. 442.

complicate and confuse matters to attempt, through the instrumentality of the classification, to bring about a revision in rates and charges. Whether a rate is too high or too low should be made a separate issue distinct from classification. Nevertheless, as far as possible, the establishment of ratings and the publication of rates should follow changes in the classification very closely. A classification is a universal tariff from which the schedules of individual carriers should not depart, except in cases demanded by special conditions. Commodity tariffs in restricted numbers will probably always remain a necessity."

In the 1915 Western Rate Advance Case,[18] F. H. Millard, a witness for the Interstate Commerce Commission, presented the result of studies seeking to measure the extent to which the value of the commodity should constitute a norm in rate-making and rate-judging. These studies are shown in the appendix to the report of the Commission in that case.

§ 82. **Cost of Carrier's Equipment.**—Bonded indebtedness, operating expenses and dividends on the investment of the carrier all enter into the "cost of service" and should be considered, but the indebtedness and the stock upon which dividends are sought must represent actual obligations contracted in good faith and the expenses must be actual and reasonable.[19] Mr. Commissioner Prouty,[20] discussing this question, aptly says: "To make the capital account of our railroads the measure of their legitimate earnings would place, as a rule, the corporation which has been honestly managed from the outset under enormous disadvantages." What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience.[21] In considering the value of the property

[18] Western Rate Advance Case 1915, 35 I. C. C. 497.

[19] Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028. Re Alleged Excessive Rates on Food Products, 4 I. C. C. 48, 116.

[20] Grain Shippers' Asso. *v.* Ill. Cent. R. Co., 8 I. C. C. 158, 182. See also Re Proposed Advance in Freight Rates, 9 I. C. C. 382, where is found a full discussion of the question.

[21] Smyth *v.* Ames (Nebraska Freight Rate Case), 169 U. S. 446, 42 L. Ed. 819, 18 Sup. Ct. 418; Covington & Lexington Turnpike R. Co. *v.* Sandford, 164 U. S. 578, 41 L. Ed. 560, 17 Sup. Ct. 198; Knoxville *v.* Knoxville Water Co., 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. 148; Brabham *v.* Atlantic C. L. R. Co., 11 I. C. C. 464, 473; Wilcox *v.* Consolidated Gas Co., 212 U. S. 19, 53 L. Ed. 382, 29 Sup. Ct. 192, 15 Ann. Cas. 1034.

employed in serving the public, it must be remembered that such a test is not absolute and, at times, yields to the public interest and the rule as to the value of service, both of which are discussed hereinafter. The cost and value of the railroad properties are among the various facts which may be considered in determining what in a particular case constitutes a reasonable rate.

The value of property employed for the public convenience is an important element in determining the reasonableness of a whole schedule of rates. It can be of little value in determining the reasonableness of rates on a particular commodity. This is true because no method has ever yet been devised by which the cost of moving a particular commodity can be determined. Whether or not such commodity is bearing its proper proportion of the charges that must be received to make "a fair return" to the carrier is a question that can not yet, if ever, be answered. It is true that certain out-of-pocket expenses can be allocated, but the proportion of the cost of maintenance, general superintendence and other general expenses which should be charged against a particular movement can not be determined with any degree of certainty. The rule announced in Smyth *v.* Ames *supra*, is as follows:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the conveyance of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

It should be kept in mind that this oft quoted rule formulated by the Supreme Court was announced in a suit to enjoin an act "To Regulate Railroads, to Classify Freights, to Fix Reasonable Maximum Rates to be Charged for the Transportation of Freights upon Each of the Railroads in the State of Nebraska, and to Provide Penalties for the Violation of this Act." While the rule is a correct rule of law, as limited by the last sentence of the foregoing quotation, when considered in reference to a general schedule of rates. It can not be practically applied to a particular rate. Even with reference to a general schedule of rates it should be construed in connection with the decision of the case of Covington & Lexington Turnpike R. Co. *v.* Sanford,[22] where the same distinguished Judge, Mr. Justice Harlan, who wrote the opinion in Smyth *v.* Ames, said:

"It is proper to say that if the answer had not alleged, in substance, that the tolls prescribed by the Act of 1890 were wholly inadequate for keeping the road in proper repair and for earning dividends, we could not say that the act was unconstitutional merely because the company (as was alleged and as the demurrer admitted) could not earn more than 4 per cent on its capital stock. It cannot be said that a corporation operating a public highway is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. 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 its property. The public cannot properly be subjected to unreasonable rates

[22] *Supra* Note 21.

in order simply that stockholders may earn dividends. The legislature has the authority in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. 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."

Value given to property by reason of its excessive earning power should not be considered, although the reasonable value of a franchise is an element in arriving at the total value of property.

The amendment giving to the Interstate Commerce Commission jurisdiction to make a valuation of the carrier's property [23] will, when the work thereunder is completed, furnish a valuation which can be used in rate-making and rate-judging. In the meantime the "cost of road and equipment" furnishes a "usable" basis which the Commission applies.[24] In rate-judging and rate-making by an administrative body performing the legislative function of determining what shall be the rate for the future, a different question is presented from that which arises when a court has for determination the question of the confiscatory character of a rate prescribed by a quasi-legislative tribunal. The Commission may and should consider all questions affecting the movement of the particular traffic, such as competition, classification, the public interests, and all of the elements which enter into the general question of reasonableness. In considering the questions so presented, Commissioners have to survey a wider field and have greater latitude than the courts, which are limited to the question, does the rate involved constitute in substance the taking of property without due compensation. This question is discussed, sec. 46 *supra*.

[23] Sec. 420, *post*.

[24] Advances in Rates, Eastern Case, 20 I. C. C. 243, Western Case, 20 I. C. C. 307; Five Per Cent Case, 31 I. C. C. 351, 32 I. C. C. 325; Western Rate Advance Case 1915, 35 I. C. C. 497.

§ 83. **Cost of Carrier's Equipment—What Is a Reasonable Return.**—On the question of what is a reasonable return, the Supreme Court has said:[25]

"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 may 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 account 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 returns upon the investment."

In this case the whole schedule of rates was involved and six per cent was held to be reasonable, the court saying: "Taking all facts into consideration, we concur with the court below on this question, and think complainant is entitled to six per cent on the fair value of its property devoted to the public use."

In the Knoxville Water Case,[26] the Supreme Court announced a rule as to depreciation as follows:

"Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning. It is not only the right of the company to make such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation at least, its plain duty to the public. If a different course were

[25] *Supra* Note 21, this chapter? Consolidated Gas Co. case.

[26] *Supra* Note 21, this chapter.

pursued the only method of providing for replacement of property which has ceased to be useful would be the investment of new capital and the issue of new bonds or stocks."

The rule has no application to the rates charged by express companies. Mr. Commissioner Prouty said:[27]

"In passing upon an entire schedule of railway rates (and when in this proceeding we pass upon the base rate of these defendants we really consider their entire schedule) the controlling factor is the value of the property which is devoted to the public service. The cost of originally producing or of reproducing that property is an important consideration, as is also the capitalization of the company and the value of its securities. In revising the rates of these express companies those considerations can have but little weight, since there is no real relation between the value of the property and the service performed, nor in the case of these companies, between their capital stock and just earnings."

Increased cost of labor and equipment makes the cost of service higher, but this is generally offset by increased efficiency. This question is interestingly discussed and valuable tables given in the case of Re Class and Commodity Rates from St. Louis to Texas Common Points, 11 I. C. C. 238, et seq., and in Sec. 47 *supra,* other cases are cited and discussed.

§ 84. **Same Subject. Difficulties in Determining the Question.**—It is easy to state the fundamental rule announced in Smyth *v.* Ames, *supra,* that the fair value of the property used for the public convenience shall be taken as a basis for determining the reasonableness of a schedule of rates, but the difficulty arises in determining what is a "fair value"—Who is to fix this value? What facts must of necessity be considered in arriving at this determination?

Primarily the rate-making body must determine what the fair value is, and such determination has a force which the courts must regard. In the Minnesota Rate Cases,[28] the Supreme Court said: "The rate-making power is a legislative power, and necessarily implies a range of legislative discretion. We do

[27] Kindel *v.* Adams Express Co., 13 I. C. C. 475, 485.

[28] Simpson *v.* Shepard, 230 U. S. 352, 433, 434, 57 L. Ed. 1511, 33 Sup. Ct. 729, citing San Diego Land & Town Co. *v.* Jasper, 189 U. S. 439, 446, 47 L. Ed. 892, 23 Sup. Ct. 571.

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 matters within the province of either." While this is true, neither a legislature nor a commission can confiscate the property of a public utility company, and the courts must therefore determine, when properly applied to, whether or not a particular rate or schedule of rates violates the constitutional rights of the carrier or other person or corporation engaged in a public service, whose rates have been prescribed by the legislature, or under its authority. Congress has empowered the Interstate Commerce Commission to make a physical valuation of railroads, but to do this will require years and even when it is done the question will not be entirely settled. In the Minnesota Rate Cases, *supra* much testimony was taken as to value, relative cost, expenses, etc., but the Supreme Court rejected the proof as not adequate—the Court did however announce certain general and fundamental principles. It was there held that (1) the basis of the calculation is the fair value of the property, used for the convenience of the public; (2) that such value was not to be determined by arbitrary rules, but cost of construction of improvements, the market value of stock and bonds, the present as compared with the original cost of construction the probable earning capacity under the rates prescribed must be considered. And after quoting from Smyth *v.* Ames the Court concluded "We do not say there may not be other matters to be regarded in determining the value of the property." And when a carrier is engaged in both interstate and intrastate transportation, and a rate is prescribed for intrastate movements the court announced a third principle as follows: The question "must be determined by considering separately the value of the property employed in the intrastate business, and the compensation allowed in the business under the rule prescribed."

In the Indiana case [29] further emphasis was given to the fact that prescribing rates was a legislative function, and when rates are so prescribed by a lawfully authorized tribunal the carriers seeking to set them aside must make definite and satisfactory proof.

In the 1910 Western Rate Advance case it was contended upon

[29] Wood *v.* Vandalia R. Co., 231 U. S. 1, 58 L. Ed. 97, 34 Sup. Ct. 7.

the part of one of the carriers that "it is immaterial how the property was acquired, what it originally cost, whether the present value may be claimed to be in part the result of earnings put back into the property in betterments or is due to growth of traffic and development of the country served."[30] This contention was denied by the Commission, Mr. Commissioner Lane saying:

"Notwithstanding these decisions, it remains for the Supreme Court yet to decide that a public agency, such as a railroad created by public authority, vested with governmental authority, may continuously increase its rates in proportion to its value, either (1) because of betterments it has made out of income, or (2) because of the growth of the property in value due to the increase in the value of the land which the company owns."

This answer is fully supported by the subsequent decision of the Supreme Court in the Minnesota Rate Cases and other like state rate cases decided about the same time.[31] This principle must not, however, be given too broad an application. Construed in the light of the decisions cited it does not deny a carrier returns on investments merely because such investments may have been made from earnings or may have resulted from an increase

[30] Advances in Rates, Western Case, 20 I. C. C. 307, 339. In support of this claim these cases were cited: Ames *v.* Union Pac. Ry. Co., 64 Fed. 165; Reagan *v.* Farmers Loan & Trust Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047; Missouri, K. & T. Ry. Co. *v.* Love, 177 Fed. 493; Kennebec Water Co. *v.* Waterville, 97 Me. 185, 54 Atl. 6; National Water Works Co. *v.* Kansas City, 62 Fed. 853; Metropolitan Trust Co. *v.* Houston & T. C. R. Co., 90 Fed. 683; San Diego Land & Town Co. *v.* National City, 74 Fed. 79; Matthews *v.* Board of Commissioners, 106 Fed. 9.

[31] Simpson *v.* Shepard—Minnesota Rates Cases—230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729; Knott *v.* Chicago, B. & Q. R. Co.—Missouri Rate Cases—230 U. S. 474, 57 L. Ed. 1571, 33 Sup. Ct. 975; Chesapeake & O. R. Co. *v.* Conley—West Virginia Rate Cases—230 U. S. 513, 57 L. Ed. 1597, 33 Sup. Ct. 985; Southern Pac. Co. *v.* Campbell, Oregon R. & Nav. Co. *v.* Campbell—Oregon Rate Cases—230 U. S 525, 537, 57 L. Ed. 1610, 33 Sup. Ct. 1027; Allen *v.* St. Louis, I. M. & S. Ry. Co.—Arkansas Rate Cases—230 U. S. 553, 57 L. Ed. 1625, 33 Sup. Ct. 1030; Wood *v.* Vandalia R. Co.—Indiana Rate Case—231 U. S. 1, 58 L. Ed. 97, 34 Sup. Ct. 7; Louisville & N. R. Co. *v.* Garrett—Kentucky Rate Case—231 U. S. 298, 58 L. Ed. 229, 34 Sup. Ct. 48. See also Sec. 46 *Supra* and notes 39, 47 and 48 this chapter.

in the value of the original investment, but the principle would prevent charging unreasonable rates even though such rates were necessary to earn a fair return on the investment.

§ 85. **Cost of Service.**—The value of the equipment of a common carrier, is an element in determining what it costs to transport any particular commodity, and what such cost is, that is the "cost of service," is a fact that is properly considered in determining what is a reasonable and just rate to be charged.[32] This item will be seen referred to by the Interstate Commerce Commission frequently in its opinions determining whether or not the rates under discussion are or are not reasonable. The Supreme Court, speaking of the commission, says: "The tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers."[33] In considering a proposed advance in freight rates,[34] Mr. Commissioner Prouty first considers the question "is the rate reasonably estimated by the cost and value of the service?" In another case,[35] Mr. Commissioner Clements said: "The test of the reasonableness of a rate is not the amount of the profit in the business of the shipper or manufacturer, but whether the rate yields a reasonable compensation for the services rendered." Cost of service, however, can not be made an absolute guide in fixing rates. District Judge Bethea[36] well says: "The cost of service to a carrier would be an ideal theory, but it is not practicable. Such cost can be reached approximately, but not accurately enough to make this factor controlling. It is worthy of consideration, however." Judge Clements expressed the rule of the commission as follows:[37]

[32] Re Alleged Excessive Rates on Food Products, 4 I. C. C. 48, 3 I. C. R. 93; Schumacher Milling Co. *v.* Chicago, R. I. & P. Ry. Co., 6 I. C. C. 61, 4 I. C. R. 373; Re Proposed Advances in Freight Rates, 9 I. C. C. 382; Int. Com. Com. *v.* Chicago G. W. Ry. Co., 141 Fed. 1003, 1015. Separation of Operating Expenses, 30 I. C. C. 676, 678; Coal Rates from Virginia, 30 I. C. C. 635, 646; and cases cited.

[33] Tex. & Pac. Ry. Co. *v.* Int. Com. Com., 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666, 5 I. C. R. 405.

[34] Re Proposed Advance in Freight Rates, 9 I. C. C. 382.

[35] Central Yellow Pine Asso. *v.* Ill. Cent. R. Co., 10 I. C. C. 505.

[36] Int. Com. Com. *v.* Chicago Great W. R. Co., 141 Fed. 1003, 1015, and cases cited. Affirmed, same style case, 209 U. S. 108, 52 L. Ed. 705, 28 Sup. Ct. 493.

[37] Cannon *v.* Mobile & O. R. Co., 11 I. C. C. 537, 542.

"While in the relative adjustment of rates as between places on its line a carrier cannot rightfully ignore the relative cost to it of the respective services rendered by it, and since it ordinarily costs more to haul freight a longer distance than a shorter one, the carrier cannot rightfully ignore substantial differences in distance where all other circumstances and conditions are equal, or substantially similar. There are other matters of equal importance to that of cost of the service and often more controlling which must also be considered. Among these is competition both of carriers and of markets. The greater the inequality or dissimilarity in other potent circumstances or conditions the less controlling becomes the matter of relative cost."

In determining the cost of service Mr. Commissioner Clements said: "Expenditures for additions to construction and equipment should be reimbursed by all the traffic they accommodate during the period of their duration, and improvements that will last many years should not be charged wholly against the revenue of a single year." [38] The principle, however, must be applied in connection with the holding in the Knoxville Water Co. case,[39] that earnings should be sufficient to pay a reasonable return on the property employed in the public service and provide against depreciation. "Cost of service," could not, in any event, require an unreasonable rate, and, under some circumstances, a carrier may be compelled to perform a particular service to the public at an actual loss.

§ 86. **Cost—When Carrier's Duty to Furnish Service.**— In Atlantic C. L. R. Co. *v.* North Carolina Corporation Commission [40] the Supreme Court had under consideration an order of the North Carolina Commission requiring the carrier to make a particular connection with certain passenger trains. To do this the carrier had to put on an extra train at a loss. The Supreme Court sustained the order of the North Carolina Commission, saying:

"But this case does not involve the enforcement by a state of

[38] Central Yellow Pine Asso. *v.* Ill. Cent. R. Co., 10 I. C. C. 505; Ill. Cent. R. Co. *v.* Int. Com. Com., 206 U. S. 441, 461, 51 L. Ed. 1128, 1136, 27 Sup. Ct. 700.

[39] Knoxville *v.* Knoxville Water Co., 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. 148.

[40] Atlantic Coast Line R. Co. *v.* North Carolina Corp. Com., 206 U. S. 1, 24, 25, 51 L. Ed. 933, 944, 27 Sup. Ct. 585, 11 Ann. Cas. 398.

a general scheme of maximum rates, but only whether an exercise of state authority to compel a carrier to perform a particular and specified duty is so inherently unjust and unreasonable as to amount to the deprivation of property without due process of law or a denial of the equal protection of the laws. In a case involving the validity of an order enforcing a scheme of maximum rates, of course the finding that the enforcement of such scheme will not produce an adequate return for the operation of the railroad, in and of itself, demonstrates the unreasonableness of the order. Such, however, is not the case when the question is as to the validity of an order to do a particular act, the doing of which does not involve the question of the profitableness of the operation of the railroad as an entirety. The difference between the two cases is illustrated in St. Louis & S. F. R. Co. *v.* Gill, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. Rep. 484, and Minneapolis & St. L. R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. Rep. 900. But even if the rule applicable to an entire rate scheme were to be here applied, as the findings made below as to the net earnings constrain us to conclude that adequate remuneration would result from the general operation of the rates in force, even allowing for any loss occasioned by the running of the extra train in question, it follows that the order would not be unreasonable, even if tested by the doctrine announced in Smyth *v.* Ames and kindred cases."

§ 87. **Cost of Service, Continued.**—That cost of service should be considered in determining the reasonableness of a rate or a schedule of rates is but a corollary of the proposition that each is entitled to his own, but this principle, like all abstract principles, must be regarded as merely a fact to be considered, and not an inflexible rule to be followed. The principle must be considered in connection with all the circumstances surrounding the transportation, the rate for which is sought to be determined. Regardless of cost of service, some traffic can and should bear a higher rate than other traffic; it is impossible to determine with accuracy the cost of moving a particular kind of traffic as, under present systems of accounting, cost of each different service can not be allocated. But, as was said by Mr. Commissioner Lane,[41] "once we have learned the comparative costs for various services, it is not fanciful to say that a schedule of rates may

[41] Advance in Rates, Western Case, 20 I. C. C. 307, 362.

be made which will approach justice as between services. Supplement cost with scientific classification of freight, giving their due to all the various factors, such as value, bulk, and hazard—especially to value—adding return for use of plant, and we have something certainly more nearly akin to reason than the hazard of a traffic manager, no matter how benevolently inclined. Such a theory gives force to every factor which the Supreme Court has said should be considered in the fixing of rates for public utilities. The investor would have his return, and the value of the property would be cared for as a part of the rate, though this return would of course vary with the rates as at present, one service making a larger return to capital than another."

But, until the facts suggested by the Commissioner are available, "the cost of the service" is one of the factors to be considered in determining the reasonableness of rates. But, neither the cost of the service, nor any of the other factors, of which there are many, can be taken alone as conclusive."[42]

Business conditions, the necessity for a rate lower than the one under which the traffic moves, its low value in comparison with its weight, and other considerations, make it proper that some traffic shall bear less than its proportion of the cost of service. Sometimes, were a particular traffic charged with its proportion of the cost of service, it would not move at all. The public welfare demands that such traffic shall move; the carrier loses nothing in conceding a low rate to such traffic if the rate exceeds, however little, the out-of-pocket cost. The carrier's equipment must be maintained, and the general expenses must go on, even though the traffic does not move. These considerations underlie the statement of the Commerce Court:[43] "That relative freight

[42] Mr. Commissioner Clark in Coke Producers Association of the Cornellsville Region *v.* Baltimore & O. R. Co., 27 I. C. C. 125, 140.

[43] Atchison, T. & S. F. Ry. Co. *v.* United States, 203 Fed. 56, 59; Commerce Court Opinion No. 61, 537, Lemon Rate Case; affirmed by the Supreme Court, Atchison, T. & S. F. Ry. Co. *v.* United States, 231 U. S. 736. The statement of the Commerce Court quoted in the text was fortified by citing: Minneapolis St. L. R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 900; St. L. & S. F. R. Co. *v.* Gill, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484; Atlantic C. L. R. Co. *v.* North Carolina Corp. Com., 206 U. S. 1, 51 L. Ed. 933, 27 Sup. Ct. 585, 11 Ann. Cas. 398. To the same effect see Texas & P. Ry. Co. *v.* R. R. Com. of La., 192 Fed. 280, 112 C. C. A. 528.

rates have not been based upon the fair, proportionate cost or value of the service alone or in combination, is demonstrated by the entire history of freight classification. The carrier can not complain of a violation of its constitutional rights if, not to favor some person or class, but for the general welfare, it is compelled to make a rate for some particular service which, though in excess of the out-of-pocket expense, would nevertheless be confiscatory, if it were applied to all its freight; that is, the carrier has no constitutional right to a rate for each distinct kind of service which will equal its proportionate share of the entire operating expense."

The language quoted from the opinion of the Commerce Court is susceptible of misconstruction, and it is not without significance that no similar statement appears in the affirming opinion of the Supreme Court. Limiting the language of the Commerce Court as it was probably intended to be limited, to the meaning that an equal percentage over actual cost need not be fixed for the transportation of all commodities, the statement is a correct rule of law. That the rule must be limited as stated above, follows from the decision of the Supreme Court annulling rates on coal prescribed under the laws of North Dakota.[44] Those state rates paying no more than the actual cost to the carrier, were prescribed for the avowed purpose of enforcing a "public policy." The state presented the argument "that the rate was imposed to aid in the development of a local industry." Answering this contention, Mr. Justice Hughes, delivering the opinion of the court, said:

"While local interests serve as a motive for enforcing reasonable rates, it would be a very different matter to say that the state may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally well be asserted—to carry gratuitously, in order to build up a local enterprise. That would be to go outside the carrier's undertaking, and outside the field of reasonable supervision of the conduct of its business, and would be equivalent to an appropriation of the property to public uses upon terms to which the carrier had in no way agreed." The learned Justice, that there

[44] Northern P. R. Co. *v.* North Dakota, 236 U. S. 585, 59 L. Ed. 35 Sup. Ct. 429. See also Norfolk & W. R. Co. *v.* Conley, 236 U. S. 605, 59 L. Ed., 35 Sup. Ct. 437.

should be no misunderstanding of the rule, expressly referred the principle that classification of commodities with different ratings thereon was permissible. He said: "The legislature undoubtedly has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities, to secure the same percentage of profit on every sort of business. There are many factors to be considered—differences in the articles transported, the care required, the risk assumed, the value of the service, and it is obviously important that there should be reasonable adjustments and classifications." Nothing in this decision conflicts with the decision in the North Carolina case, note 40 *supra*, this chapter. Thus the carrier was compelled to perform an absolute duty although in doing so for a reasonable charge there was a loss. In the North Dakota case the court held that less than a reasonable rate could not be required of the carrier.

§ 88. **Value of Service.**—The shipper cannot ordinarily pay more than the service is worth, consequently, from necessity as well as from a consideration of what is just, the value of the service must constitute the maximum charge. Rates should be proportioned to the value of the service to the shipper.[45] The value of the commodity enters into the value of the service, and consequently must also be considered in determining what constitutes a reasonable rate.[46] That the interests of the public are

[45] Delaware State Grange *v.* New York, etc., R. Co., 4 I. C. C. 588, 3 I. C. R. 554, 561; Loud *v.* South Carolina R. Co., 5 I. C. C. 529, 4 I. C. R. 205, citing cases. Loftus *v.* Pullman Co., 18 I. C. C. 135, 140, difference in value of service between upper and lower Pullman berths. See also Re Suspension of Western Classification No. 51, 25 I. C. C. 442, at pp. 472, 474, discussing principles of classification.

[46] The principle that the value of a particular commodity must be considered in determining what is a reasonable rate thereon, is one which has been applied throughout the history of the Interstate Commerce Commission. Evans *v.* O. R. N. Co., 1 I. C. C. 325; Howell *v.* N. Y. L. E. & W. R. Co., 2 I. C. C. 272, 285, 1 I. C. R. 162; Thurber *v.* N. Y. C. & H. R. Co., 3 I. C. C. 473, 503, 2 I. C. R. 742; Re Excessive Rates on Food Products, 4 I. C. C. 48; Buchanan *v.* N. P. R. Co., 5 I. C. C. 7; Colorado F. & I. Co. *v.* S. P. Co., 6 I. C. C. 488, 489; Grain Shippers Asso. *v.* L. S. & M. S. R. Co., 9 I. C. C. 264, 286; Georgia Peach Growers Asso. *v.* A. C. L. R. Co., 10 I. C. C. 255, 277; Tift *v.* So. Ry. Co., 10 I. C. C. 548; National Machinery Co. *v.* P. C. C. & St. L. R. Co., 11 I. C. C. 581, 584; Society American Florists

important in determining the reasonableness of charges by public service corporations, has been announced by the Supreme Court as an established principle in rate making. Mr. Justice Harlan says:[47] "The public can not properly be subjected to unreasonable rates in order simply that stockholders may earn dividends." This view is further supported by the case of Smyth *v.* Ames,[48] where it was said: "It can not be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public.

v. U. S. Express Co., 12 I. C. C. 120, 125; Re Released Rates, 13 I. C. C. 550; Union Pac. Tea Co. *v.* P. R. R. Co., 14 I. C. C. 545, 547; Darling *v.* B. & O. R. Co., 15 I. C. C. 78, 81; Union Made Garment Mfr's Asso. *v.* C. & N. W. Ry. Co., 16 I. C. C. 405, 407; Metropolitan Paving Brick Co. *v.* A. A. R. Co., 17 I. C. C. 197, 205; Forest City Freight Bureau *v.* A. A. R. Co., 18 I. C. C. 205, 206; Re Reduced Rates on Returned Shipments, 19 I. C. C. 409; Ford Co. *v.* M. C. R. R. Co., 19 I. C. C. 507, 509; Advances in Rates, Western Case 1910, 20 I. C. C. 307, 355, where Mr. Lane said: "To be sure we can never depart from the *ad valorem* principle in rate making;" Investigation of Advances in Rates on Grain, 21 I. C. C. 22, 30, 35; Investigation & Suspension Docket, 26 to 26c (Coal Rates), 22 I. C. C. 604, 623; Minneapolis Traffic Asso. *v.* C. & N. W. Ry. Co., 23 I. C. C. 432, 437; Bancroft-Whitney Co. *v.* C. N. O. & T. P. Ry. Co., 24 I. C. C. 557, 558; Bernheim *v.* O. R. & Nav. Co., 25 I. C. C. 156, 158; Union Tannery Co. *v.* S. Ry. Co., 26 I. C. C. 159, 163, where Mr. Commissioner Clements clearly and forcibly states the principle; Dixie Dairy Men's Asso. *v.* Y. & M. V. R. Co., 27 I. C. C. 618, 621; Scrap Iron Rates, 28 I. C. C. 525; Pardee Works *v. C. R. R. Co.*, 29 I. C. C. 500, where value was under the facts therein, limited to the hazard; but this opinion is not in accord with the general views of the Commission as elsewhere expressed; Rates on Flaxseed, 29 I. C. C. 633, 636; Molasses Rates to Knoxville, 30 I. C. C. 313, 314; Railroad Com. of Montana *v.* B. A. & P. Ry. Co., 31 I. C. C. 641, 652; Five Per Cent Case, 31 I. C. C. 351, 419; Nebraska State Ry. Com. *v.* C. V. R. Co., 32 I. C. C. 41, 44; Anson Gilkey & *Hurd Co. v.* S. P. Co., 33 I. C. C. 332, 339, 341; Des Moines Commodity Rates, 34 I. C. C. 281, 288; Western Rate Advance Case 1915, 35 I. C. C. 497, 606; and see Int. Com. Com. *v. Chicago Great W. R. Co.*, 141 Fed. 1003, 1015 and cases cited; Northern Pac. R. Co. *v.* North Dakota, 236 U. S. 585, 59 L. Ed. —, 35 Sup. Ct. 429.

[47] Covington & L. Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 596, 41 L. Ed. 560, 566, 17 Sup. Ct. 198.

[48] Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418.

The rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered." In San Diego Land & Town Co. v. National City,[49] the Supreme Court reviewed and approved the case and reiterated the principle of the importance of considering "fair value * * * of the services rendered."

The "value of the service" may mark the boundary beyond which rates may not ordinarily go, but the rule can not be at all times applied. The commission has held that a difference in the value of two car loads of peaches would not justify a higher rate on the more valuable car.[50] This is true because it is impracticable to know the exact value of the service in any case, and, as will be frequently seen throughout this chapter, rate making is not subject to unalterable theoretical rules. Judge Bethea [51] says of the rule: "This is considered an ideal method, when not interfered with by competition or other factors. * * * This method is considered practical and is based on an idea similar to taxation." Kirkman, in The Science of Railways, vol. 8, pp. 42, 43, writing from the standpoint of a trained railway man, says:

"A prime factor in determining the rates carriers charge, is the value of the service to the shipper. This is the basis of remuneration for labor in every field of industry. Any other would be oppressive, if not prohibitory. Its operation involves the exercise of discrimination. But discrimination is the instinct of trade, its intelligent, directing and governing force. The ignorant, the vicious, and the superficial speak of it, when exercised by railroads, as something oppressive, something to be discountenanced. This is because they do not consider the analogies of trade, or its merits. The charges of carriers can not be disproportionate to the thing handled. If more is charged than I can reasonably pay, it prohibits me from doing business;

[49] San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804.

[50] Georgia Peachgrowers' Asso. v. Atlantic C. L. R. Co., 10 I. C. C. 255.

[51] Int. Com. Com. v. Chicago G. W. R. Co., 141 Fed. 1003, 1015, Noyes, Am. R. R. Rates, p. 53. Int. Com. Com. v. Baltimore & O. R. Co., 43 Fed. 37, 53, 3 I. C. R. 192.

but if I am charged what I can afford, I am not treated unjustly, so long as the general profits of the seller are not unreasonable. It is not an act of injustice to me that a carrier charges a higher rate for my blooded horse than for my neighbor's mule, although they both occupy the same space. I can not afford to pay the same rate for the brick used in the construction of my house that I can for the carpets that cover its floors. Rates are based on discriminations of this kind, at once practicable, necessary, and wise."

This statement is correct as stating a general rule, but the rule is subject to many modifications. His illustration of the blooded horse and the mule is not a safe application of the rule. That a horse may be worth ten or twenty times as much as a mule makes the transportation service for moving the horse more valuable than for moving the mule; but when the horse is worth only a little more than the mule, it would be impossible to grade the relative rates. Difference in value on the same kind of commodity can rarely be practically applied in rate making. Value of service is more a limitation on rates than a reason for increasing rates.

§ 89. **Same Subject—Use to Which Commodity Put.**— Mere difference in value or use of a different species of the same general class of commodities, furnishes no reason for divergent rates. The Commission has said:[52]

"It may be fairly said in conclusion that the carriers in this case show no sufficient justification whatsoever for discriminating between the three kinds of fire-clay brick involved in this proceeding. The brick themselves are so nearly alike in color that, being the same size and of the same weight, they are practically indistinguishable the one from the other. To make different rates on each of these brick is virtually to permit the shipper to declare which of the three rates he chooses to impose upon the freight. The receiving agent of the railroad, unless an expert in fire-clay brick, could not tell which of the three rates to impose upon any one of the three varieties, except by inquiring what use was to be made of these brick. Aside from

[52] Stowe-Fuller Co. *v.* Pennsylvania Co., 12 I. C. C. 215, 220; Metropolitan Paving Brick Co. *v.* Ann Arbor R. Co., 17 I. C. C. C. 197.

the difficulty in learning what use the brick were to be put to upon reaching their destination, we cannot regard a classification as scientific, or a difference in rates as well based, which is altogether founded upon a distinction that has no transportation significance.

"Moreover, such a differentiation, if permitted and extended throughout the various classes of freight handled by railroads, would lead to an almost endless multiplication of rates, which could find no excuse save in the use which might be made of the article transported. One class of lumber of the same measurement and of the same value and of the same general appearance and of the same weight as another might be given a distinct and separate rate. And so with building stone and cement and steel in certain forms, and many other commodities which will readily suggest themselves. Classification must be based upon a real distinction from a transportation standpoint; and we can find no such distinction between these three classes of brick, which are made of the same material and come out of the same kiln, as justifies a difference in rates. To hold otherwise would be to promote false billing on the part of shippers, and to require the carriers, if they would avoid the penalty of the law, to make a practically impossible examination into the use to which each shipment of these brick was put."

The subject is extensively discussed in Re Restricted Rates,[53] and the conclusion stated "that the carrier has no right to attempt to dictate the uses to which commodities transported by it shall be put in order to enjoy a transportation rate." In the course of the opinion Conference Ruling 34 was quoted as follows:

"A tariff providing for reduced rates on coal used for steam purposes, or that the carrier will refund part of the regular tariff charges on presentation of evidence that the coal was so

[53] Re Restricted Rates, 20 I. C. C. 426. See also Carter White Lead Co. *v.* Norfolk & W. Ry. Co., 21 I. C. C. 41; Ohio Allied Milk Product Shippers *v.* Erie R. Co., 21 I. C. C. 522, 527; Re Rates on R. R. Fuel & Other Coal, 36 I. C. C. 1. Association of Union Made Garments Mfrs. of America *v.* Chicago & N. W. R. Co., 16 I. C. C. 405; Whitcomb *v.* Chicago & N. W. Ry. Co., 15 I. C. C. 27; Northbound Rates on Hardwood, 32 I. C. C. 521.

used, is improper and unlawful—that is to say, that the carrier has no right to attempt to dictate the uses to which commodities transported by it shall be put in order to enjoy a transportation rate."

§ 90. **Value of the Commodity, Its General Utility and Danger of Loss.**—The commission in the Tift and Central Yellow Pine cases,[54] as reasons for its conclusion that the rates there under investigation were illegal and unreasonable, said, "Lumber is an inexpensive freight. * * * It is not what is known as perishable traffic, * * * and in case of accident, the damage is insignificant. * * * Lumber is moreover an article of general utility." Each of these cases received the approval of the Supreme Court.[55] The element of value of the commodity transported forms a proper consideration to be taken into account in the establishment of a rate. The liability of a carrier as an insurer of freight against all loss, except such as is occasioned by the act of God or the public enemy is elementary, and the greater the value the greater the risk.[56] In the Food Products case,[57] it was stated: "While rates should not be so low as to impose a burden on other traffic, they should have reasonable relation to the cost of production, and the value of the transportation service to the producer and shipper. In the carriage of the great staples which supply an enormous business, and which in market value and actual cost of transportation, are among the cheapest articles of commerce, rates yielding moderate profit are both justifiable and necessary."

"It is axiomatic that rates depend largely upon value," [58] and

[54] Tift *v.* So. Ry. Co., 10 I. C. C. 548; Central Yellow Pine Asso. *v.* Ill. Cent. R. Co., 10 I. C. C. 505.

[55] So. Ry. Co. *v.* Tift, 148 Fed. 1021, 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. 709; Ill. Cent. R. Co. *v.* Int. Com. Com., 206 U. S. 441, 51 L. Ed. 1128, 27 Sup. Ct. 700.

[56] Notes 37 and 46 *supra*, this chapter. Howell *v.* New York, L. E. & W. Ry. Co., 2 I. C. C. 272, 1 I. C. R. 162, 172. See also Int. Com. Com. *v.* Chicago Great W. Ry. Co., 141 Fed. 1003, 1015, and citations.

[57] Re Alleged Excessive Rates on Food Products, 4 I. C. C. 116, 3 I. C. R. 93, 104. See also Mayor, etc., of Wichita *v.* Atchison, T. & S. F. Ry., 9 I. C. C. 534, 548; Farmers', etc., Club *v.* A. T. & S. F. Ry. Co., 12 I. C. C. 351, 360.

[58] Re Reduced Rates on Returned Shipments, 19 I. C. C. 409, 418.

"value has long been one of the established measures of a rate,"[59] but value and not use is one of the determining factors in classification.[60] That value should be considered in rate-making has been recognized by the Supreme Court.[61]

The correctness of the rule, that value should be considered in making rates, and the difficulty of applying the rule, is forcefully stated by the Commission in the Overall case[62] where, although recognizing that equitably these cheap cotton garments were entitled to a classification different from the more valuable woolen clothing, relief was denied.

When increased value of a commodity increases the hazard, the cost of service from loss and damage may be increased and that fact might justify an increased rate.[63] Iron should not bear a rate equal to the average of all rates.[64] Coal[65] and salt[66] are articles of low grade traffic and entitled to relatively low rates.

§ 91. **Value of the Commodity—Difference between the Raw and the Manufactured Product.**—The more valuable the commodity shipped the greater the loss to the carrier should the commodity be damaged or destroyed while in course of transportation. This and the rule just discussed relating to the value of the commodity justifies the general rule that the manufactured product should take a higher rate than the raw product from which the finished product is made.

[59] Fels & Co. *v.* Pennsylvania R. Co., 25 I. C. C. 154, 158, and Note 46 *supra* this chapter.

[60] Re Suspension of Western Classification No. 51, 25 I. C. C. 442, 499. See also Union Tanning Co. *v.* Southern Ry. Co., 26 I. C. C. 159, 163.

[61] Kansas City Southern Ry. Co. *v.* Carl, 227 U. S. 639, 650, 653, 57 L. Ed. 683, 33 Sup. Ct. 391, citing Re Released Rates, 13 I. C. C. 550; Southern Oil Co. *v.* Southern Ry. Co., 19 I. C. C. 79; Miller *v.* Southern Pac. Co., 20 I. C. C. 129; Northern Pac. R. Co. *v.* North Dakota, 236 U. S. 585, 59 L. Ed. —, 35 Sup. Ct. 429.

[62] Association of Union Made Garment Mnfrs. of America *v.* Chicago & N. W. Ry. Co., 16 I. C. C. 405. See also Caldwell Co. *v.* Chicago, I. & L. Ry. Co., 20 I. C. C. 412.

[63] Kindel *v.* Adams Express Co., 13 I. C. C. 475, 485.

[64] Colorado Fuel & Iron Co. *v.* So. Pac. Co., 6 I. C. C. 488, 515.

[65] Denison Light & Power Co. *v.* Missouri, K. & T. Ry. Co., 10 I. C. C. 337; Sligo Iron Stove Co. *v.* Atchison, T. & S. F. Ry. Co., 17 I. C. C. 139; Sligo Iron Stove Co. *v.* Union Pac. R. Co., 19 I. C. C. 527.

[66] Anthony Salt Co. *v.* Mo. Pac. Ry. Co., 5 I. C. C. 299, 315, 4 I. C. R. 33.

This general rule, the Commission has held, is founded in reason "because ordinarily there is a substantial difference between the value of the one and of the other, and frequently there is a greater degree of risk incident to the transportation and care of the manufactured product than of the raw material." [67]

While this general principle has been frequently applied,[68] the rule has its exceptions. Between the rates on live stock and the rates on the products of live stock there is no uniform relation. In some territory the manufactured product takes the higher rate, in other sections live stock and packing house products take the same rates.[69] So with grain and grain products.[70]

§ 92. **Competition or Its Absence Considered in Determining Reasonableness of Rate.**—In the Central Yellow Pine and the Tift cases,[71] the commission had under consideration a rate fixed by the concerted and concurrent action of the carriers and there said:

"We deem it unnecessary to express an opinion as to whether this concert of action in fixing the advanced rate amounts to an unlawful agreement under the so-called "Anti-Trust Act"—the enforcement of that act being a matter properly cognizable by

[67] East St. Louis Cotton Oil Co. *v.* St. Louis & S. F. Ry. Co., 20 I. C. C. 37.

[68] Bulte Milling Co. *v.* Chicago & A. R. Co., 15 I. C. C. 351, 364; Massee & Felton Lumber Co. *v.* Southern Ry. Co., 23 I. C. C. 110; Association of Union Made Garment Mnfrs. of America *v.* Chicago & N. W. Ry. Co., 16 I. C. C. 405; American Milling Co. *v.* Pierre Marquette R. Co., Unrep. Op. 328.

[69] Chicago Board of Trade *v.* C. & A. R. Co., 4 I. C. C. 158; Squire & Co. *v.* M. C. R. Co., 4 I. C. C. 611; Chicago Live Stock Exchange *v.* C. G. & W. R. Co., 10 I. C. C. 429; Int. Com. Com. *v.* C. G. & W. R. Co., 141 Fed. 1003; Investigation of Alleged Unreasonable Rates on Meat, 20 I. C. C. 160; Sinclair *v.* C. M. & St. P. R. Co., 21 I. C. C. 490, 506; Western Rate Advance Case, 1915, 35 I. C. C. 497.

[70] Mayor, etc., of Wichita *v.* A. T. & S. F. R. Co., 9 I. C. C. 534; Farmers, Merchants & Shippers Club *v.* A. T. & S. F. R. Co., 12 I. C. C. 351; Howard Mills Co. *v.* M. P. Ry. Co., 12 I. C. C. 258; Investigation of Advances in Rates on Grain, 21 I. C. C. 22, 32; Kansas-California Flour Rates, 29 I. C. C. 459, 32 I. C. R. 602; Wheat Rates from Oklahoma, 30 I. C. C. 93; Western Advance Rate Case 1915, 35 I. C. C. 497.

[71] Central Yellow Pine Asso. *v.* I. C. C. Co., 10 I. C. C. 505; Tift *v.* So. Ry. Co., 10 I. C. C. 548.

the courts. It is clearly, however, within the scope of our authority and duty to consider this joint or concerted action of the defendants in the aspect of its bearing upon the reasonableness and validity of the advanced rate, the result of that action. Where rates are established by concert of action and previous understanding between the carriers, it is manifest, whether or not there be a binding agreement to maintain such rates, that the element of competition is eliminated. Concert of action is wholly inconsistent with competition and, during the time the rates fixed by concert of action are maintained, the effect, so far as competition is concerned, is the same as if there was a binding agreement to maintain such rates.

"Competition is favored by law. The object of the pooling section (§ 5) of the Interstate Commerce Act is to prevent 'any contract, agreement, or combination' between otherwise competing carriers by which competition between them may be done away with. In East Tenn., Va. & Ga. Railway Co. *v.* Interstate Commerce Commission it is said, the Interstate Commerce Law, it is conceded, was intended to encourage normal competition. It forbids pooling for the very purpose of allowing competition to have effect. (99 Fed. Rep. 61.) The Supreme Court holds that the suppression of competition is violative of the so-called "Anti-Trust Act," in that, such suppression restrains trade and commerce by "keeping rates and charges higher than they might otherwise be under the laws of competition." (Joint Traffic Association Case, 171 U. S. 505, 569, 571, 577, 43 L. Ed. 259, 287, 288, 290, 19 Sup. Ct. Rep. 25; 1 Fed. Anti-Trust Dec. 869; U. S. *v.* Trans-Missouri Freight Association, 166 U. S. 341, 41 L. Ed. 1027, 17 Sup. Ct. Rep. 540.

The ground upon which competition is favored is that it conduces to the reasonableness of rates or to the protection of the public from unreasonably high or excessive rates. In United States *v.* Freight Association, *supra,* the Supreme Court says, "competition will itself bring charges down to what may be reasonable. (166 U. S. 339, 41 L. Ed. 1027, 17 Sup. Ct. Rep. 540). The act to regulate commerce (§ 1), in prohibiting unreasonableness of rates, in effect forbids whatever conduces to such unreasonableness. In any event, it is incumbent upon the commission, when the reasonableness of rates is in issue before it, to consider how those rates were brought about—whether

they are the product of untrammeled competition or the result of a concert of action or combination between the carriers establishing and maintaining them. The advanced rates complained of cannot be claimed to be the outcome of competition because the natural, direct and immediate effect of competition is to lower (United States *v.* Joint Traffic Asso., 171 U. S. 505, 577, 43 L. Ed. 529, 290, 19 Sup. Ct. Rep. 25), rather than advance, rates. The advanced rates must be presumed to be higher than rates which unrestrained competition would produce."[72]

Mr. Commissioner Prouty, in Re Class and Commodity Rates from St. Louis to Texas Common Points, 11 C. C. 238, 269, 270, discusses this question as follows:

"The theory of this country in respect to interstate rates in the past has apparently been that competition between various railroads would, if it could be secured, produce reasonable freight rates in the same way that competition tends to produce a reasonable price of commodities in general. This was the idea expressed in the enactment of the 5th section of the act to regulate commerce in 1887 which prohibits pooling. It was also the purpose of the Sherman Anti-Trust Act of 1890 which forbids all agreements in restraint of interstate commerce, and as interpreted by the Supreme Court of the United States, all agreements between carriers as to the rate of freight applied to interstate shipments. The idea has received the sanction of judicial interpretation and the approval of judicial dicta. It is impossible to read the utterances of the Supreme Court in the Trans-Missouri case and the Joint Traffic Association case without the conviction that a majority of that tribunal were of the opinion not only that competition could be relied upon to regulate freight rates but that it was the safest and best means to that end."

§ 93. **Same Subject.**—The principle applied by the Commission has received the approval of the courts. The Supreme Court has said: "The interstate commerce law was intended to promote trade."[73] And in Int. Com. Com. *v.* Chicago G. W. R. Co.[74]

[72] Tift *v.* So. Ry. Co., 138 Fed. 753; Ill. Cent. R. Co. *v.* Int. Com. Com., 206 U. S. 441, 51 L. Ed. 1128, 27 Sup. Ct. 700.

[73] Louisville & N. R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209.

[74] Int. Com. Com. *v.* Chicago G. W. R. Co., 209 U. S. 108, 119, 120, 52 L. Ed. 705, 712, 713, 28 Sup. Ct. 493.

"It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet, in no proper sense, is the public a general manager. As said in Interstate Commerce Commission *v.* Alabama Midland R. Co., 168 U. S. 144, 172, 42 L. Ed. 414, 425, 18 Sup. Ct. Rep. 45, 51, quoting from the opinion in Circuit Court of Appeals same style case, 5 Inters. Com. Rep. 697, 21 C. C. A. 59, 41 U. S. App. 466, 74 Fed. 723:

"'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law,—free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits.'

"It follows that railroad companies may contract with shippers for a single transportation or for successive transportations, subject though it may be to a change of rates in the manner provided in the interstate commerce act (Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. Rep. 428), and also that, in fixing their own rates, they may take into account competition with other carriers, provided only that the competition is genuine, and not a pretense (Interstate Commerce Commission *v.* Baltimore & O. R. Co., 145 U. S. 263, 36 L. Ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Texas & P. R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 40 L. Ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission *v.* Alabama Midland R. Co. *supra;* Louisville & N. R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. Rep. 209; East Tenn., V. & G. R. Co. *v.* Interstate Commerce Commission, 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. Rep. 516; Interstate Commerce Commission *v.* Louisville & N. R. Co., 190 U. S. 273, 47 L. Ed. 1047, 23 Sup. Ct. Rep. 687).

"It must also be remembered that there is no presumption of wrong arising from a change of rate by a carrier. The presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life. Undoubtedly, when rates are changed, the carrier making the change must, when properly called upon, be able to give a good reason therefor; but the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done. Those presumptions of good faith and integrity which have been recognized for ages as attending human action have not been overthrown by any legislation in respect to common carriers."

It is evident "that there is no presumption of wrong" when a carrier "takes into account competition with other carriers" and without an illegal combination between it and other carriers makes an advance in its rates, for as said by the court in the course of the same opinion, "Competition eliminates from the case an intent to do an unlawful act." But when an advance is made as a result of a combination that is illegal, there can be no presumption that the act of making the advance was in good faith and the carrier should not only show "a good reason therefor," but the rate so advanced is presumptively illegal, and the carrier should be required clearly to show that it is not unreasonable. Judge Speer, with that ability and clearness that usually mark his opinions, in the case of Tift *v.* So. Ry. Co., *supra,* states the rule correctly and at length.[75]

It is true that the commission has no authority to enforce the Sherman Anti-Trust Law and cannot penalize carriers who may violate it, but the commission can and should, when considering the difficult question of what is a reasonable rate, look to the causes that produced the rate and the method adopted in putting it into effect. Congress has been repeatedly importuned to permit interstate carriers to combine, and has so far refused to amend the Sherman Anti-Trust Law in that respect. That the law applies to carriers, and that any contract or combination in restraint of trade between the states violates the act has been definitely settled in the Trans-Missouri Freight and Joint Traffic Associa-

[75] Tift *v.* So. Ry. Co., 138 Fed. 753, 761, 762, 763. Affirmed, So. Ry. Co. *v.* Tift, 148 Fed. 1021, 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. 709.

tion Cases cited *supra* section 92. It is probably true that freight associations are necessary to the proper conduct of the great business of carriers, and that there should be some modification of the law with reference to such associations. Such modifications, if made, should protect the interests of the public as well as that of the carriers, and rates made by such associations should, in some manner, be investigated and found reasonable before becoming effective. Of course, if a rate is reasonable, although made as the result of concert of action, it cannot, for that reason alone, be condemned by the commission.[76]

§ 94. **Same Subject—Rule Since 1910.**—The Amendment of 1910 provides: "At any hearing involving a rate increased after January 1, 1910, or of a rate sought to be increased after the passage of this Act, the burden of proof to show that the increased rate is just and reasonable shall be upon the common carrier."[77] The Tift case was decided before this provision was adopted, and at a time when the burden of proof was on him who attacked a particular rate. The rule applied where rates were advanced as the result of concerted action was a rule of evidence the principal effect of which was to shift the burden of proof. Such rule in so far as that effect is concerned has now no application, as the statute has itself placed the burden on the carrier increasing the rate. Since 1910 the Commission gives less weight to the fact of concerted action, both because of the effect of the statute and because as a practical matter carriers can advance few rates except by unanimous consent. However, among the multitudinous facts which must be considered by the Commission and to which it must apply the "flexible limit" of judgment, this is a relevant although not a very important one.

§ 95. **Same Subject—Conclusion.**—Competition never raises rates, and, therefore, the effect of competition on the question of what is a reasonable rate has not frequently been considered.

[76] China & Japan Trading Co. *v.* Ga. R. Co., 12 I. C. C. 236, 241, and cases there cited. Enterprise Mfg. Co. *v.* Ga. R. Co., 2 I. C. C. 451, 456; Board of Bristol, Tenn. *v.* Virginia & S. W. Ry. Co., 15 I. C. C. 453. The Commission has not always indulged any presumption against a rate established in consequence of an agreement between carriers. R. R. Com. of Texas *v.* Atchison, T. & S. F. Ry. Co., 20 I. C. C. 463, 466.

[77] See Secs. 399 and 505, *post.*

The effect of competition is important, as will be seen in chapter four *post* when the commission or the courts are called upon to determine whether or not a particular rate is discriminatory. In making comparisons a rate created by competition may be considered reasonably low, and frequently the commission has refused to reduce a noncompetitive rate to a mileage basis equal to that of a competitive one. This is just to the carriers because competition, especially water or market competition, will force a carrier to transport to a particular point at a very small margin of profit. The carrier is permitted to meet competition, provided that in doing so, it does not transport at a loss. Market competition frequently may require a carrier to transport goods a long distance at a comparatively low rate. So long as any profit is made by such transportation, it benefits not only the carrier but all shippers that such transportation should be accepted. But it would be unjust to the carrier to make this kind of traffic a basis for all rates. Kirkman, speaking of this kind of competition, says:[78]

"Competition is a potent factor in determining rates, and is general in the case of railroads. Thus the facility and cheapness with which wheat may be moved from India to Liverpool affect the rate on wheat in every quarter of the globe. They also affect the rates on substitutes therefor, such as rye, barley, and so on. In so far as this is so, it is apparent that competition is only partially dependent upon the presence of neighboring lines or other local influences. Local competition, while valuable, is not enough to enforce equitable conditions. It must be supplemented by the competitive markets of the world, including the diversified carriage of mankind by land and water. Richness of soil, facilities of production, the price of labor and rates of local carriers from points of production to places of general consumption influence the charges of other carriers in every quarter of the globe. It is no exaggeration to say that sources of competition among carriers are as numerous as the divergent interests of trade. Because of this they are self-regulative. Their errors of judgment and sins of omission and commission are self-corrective."

This quotation would not be accurate if applied to competi-

[78] Science of Railways, vol. 8, pp. 8 and 9.

tion generally; it does correctly describe market competition. Water competition, where it exists, affects rates in a similar way to that of market competition. The carriers have suppressed water competition in some cases and use it in others to defend some particular practice. This competition is discussed by Mr. Commissioner Prouty as follows:[79]

"Without doubt water competition is made to do most heroic service in many portions of the United States in justifying anomalies in the freight rate, but we are constrained to believe that this competition between the Atlantic and Pacific Oceans is not a thing of the imagination, but rather of intense reality with which these rail carriers must deal.

"When the rail lines first reached the Pacific Coast all merchandise was brought in by water; at the end of several years the greater portion of it still came by that means. While both the tonnage and the proportion have been largely reduced since, there has been no time when the ocean was not an important factor in determining the rate from New York to San Francisco. Nothing gives stronger evidence of the present vitality of that competition than the fact that men familiar with the situation have been to an enormous expense in providing tonnage for this service which is more than three times the amount carried in recent years. From the day the transcontinental railroad touched the Pacific Ocean its struggle has been to divert business from sail to rail; and with steamships already in service and the canal in immediate prospect it is certain that this struggle has not ended.

"In 1869, when the Central Pacific and Union Pacific began business, goods used in California were mainly manufactured upon the Atlantic seaboard. In order to secure the transporta-

[79] Business Men's League of St. Louis *v.* Atchison, T. & S. F. Ry. Co., 9 I. C. C. 318, 359, 360. Low rate induced by water competition, Re Advances in Rates for the Transportation of Flaxseed, 23 I. C. C. 272, 275. Water competition creating dissimilar conditions, Georgetown Ry. & Light Co. *v.* Norfolk & W. R. Co., 2 I. C. C. 144; Chamber of Commerce of Newport News *v.* Southern Ry. Co., 23 I. C. C. 345. But a competing water route will not justify unreasonable rates, Southern Pac. Co. *v.* Interstate Com. Com., 219 U. S. 433, 55 L. Ed. 283, 31 Sup. Ct. 288. See amendment as to water competition suppressed by rail carriers, Sec. 351, *post*.

tion of these goods the rail lines found it necessary to make a rate, not as low in cents per hundred pounds, but of as great value, all things considered, as the water rate. Most rates between New York and San Francisco have ever since been and still are established on this basis. It is idle to say that when wrought iron pipe, for instance, can be transported from coast to coast by water for 35 cents per hundred pounds, rail carriers can maintain a carload rate much above the 75 cents now in force."

Rail competition has practically been extinguished in so far as it affects rates.[80] There is a carrier competition in service. This competition Kirkman describes as follows:[81] "Competition between local carriers is beneficial in many ways aside from its effect and uses. It insures better facilities, superior warehouses, yards and grounds, adequate equipment and suitable provision for the convenience, safety and comfort of the traveling public."

§ 96. **Rates Affected by Amount of Tonnage.**—The commission has said: "The business of the defendants (the carriers), not only in lumber, but in traffic in general, has grown and is growing largely, and in view of the fact that they derive their franchises, or right to exist, from the public, the lumber shippers as part of the public might plausibly, to say the least, claim that they have a right to participate in the prosperity of the defendants by having their rates reduced rather than advanced. The general rule is, the greater the tonnage of an article transported, the lower should be the rate. No rule is more firmly grounded in reason or more universally recognized by carriers. It is because of the greater density of traffic north of the Ohio River in Central Freight Association territory and in the eastern territory that rates in general are made materially lower in those territories than in the southern territory.[82] This principle was restated by Mr. Commissioner Clements, in Farrar *v.* So. Ry. Co., 11 I. C. C. 632, 637, where he says:

"In regions of lumber supply the amount of this class of freight offered for transportation is very large and the ship-

[80] Tift *v.* Southern Ry. Co., 138 Fed. 753.

[81] Science of Railways, vol. 8, pp. 10, 11.

[82] Tift *v.* Southern Ry. Co., 10 I. C. C. 548, 583.

ments continuous and regular. The tonnage is of vast importance to the carriers, affording them a principal source of revenue. The immense volume alone of traffic is an argument for not only reasonable but comparatively low rates, and these in turn are necessary to the exploitation of the lumber industry in new fields that partake of the character of pioneer development."

In a later case Mr. Commissioner Prouty, said:[83]

"It is well understood that freight rates should decline as a country develops and as business therefore increases. Rates are and have been lower in the very densely populated portions of our country than in those parts where population is less dense; and this is because with the increase of traffic comes increased profit from the handling of that traffic. Now there is no portion of the United States which in the last fifteen years has increased to a more marked degree in population, there are few sections of our country in which greater development has occurred than here. Within that time a great volume of export business has been directed over the lines of these respondents to Galveston and importations have begun to flow through that port. The increase in tonnage has been enormous and we have noted the economies which have been introduced into the handling of that tonnage.

"It was urged that the improvements required for these economies, the reduction of grades, the laying of heavier rail, the purchase of modern equipment, had necessitated vast outlays of money and that this was a valid reason for the advance in rates. Undoubtedly the making of these improvements has required the expenditure of large sums; in many cases it has amounted to a virtual reconstruction of the railroad and to a practical change of its equipment. This added expenditure must be considered in determining the reasonableness of these

[83] Re Class and Commodity Rates from St. Louis to Texas Common Points, 11 I. C. C. 238, 273, 274. For other cases applying the principle, see Re Advances in Rates, Eastern Case, 20 I. C. C. 243, 275; National Hay and Grain Association *v.* Michigan C. R. Co., 19 I. C. C. 34, 47; Hydraulic Press Brick Co. *v.* Mobile & O. R. Co., 19 I. C. C. 530, 531; Virginia Carolina Chem. Co. *v.* St. Louis, I. M. & S. Ry. Co., 18 I. C. C. 1; Ozark Fruit & Grain Assn. *v.* St. L. & S. F. R. Co., 16 I. C. C. 134, 139; Burgess Transcontinental Freight Bureau, 13 I. C. C. 668, 675.

rates, but does not justify an advance in rates. What has been the purpose of these improvements? Certainly to decrease the cost of operation, to handle freight and passengers at less expense than they could be handled in the former way. It is a strange logic which imposes upon the public a higher rate while insuring to the carrier a lower cost of operation. The actual making of these improvements may have added not only to the expense of operation but may have detracted from the efficiency of operation. The prosecution of the necessary work has interfered with the movement of traffic and thereby added to the cost of this movement. But all this is temporary and comparatively insignificant and should not be made an excuse for a permanent advance in rates.

"It is urged that the increased volume of traffic has necessitated these outlays; that otherwise the business could not be handled. And that is probably true; but increase of traffic, while it may produce temporary embarrassment, should reduce, not advance, rates."

The rule stated in the Tift case *supra* is too broad. While increased density of all traffic affects rates and justifies lower rates, increased density of a particular traffic may not necessarily have that effect. If there is a large volume of a particular traffic with a light density of all traffic, higher rates may be necessary than when there is a lesser volume of the particular traffic with a greater volume of all traffic. It is, however, unquestionably true that a large volume of a particular traffic is a fact which ought to be considered in determining what should be the rate thereon.

§ 97. **Same Subject—Further Limitations of the Rule.**— The rule may not be applied too far. A traffic official of one of the defendants in the Morgan Grain case,[84] testified that the amount of traffic offered in 1907 was so large as to pass the "economic maximum," and, therefore, the carriers not having sufficient equipment, the cost of handling the traffic was relatively higher than if less traffic had been offered. This may be true, and when true, while furnishing no reason why the carrier should increase rates based upon its inability to meet economically its obligations to the shippers, it would not be just to require the

[84] Morgan Grain Co. *v.* A. C. L. R. Co., 19 I. C. C. 460.

application of the rule that the greater the traffic the less relatively should be the rate. Although if the condition of more traffic than could be economically handled should be a permanent one, it would be the duty of the carrier to provide adequate facilities therefor. The effect of "this added expenditure" is discussed in the quotation *supra* from the opinion of Mr. Commissioner Prouty.

§ 98. **Density of Traffic.**—Within reasonable limits, the greater the volume of all traffic the lower should be the rates. This is obvious and is the practice of railroads generally. In the densely populated sections of the country rates are on a lower level than in the sparsely settled sections.

The statement of the Commission, speaking through Mr. Commissioner Prouty, in Re Class and Commodity Rates, *supra,* applies here. Rates should decrease as density of traffic increases,[85] and the fact that a region is "comparatively thinly populated" [86] may justify higher rates.[87]

§ 99. **Distance and Revenue per Ton Mile.**—Judge Cooley, then chairman of the commission, in a head note stated this rule:[88] "As a rule in the transportation of freight by railroads, while the aggregate charge is continually increasing the further the freight is carried, the rate per ton mile is constantly growing less all the time, making the aggregate charge less in proportion every hundred miles after the first, arising out of the character and nature of the service performed and the cost of the service; and thus staple commodities and merchandise are enabled to bear the charges of this mode of transportation from and to the most distant portions of the country." Judge Cooley also pointed out that this rule is not only not abrogated but is sanctioned by the act to regulate commerce. The general principle has been applied by the commission in other

[85] Re Advances in Rates—Eastern Case—20 I. C. C. 243, 275.

[86] Cherokee Lumber Co. *v.* Atlantic C. L. R. Co., 27 I. C. C. 438.

[87] Stiritz *v.* New Orleans, M. & C. R. Co., 22 I. C. C. 578; Memphis Freight Bureau *v.* Illinois Cent. R. Co., 27 I. C. C. 507, 511; Railroad Com. of Ark. *v.* M. & N. A. R. Co., 30 I. C. C. 488; Railway Com. of Montana *v.* B. A. & P. Ry. Co., 31 I. C. C. 641, 648, 649.

[88] Farrar *v.* East Tenn., Va. & Ga. Ry. Co., 1 I. C. C. 480, 1 C. R. 764.

cases.[89] The rule is, however, subject to exceptions,[90] and when comparing rates, "the rate per ton mile is not always the measure of a reasonable rate, and, rightly applied, would make distance alone the gauge for transportation charges, but it is always valuable as affording a basis of comparison for relative rate burdens.[91] Mr. Commissioner Prouty says, "The rate per ton mile, while often instructive, is not by any means a fair index of a reasonable rate." [92] While the rate per ton mile should, and usually does, decrease as distance increases, the rate per ton mile on one road is not necessarily a safe guide in fixing a rate on another road operating under different conditions.

The rule that as the distance increases the rate per mile should decrease, as has been so frequently said of all formulas of rate-making, must be applied with due regard to all the circumstances and conditions surrounding the making of the rate or rates under discussion. The principle is but a rule of evidence, a fact which may justify a particular deduction, and not an inflexible rule of law. The question of expense incurred in earning the particular revenue must not be lost sight of,[93] and the formula is but one of many considerations in rate adjustments.[94]

Car mile and train mile earnings are frequently used in comparing rates and, as with the ton mile comparisons, may constitute probative evidence.[95]

[89] Business Men's Asso. *v.* Chicago, St. P., M. & O. R. Co., 2 I. C. C. 52, 2 I. C. R. 41; Business Men's Asso. *v.* Chicago & N. W. Ry. Co., 2 I. C. C. 73, 2 I. C. R. 48, 52; Gustin *v.* Atchison, T. & S. F. Ry. Co, 8 I. C. C. 277, 288. Re Investigation of Advances in Rates on Grain, 21 I. C. C. 22, 23; National Hay Assn. *v.* Michigan C. R. Co., 19 I. C. C. 34, 47; Muscogee Traffic Bureau *v.* Atchison, T. & S. F. Ry. Co., 17 I. C. C. 169, 173.

[90] Manufacturers' and Jobbers' Union *v.* Minneapolis & St. L. Ry. Co., 4 I. C. C. 79, 3 I. C. R. 115.

[91] Farrar *v.* So. Ry. Co., 11 I. C. C. 640, 649.

[92] Re Proposed Advances in Freight Rates, 9 I. C. C. 383, 396; Butte Milling Co. *v.* Chicago & A. R. Co., 15 I. C. C. 351, 362.

[93] Nebraska State R. Com. *v.* Chicago, B. & Q. R. Co., 23 I. C. C. 121, 125, 126. In Kansas *v.* A. T. & S. F. Ry. Co., 27 I. C. C. 673, owing to lighter density of traffic, rates for the longer distances in West Kansas were approved which yield a revenue per net ton mile higher than for the shorter distances.

[94] Ashgrove Cement Co. *v.* Atchison, T. & S. F. R. Co., 23 I. C. C. 519, 524.

[95] Wisconsin Steel Co. *v.* Pittsburg & L. E. R. Co., 27 I. C. C. 152, 162; Lake Cargo Coal Rate

What is sometimes called the rate per ton mile, more properly the revenue per ton mile which the rate for the distance yields, reflects the rate and the length of haul only, and is obtained by dividing the rate per ton for the total haul by the length of the haul. Students of the principles applied to rate-judging have extended the comparisons by using revenues per gross ton mile both with and without a consideration of the empty haul incident to a particular traffic. The revenue per net ton mile gives no consideration to the ratio of revenue paying load to the total load hauled, while the revenue per gross ton mile reflects both the weight of the commodity hauled and the weight of the car in which it is hauled. Some commodities, such as oil, coal, live stock and meat products, are transported in special equipment which from necessity is hauled nearly as great distances empty as loaded. Comparisons which include these additional considerations are obviously more valuable than comparisons of revenue per net ton mile and revenue per car mile. In the Western Rate Advance case of 1915, those more comprehensive comparisons were presented and relied on as tending to show the propriety of selecting for rate advances the commodities affected by the tariffs there under suspension and investigation.[96]

§ 100. **General Business Conditions.**—How far rates may be affected by the business situation of the country and the shippers has been the subject of consideration in several cases. It will be admitted that the fact, when such fact exists, that a shipper has a ready market for his goods at a good price, affects the value of the service to the shipper and may be considered in determining what, in a particular case, is a reasonable rate. It is also true that prosperous times may and generally do increase the price of both labor and equipment necessary for the carrier to operate, thus affecting "the cost of service," and consequently furnishing a fact that is an element among the many considerations entering into a determination of what is the proper rate to be charged for transportation. But the mere fact of general

Case, 22 I. C. C. 604, 620; construed, Rock Springs Distilling Co. *v.* Illinois C. R. Co., 27 I. C. C. 54, 57; Milburn Wagon Co. *v.* Toledo, St. L. & W. R. Co., 27 I. C. C. 63, 66; Re Export Rates of Flax Seed Products, 27 I. C. C. 246, 248; Little Rock Chamber of Commerce *v.* St. Louis, I. M. & S. R. Co., 26 I. C. C. 341, 343.

[96] Western Rate Advance Case 1915, 35 I. C. C. 497.

prosperity, or of general depression, will not justify a carrier in absorbing the one or shifting the other to the shipper. "Transportation by rail is a service of a quasi public nature, not to be sold to the highest bidder, nor subject to the law of supply and demand." [97] "The claim" that the carriers may absorb all or part of the prosperity of the shipper, says Mr. Commissioner Clements "is based upon the erroneous assumption, so prevalent among traffic managers, that a rate may be made as high as 'the traffic will bear.' " [98] When rates have been reduced because it was necessary to meet conditions caused by depressed financial conditions, such rates may be advanced in prosperous times to the point where they are reasonable. Mr. Commissioner Prouty, in the able discussion of the principles of rate making already quoted from, says: [99]

"No reduction in these rates has been made in the past for the purpose of stimulating the movement of this traffic. The amount of these advances is so slight as compared with the selling price of the article transported that they produce no effect whatever upon the volume of the traffic. Now with respect to a rate of this kind we do not think an increase in the price of the article transported justifies of itself an increase in the freight rate. These rates were not reduced when the prices fell; why should they be advanced when prices rise? An incident which occurred in this very case strongly emphasizes the absurdity of the claim.

"Cotton is an important item of traffic upon the International & Great Northern Railroad, one of these respondents. It is well known that the ravages of the boll weevil have seriously affected the cotton crop in certain parts of Texas. The attorney for the International & Great Northern, himself, a former railroad commissioner of Texas and a thoughtful student of this subject, gave as a reason for the advances in question in which his line participates, that owing to the boll weevil the cotton crop upon a large part of his road was a failure, and that this reduced

[97] Re Proposed Advances in Freight Rates, 9 I. C. C. 382, 405. See also Freight Bureau of Cincinnati *v.* Cincinnati, N. O. & T. P. Ry. Co., 6 I. C. C. 195, 4 I. C. R. 592, 617.

[98] Tift *v.* So. Ry. Co., 10 I. C. C. 548, 582; Central Yellow Pine Asso. *v.* Ill. Cent. R. Co, 10 I. C. C. 505.

[99] Re Class and Commodity Rates from St. Louis to Texas Common Points, 11 I. C. C. 238, 272, 273.

the amount of cotton for transportation; that in consequence of the failure of this important crop the whole country was impoverished and was able to purchase less, which also contributed to reduce the income of his railroad. For these reasons it had become necessary to advance rates in order to obtain sufficient revenue with which to operate the road and pay a fair return upon the investment. Here, therefore, we have in the same case and by parties of the same general system a claim upon the one hand that these advances are justified by general conditions of prosperity and upon the other hand that they are justified by general conditions of adversity.

"Railroads should share in the general prosperity. They should do this partly by being able to advance those rates which have declined under commercial conditions. They should do it still more by the increased traffic which they obtain. In times of prosperity when money is plenty and business good people ride more, buy more, new industries are being established and old industries are active, traffic increases and out of such increased traffic the railway obtains, by automatic action so to speak, without any advance in its rate a large share in the general prosperity."

The opinions of Commissioners Clements and Prouty, *supra,* are in accord. The carrier may not absorb the prosperity of the shipper, but when prosperity exists the carriers may restore rates "that have declined under commercial conditions." If the prosperity of the country adds to the density of the traffic, it might, in some cases, furnish a reason for reductions in rates.

In the 1910 Western Rate Advance case, p. 315,[100] the broad view which the Commission may take was discussed. It was there said: "It must be borne in mind that the Commission is not a court of law; its function is to apply the mandatory and restrictive provisions of the Act to Regulate Commerce to stated conditions of fact. We must regard the problems presented to us from as many standpoints as there are public interests involved. * * * The reasonableness of a rate is to be determined by no mere mathematical calculation."

And in the further course of the opinion in that case, p. 317: "It is doubtless true that in its control over the charges which

[100] Advance in Rates—Western Case—20 I. C. C. 307, 315, 317.

our railroads may make this Commission exercises a power so extensive as to justify the broadest consideration of the economic and financial effects of its orders."

Notwithstanding the fact that business conditions should be considered in making and judging rates, it is not permissible to fix rates lower than are just and reasonable, because of the inability of a particular commodity to bear such rates. Mr. Commissioner Daniels, citing prior decisions of the Commission in deciding the claim for lesser rates based upon the statement that the prices received were less than the actual cost of production, said:[101] "It should be observed, however, that the reasonableness or unreasonableness of freight rates can not be gauged solely by the ability or inability of shippers under depressed prices to market their products at the existing rates with a reasonable margin of profit. Such a doctrine would lead to the conclusion that the differential burdens of production arising from natural disadvantages, distance from market, and other economic difficulties of all communities and industries should be neutralized and absorbed by the carriers which serve them."

§ 101. **Estoppel.**—Where carriers, in the exercise of their right to determine the policy under which their rates are to be made, establish a rate for the purpose of developing a particular industry, called by the carriers, "Missionary Rates," they are not estopped from advancing such rates when the resultant rates are not unreasonable, and the fact that such rates were so established is not alone sufficient evidence to justify a finding that the advanced rates are unreasonable and violative of section one of the interstate commerce act. In Western Oregon Lumber Manufacturers' Association *v.* Southern Pacific Co.,[102] the Commission held that when the Southern Pacific Co. established a rate for the purpose of developing the lumber industry of a particular section, which rate it maintained with brief intervals for six years, an advance thereon, when "on the strength of this rate that industry had attained considerable proportions," was unrea-

[101] Railroad Com. of Montana *v.* B. A. & P. Ry. Co., 31 I. C. C. 641, 644; and see N. P. R. Co. *v.* North Dakota, 236 U. S. 585, 59 L. Ed. —, 35 Sup. Ct. 429.

[102] Western Oregon Lumber Mfrs. Assn. *v.* Southern Pac. Co., 14 I. C. C. 61. See also Northbound Rates on Hardwood, 32 I. C. C. 521, 524.

sonable. The question of the validity of this order having come before the Supreme Court, that court in speaking of the contention of the carriers, said: "That is to say the contention is that the order entered by the Commission shows on its face that that body assumed not only that it had power to prevent the charging of unjust and unreasonable rates, but also to regulate and control the *general policy* (italics supplied) of the owners of railroads as to fixing rates, and consequently that there was authority to substitute for a just and reasonable rate one which in and of itself in a legal sense might be unjust and unreasonable, if the Commission was satisfied that it was a wise *policy* to do so, or because a railroad had so conducted itself as to be estopped in the future from being entitled to receive a just and reasonable compensation for the service rendered." [103]

While the attorneys representing the Commission before the Supreme Court disclaimed for the Commission any such construction of the order, the order was construed by the court to mean what was contended in the foregoing quotation.

In speaking of the power necessary to enter the order as it was construed, the court said: This "extraordinary power which the railroads thus say was exerted in rendering the order complained of, a power which if obtained, would open a vast field for the exercise of discretion, to the destruction of rights of private property in railroads and would in effect assert public ownership without any of the responsibilities which ownership would imply."

The court having given the Commission's order a construction as indicated by the contention made, held the order void.

The Commerce Court, citing the Supreme Court case, *supra*, and in speaking of orders of the Commission, said: "Its orders must be based on transportation considerations, and while it may give weight to all factors bearing either on the cost or value of the transportation service, it must disregard as well the demand of the shipper for protection from legitimate competition, domestic or foreign, for unlimited markets, or for the enforcement of equitable estoppels arising from a justifiable expectation that

[103] Southern Pac. Co. *v.* Interstate Com. Com., 219 U. S. 433, 444, 55 L. Ed. 283, 31 Sup. Ct. 288.

past rates will be maintained."[104] That because a carrier has maintained a low rate upon which business has been built up, the carrier may not advance its charges to a reasonable rate, is unquestionably true. This is true because all parties know that rates are subject to legislative control and estoppel can not apply, and Congress has not as yet given the Commission power to initiate rates but has left the general policy of rate making to the carriers, subject only to the specific provisions of the statutes regulating interstate commerce. Nor does the decision of the Supreme Court necessarily mean that there is no evidentiary value in the proof that a rate was established to encourage an industry whose prosperity is dependent upon a continuation of the rate.[105] There is nothing in the decision of the Supreme Court which prevents the Commission from giving consideration to the presumption arising from the fact that the carriers selling transportation have long fixed a particular value thereon. This presumption is discussed in the next section.

It is also true that carriers "may not make contracts which abrogate the Act to Regulate Commerce," and such contracts can not prevent the Commission from determining the rate involved therein and prescribing when necessary a different rate or practice.[106]

§ 102. **Rates Long in Existence Are Presumed to Be Reasonable.**—When conditions have not materially changed, it is consistent with the motives which usually actuate mankind to presume that a rate long in existence is reasonable and that the burden of proof is on him who seeks to obtain or justify another and higher rate. As early as 1889 the commission,

[104] Atchison, T. & S. F. Ry. Co. *v.* Interstate Com. Com., 190 Fed. 591 (Lemon Case), Opinion Commerce Court No. 7, p. 83; same case, 203 Fed. 56, Opinion Commerce Court No. 61, p. 537.

[105] Louisville & N. R. Co. *v.* Finn, 235 U. S. 601, 59 L. Ed. —, 35 Sup. Ct. 146; Duluth, Minnesota Log Rates, 29 I. C. C. 420, 421.

[106] Ottumwa Bridge Co. *v.* Chicago, M. & St. P. Ry. Co., 14 I. C. C. 121. See also Commercial Coal Co. *v.* Baltimore & O. R. Co., 15 I. C. C. 11; Menefee Lumber Co. *v.* Texas & P. Ry. Co., 15 I. C. C. 49; Penn Tobacco Co. *v.* Old Dominion Steamship Co., 18 I. C. C. 197; Baltimore Butchers Abattoir & Live Stock Co. *v.* Philadelphia, B. & W. R. Co., 20 I. C. C. 124, 128.

speaking of a rate sought to be changed by a carrier, said: "It has, without the pressure of competition other than on equal terms, long continued this rate and as long been making evidence that this nineteen-cent rate is not unreasonably low."[107] The principle was again announced in the Food Products Case[108] and in Proctor *v.* Cincinnati, H. & D. R. Co.[109] Mr. Commissioner Prouty, in Holmes *v.* Southern Ry. Co.,[110] announced the rule in this language: "The continuance of a given rate is not conclusive evidence of the reasonableness of that rate, but when a railway company advances a rate which has been for some time in force, the fact of its continuance is in the nature of an admission against that company, which tends to show the unreasonableness of the advance; and the force of this admission becomes great in view of the general decline in the average of railway rates and the lessened cost of service." The general rule is recognized, but found not applicable to the facts in Proctor *v.* Cincinnati, H. & D. R. Co.[111] In the Central Yellow Pine Asso. Case[112] the commission said: "When carriers advance a rate which has been for some time in force, the burden of proof is upon them to show sufficient grounds for such advance." In the Tift case[113] this language was used: "The maintenance of materially lower rates for such long periods of time brings this case within the rule that 'when an advance is made in rates which have long been maintained and the evidence shows that the traffic affected is large, important and constantly increasing, the advance will be held unjust unless it is satisfactorily ex-

[107] Logan et al., Com. of Northwestern Grain Asso. *v.* Chicago & N. W. R. Co., 2 I. C. C. 604, 2 I. C. R. 431, 434.

[108] Re Alleged Excessive Freight Rates on Food Products, 4 I. C. C. 48, 3 I. C. R. 93.

[109] Proctor *v.* Cincinnati, H. & D. R. Co., 4 I. C. C. 87, 3 I. C. R. 131.

[110] Holmes *v.* Southern Ry. Co., 8 I. C. C. 561, 568.

[111] Proctor *v.* Cincinnati, H. & D. R. Co., 9 I. C. C. 440. For further history of this case, see Interstate Com. Com. *v.* Cincinnati, H. & D. R. Co., 146 Fed. 559; Cincinnati, H. & D. R. Co. *v.* Interstate Com. Com., 206 U. S. 142, 51 L. Ed. 995, 27 Sup. Ct. 648, enforcing order of the Commission.

[112] Central Yellow Pine Asso. *v.* Ill. Cent. R. Co., 10 I. C. C. 505.

[113] Tift *v.* So. Ry. Co., 10 I. C. C. 548.

plained.'" Each of these cases were tried in the circuit court and reached the Supreme Court where both were affirmed.[114] In the Yellow Pine case the Supreme Court said: "The question submitted to the commission * * * was one which turned on matters of fact. In that question, of course, there were elements of law, but we can not see that any one of these or any circumstances probative of the conclusion was overlooked or disregarded." It was stated by the Supreme Court that the Tift case, *supra,* depended "upon the same legal considerations," as the Yellow Pine case.

The case of Memphis Cotton Oil Co. *v.* Illinois Cent. R. Co., 17 I. C. C. 313, while not repudiating the doctrine above, states it less clearly than some of the prior decisions of the Commission. It is a fundamental law that acts of an individual are presumptively not contrary to his interests, and as said by Judge Wallace, in Menacho *v.* Ward, 27 Fed. 529, 532, 23 Blatch. 502: "The estimate placed by a party upon the value of his own services or property is always sufficient, against him, to establish the real value; but it has augumented probative force, and is almost conclusive against him, when he has adopted it in a long-continued and extensive course of business dealings."

§ 103. **Same Subject.**—The Supreme Court, in the case of Int. Com. Com. *v.* Chicago G. W. Ry. Co.,[115] without referring to the Tift or Yellow Pine case, said: "It must also be remembered that there is no presumption of wrong arising from a change of rate by a carrier. * * * Undoubtedly when rates are changed the carrier making the change must, when properly called upon, be able to give a good reason therefor, but the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done." These decisions of the Supreme Court are harmonious. The fact that a "good reason" must be given by the carrier is equivalent to saying that, "the advance will be held unjust unless it is 'satisfactorily explained,'

[114] Tift *v.* So. Ry. Co., 138 Fed. 753; So. Ry. Co. *v.* Tift, 148 Fed. 1021, 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. 709; Ill. Cent. R. Co. *v.* Int. Com. Com., 206 U. S. 441, 51 L. Ed. 1128, 27 Sup. Ct. 700.

[115] Interstate Com. Com. *v.* Chicago G. W. Ry. Co., 209 U. S. 108, 119, 52 L. Ed. 705, 712, 713, 28 Sup. Ct. 493, affirming same styled case, 141 Fed. 1003.

that is, unless a 'good reason' therefor is given." Mr. Commissioner Clements [116] discusses these cases, and, after quoting from the decision of the Supreme Court in the Great Western case, says, "This is a mere affirmance of what the act to regulate commerce itself recognizes as a right of the carriers, viz., the right to initiate rates. And it must be apparent that were a 'presumption of wrong' to attach to any change in rates which the carriers are authorized to establish, this must result in a denial of the free exercise of the right guaranteed by the act. But it would be going far to say that the language above quoted is authority for the inference that the Supreme Court does not still recognize the principle that a rate which has been in force for a long period of years and with respect to which commercial conditions have been adjusted, which rate has presumably afforded a reasonable return to the carrier, may not be materially advanced without imposing upon the carriers the burden of justifying the increase."

The principle that the long maintenance of rates is evidence that such rates are reasonably high, was applied by the Supreme Court in a case where rates were fixed by the Railroad Commission of the state of Kentucky. Mr. Justice Pitney, delivering the opinion of the Court, said: [117] "Since it appeared that the company, long prior to March 25, 1910, had voluntarily established the comparatively low rates upon a substantial part of their traffic, had maintained them for many years after the reason assigned for originally introducing them had ceased to exist, and had then withdrawn them, not upon the ground that they were inadequate, but because they gave rise to discrimination, and in so doing had introduced rates very much greater, it seems to us that the conduct of the carrier, in the absence of some explanation more conclusive than any that was made, was sufficient basis for a reasonable inference that the special rates in force prior to March 25 upon the distillery supplies were rea-

[116] Pacific Coast Lumber Mnfrs. Asso. *v.* N. Pac. Ry. Co., 14 I. C. C. 23, 38. See also Re Class and Commodity Rates from St. Louis to Texas Common Points, 11 I. C. C. 238.

[117] Louisville & N. R. Co. *v.* Finn, 235 U. S. 601, 59 L. Ed. —, 35 Sup. Ct. 146, 147; Int. Com. Com. *v.* Louisville & N. R. Co., 227 U. S. 88, 99, 57 L. Ed. 431, 436, 33 Sup. Ct. 185.

sonable and adequate compensation for that and other similar traffic, and that the rates thereafter charged were unreasonably high to the extent of being extortionate."

§ 104. **Voluntary Reduction of Rates.**—Where a carrier voluntarily reduces its rates, that fact under the principle applicable to presumptions would be evidence that from and after the date of the reduction the resultant rate was reasonably high. Such a presumption, however, should not be indulged to the extent of holding that the act of the carrier is proof sufficient that the rate in force prior to the reduction was unreasonably high. To hold such a presumption to be conclusive would make it dangerous for carriers ever voluntarily to reduce rates. On this subject the Commission has said: "The subsequently established lower rate is now a just and reasonable rate over the defendant lines; but the Commission is unwilling to subscribe to the theory that the voluntary reduction of a rate by a carrier conclusively shows that the former rate was unreasonable and that reparation should be granted on all shipments moving thereunder within the period of the statute of limitations." [118]

§ 105. **Same Subject—Act June 18, 1910.**—By Act of June 18, 1910,[119] it is provided: "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare or charge," the Commission may, as provided in the amendment "enter upon a hearing concerning the propriety of such *rate, fare, charge, classification, regulation or practice,*" and "after full hearing, * * * the Commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice" as it might make in an ordinary proceeding complaining of an existing rate. It is further provided that, "At any hearing involving a *rate* increased after January 1, 1910, or of a rate sought to be increased after

[118] Ottumwa Bridge Co. *v.* C., M. & St. P. R. Co., 14 I. C. C. 121, 125; Commercial Coal Co. *v.* B. & O. R. Co., 15 I. C. C. 11; Menefee Lumber Co. *v.* T. & P. Ry. Co., 15 I. C. C. 11; Penn Tobacco Co. *v.* Old Dominion Steamship Co., 18 I. C. C. 197; Baltimore Butchers Abattoir *v.* P. B. & W. R. Co., 20 I. C. C. 124.

[119] *Post*, Secs. 398, and 399.

the passage of this Act, the burden of proof to show that the increased *rate* or proposed increased *rate* is just and reasonable shall be upon the common carrier."

This burden is fixed as to the rate although the clear meaning of the whole section is that when any change is made in any classification, regulation or practice affecting and increasing a rate, the burden of justifying the change is upon the carrier. A change that did not increase the rate would not, as to the burden of proof, be affected by the amendment.

This statutory rule as to burden of proof does not lessen the force of the rules of evidence stated in the preceding two sections. The Commission, in speaking of a rate in force for a quarter of a century and which had been materially advanced in the last seven years, held that the reason justifying a further advance "must be even more cogent," and that the history of the rates "was evidence which bears strongly upon the propriety of the * * * increase."[120] In a still more recent case the rule was stated with its proper limitations as follows: "Undoubtedly a presumption of reasonableness arises from the long existence of a rate; but if this presumption were conclusive, necessary and proper changes in rates would be prohibited."[121]

The Commerce Court,[122] citing the Great Western case,[123] gave that case a somewhat wider meaning than was meant by the opinion therein. In reversing the Commerce Court, the Supreme Court cited the Great Western case, but said: "Under the circumstances the maintenance of these low rates, after the water competition disappeared, tends to support the theory that by an increase of business or other cause they had become rea-

[120] United States Leather Co. *v.* Southern Ry. Co., 21 I. C. C. 323, 327.

[121] Robinson Land & Lumber Co. *v.* Mobile & O. R. Co., 26 I. C. C. 427, 429. For illustrative application of the principle see, Ocheltree Grain Co. *v.* St. Louis & S. F. R. Co., 13 I. C. C. 46; Millar *v.* New York C. & H. R. R. Co., 19 I. C. C. 78; Audley, Hill & Co. *v.* Southern Ry. Co., 20 I. C. C. 225; Commercial Club of Omaha *v.* Southern Pac. Co., 20 I. C. C. 631.

[122] Louisville & N. R. Co. *v.* Interstate Com. Com., 195 Fed. 541, 557, Opinion Commerce Court No. 4, pp. 325, 375, and see same styled case, 184 Fed. 118, denying a preliminary application for injunction.

[123] Int. Com. Com. *v.* Chicago G. W. Ry. Co., 209 U. S. 108, 119, 52 L. Ed. 705, 712, 713, 28 Sup. Ct. 493.

sonable and compensatory." So, the presumption may or may not arise and all the facts must be considered. The syllabus of the opinion is as follows: "The value of evidence in rate proceedings varies, and the weight to be given to it is peculiarly for the body experienced in regard to rates and familiar with the indicias of rate-making."

"When rail rates are advanced with the disappearance of water competition, no inference adverse to the railroads can be drawn, but when the old rates had been maintained for *several* years after such disappearance *there is a presumption* if the rates are raised that the advance is made for other purposes."[124] The italics do not appear in the syllabus.

§ 106. **Grouping Territory and Giving Each Group Same Rate Legal under Some Circumstances.**—It has been and is yet a practice with carriers to group contiguous territory and give the same rate to all points within a particular group. This practice is called "blanketing." The commission in 1888, speaking of this practice, said:[125]

"This is a practice which prevails very largely in the making of rates and results in giving to some towns rates which are relatively lower than are charged to others. It is probably a convenient practice to the railroad companies or it would not be so often adopted; and it may sometimes tend to equalize railroad advantages as between towns without wronging any one. The system is not necessarily illegal, it only becomes illegal when it can be shown that illegal results flow from it."

The practice is not approved by the commission, however, when "the difference in the transportation expense from the various parts of such district is considerable and substantial."[126]

[124] Int. Com. Com. *v.* Louisville & N. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185. See also note 105 this chapter.

[125] LaCrosse Manufacturers' & Jobbers' Union *v.* Chicago, M. & St. P. R. Co., 1 I. C. C. 629, 631, 2 I. C. R. 9, 10. See also Business Men's Asso. of Minnesota *v.* Chicago, St. P., M. & O. Ry. Co., 2 I. C. C. 12, 52, 2 I. C. R. 41, 46; Lippman & Co. *v.* Ill. Cent. R. Co., 2 I. C. C. 584, 2 I. C. R. 414; Howell *v.* New York, L. E. & W. R. Co., 2 I. C. C. 272, 2 I. C. R. 162; Imperial Coal Co. *v.* Pittsburg & L. E. R. Co., 2 I. C. C. 618, 2 I. C. R. 436.

[126] Newland *v.* N. Pac. R. Co., 6 I. C. C. 131, 4 I. C. R. 474, 480; Merchants' Union of Spokane Falls *v.* N. Pac. R. Co., 5 I. C. C. 478, 4 I. C. R. 183; Rea *v.* Mobile & O. R. Co., 7 I. C. C. 43.

Texas is arranged in groups for rate-making purposes, and when the parties to the case are satisfied with the system, the commission will not disturb it.[127]

But in referring to the holding in the Farmers, Merchants & Shippers Club case, *supra*, the Commission said: "In so holding we said that the reasonableness of these rates must be determined not by considering the rate from the point of origin to a particular station in the group, but rather as applicable to the entire group. It is evident that every system of group rates must occasion more or less discrimination. The rate to the nearer edge of the group as compared with that to the more distant edge is of necessity discriminatory."[128]

In concluding the opinion of the Commission, Mr. Commissioner Prouty said: "It is impossible to pass abruptly from the group system."

There are many cases in the reports of the Commission recognizing the group system of rates, some of which will be discussed in the chapter on Equality in Rates. In this section the reasonableness of rates is under discussion and the group system is opposed to the distance basis.

Considering distance and the group system, the Commission said: "Distance is, of course, a factor to be considered in determining the reasonableness of rates, and when rates are constructed upon this basis, and other things are equal it may become a very important factor. When, however, as in this case, rates are constructed and maintained upon the group system and the subject matter is a heavy commodity like coal, and the differences in distance are relatively inconsiderable, such differences do not of themselves compel differences in rates."[129]

§ 107. **Grouping Producing Points, and Making Zones Taking Same Rates.**—The principles discussed in the forego-

[127] Farmers, Merchants & Shippers Club *v.* Atchison, T. & S. F. Ry. Co., 12 I. C. C. 351, 365. Although when such grouping results in unjust discrimination it will be changed. Kaufman Commercial Club *v.* T. & N. O. R. Co., 31 I. C. C. 161.

[128] Mitchell *v.* Atchison, T. & S. F. Ry. Co., 12 I. C. C. 324, 325. For a discussion and history of the Texas common point territory and a comparison with the transcontinental group, see Texas Common Point Case, 26 I. C. C. 528, 529.

[129] Victor Manufacturing Co. *v.* Southern Ry. Co., 27 I. C. C. 661, 663.

ing section have been applied by the Commission to cases where a more or less contiguous territory is given the same rate to the markets. In speaking of such system already in existence the Commission said:

"When the United States Government transports a package 10 miles for one citizen for 10 cents, while it charges his neighbor the same amount for transporting a like parcel 3,000 miles, a clear discrimination is made, but it is a discrimination of that character which by universal consent is in the public interest. So, here, it is by no means certain that these postage-stamp rates as applied to the distribution of the products of the Pacific coast states are not upon the whole for the general public good. Under this system the producers upon the Pacific coast are given the widest possible market for their products; the carriers obtain a certain amount of long-distance business at remunerative rates, which they would not otherwise have; the freight rate does not so far enter into the cost of these articles to the consumer that any noticeable burden is imposed upon any section of the country. If this Commission were required to establish a reasonable schedule of rates for the transportation of citrous fruits from southern California to eastern destinations, we should not feel at liberty to put in this blanket; but to establish graded rates at this time upon lemons would be to break up this rate system which is highly satisfactory to all parties concerned, and while the action of the court may in the end compel us to do this, we feel that we can, for the present, properly leave this situation as it is." [130]

The rates resulting from this system of rate-making must, of course, be reasonable and not unjustly or unduly discriminatory.[131] The system has its irregularities at best, but there are reasons why, at least until a more scientific basis of rate-making is possible, it should be tolerated. In giving such reasons, the Commission has said:

"In transportation of low-grade commodities that move in

[130] Arlington Heights Fruit Exchange *v.* Southern Pac. Co., 22 I. C. C. 149, 156; order sustained by Commerce Court, Atchison, T. & S. F. Ry. Co. *v.* United States, 203 Fed. 56, Opinion Commerce Court No. 61, p. 537.

[131] Sun Company *v.* Indianapolis Sou. R. Co., 22 I. C. C. 194, 197; Clyde Coal Co. *v.* Pennsylvania R. Co., 23 I. C. C. 135.

bulk and in large quantities it is a long established custom to group or blanket a number of stations or a large expanse of territory. Such rate adjustments necessarily to some extent disregard distances. If strictly distance rates were applied to grain moving from points of origin it is apparent that at a certain distance from a market that is prepared to purchase the surplus the rate would be prohibitive."[132]

In prescribing rates, the Commission has adopted a system of zones "as an appropriate solution" of a particular rate situation.[133] The courts recognize that the Commission has the jurisdiction to determine the effect of the custom of the carriers in making groups and zones.[134] It is interesting to note that in prescribing parcel post rates, the postage stamp system was abandoned to an extent and zone rates applied.

§ 108. **Basing Point System.**—What this system is and the attitude of the commission thereon can not be better stated than by using the language of the commission itself. In Board of Trade of Hampton *v.* Nashville, Chattanooga & St. L. R. Co.,[135] it was said by Mr. Commissioner Clements:

"As stated in our finding of fact, through rates made in this way—that is, composed of rates to "basing points" and local rates back—are in pursuance of what is known as the "basing-point" system of rate-making, which, according to the evidence of the witness (Cutler), prevails "throughout the southern territory. This system has been heretofore several times discussed and disapproved by the commission. Re Louisville & N. R. Co., 1 I. C. C. Rep. 84, 85, 1 Inters. Com. Rep. 287; Martin *v.* Chicago, B. & Q. R. Co., 2 I. C. C. Rep. 25, 46, 47, 2 Inters. Com.

[132] Kansas City Transp. Bureau *v.* Atchison, T. & S. F. Ry. Co., 16 I. C. C. 195, 204. For typical grouping, see Ferguson Saw Mill Co. *v.* St. Louis, I. M. & S. Ry. Co., 18 I. C. C. 396, 398; Re Transportation of Wool, Hides and Pelts, 23 I. C. C. 151, 164 (coal); Transportation Bureau of Wichita *v.* St. Louis, I. M. & S. Ry. Co., 23 I. C. C. 679, 680.

[133] Pacific Creamery Co. *v.* Atchison, T. & S. F. Ry. Co., 29 I. C. C. 405, 408, and cases cited.

[134] Int. Com. Com. *v.* Chicago, R. I. & P. Ry. Co., 218 U. S. 88, 54 L. Ed 946, 30 Sup. Ct. 651.

[135] Board of Trade of Hampton *v.* Nashville, C. & St. L. R. Co., 8 I. C. C. 503, 520, 521, 522. See also Board of Trade of Dawson *v.* Central of Ga. Ry. Co., 8 I. C. C. 142. Competition at one place may justify a different rate to another. Roberts Cotton Oil Co. *v.* Illinois C. R. Co., 21 I. C. C. 248.

Rep. 32; Re Tariffs and Classifications of A. & W. P. R. Co., 3 I. C. C. Rep. 19, 24, 25, 46-49, 2 Inters. Com. Rep. 461.

"Under this system, where the haul is through the basing point to a point beyond, the rate to the latter is the through rate to the basing point plus the local rate from the basing point on and where, as in the present case, the haul is to an intermediate point, the rate to the intermediate point is the rate for the haul through such intermediate point to the basing point plus the local rate back over the same line. In the former case, the haul is not treated as a continuous haul through the basing point to the point beyond, but as two distinct hauls: one a through haul to the basing point, and the other a local haul from the basing point to the point beyond; and in the latter case, not as a through haul to the intermediate point, but as a haul through the intermediate point to the basing point beyond plus a local haul back. Local hauls, as is well known, are much more expensive to the carrier per mile than long through hauls, or any proportion of such through hauls. Therefore local rates are properly made much higher for the same distance than through rates, and hence the charge of a local rate for a part of a through haul, when the extra expense of a local haul has not been incurred, is *prima facie* excessive. Augusta Southern R. Co. *v.* Wrightsville & T. R. Co., 74 Fed. Rep. 522.

"It is a significant fact that the result of this system of rate-making is to enable the basing-point merchants to compete with the local merchants of surrounding localities at their own doors on equal terms, while the latter are debarred from such competition with the former, and as to territory intermediate between the basing points and surrounding localities, merchants at the basing points are given such an advantage in rates as to enable them to undersell merchants at surrounding localities, and drive them out of the "jobbing business" in such intermediate territory as the testimony shows has been the result in the present case. The direct tendency and almost invariable outcome of the system is that basing points are built up and flourish at the expense of surrounding localities. The building up of one locality at the expense of another, by rates favoring the former and discriminating against the latter, was undoubtedly one of the principal evils which the act to regulate commerce was designed to remedy, and it would seem that due allowance might and should

be made for the effect of competition without defeating the object of the law."

The system of making the rate to the point beyond the full local from the basing point was abandoned by the carriers and a system of differentials or arbitraries over the basing point established. Even this, when resulting in discrimination, is illegal and the principle was announced by the Commission that "rates to the basing points should bear some reasonable relation to the total distances involved."[136] In adjusting rates under the amended fourth section of the act, the basing point system was practically destroyed by the Commission.[137]

§ 109. **Same Subject—Breaking Rates.**—It has been the system adopted by the carriers in different sections of the country to make rates to a river crossing and thence to the point of destination, the through rate being a combination of the two. In some places this system, called the rate breaking system, is applied at inland points although "such an adjustment is unusual, because it is at points and on the banks of rivers, where a transfer is necessary, that rates ordinarily break." And "to have rates break at a particular point is not an inherent right."[138] While the system of breaking rates at particular points may not be the best, the Commission can not at once overcome such a system but can, when necessary to prevent discrimination, control this method of rate-making. Speaking of the system in a case where the complainants insisted, "that the system of basing rates to the Missouri River cities and points beyond upon the Mississippi River crossings is improper," Mr. Commissioner

[136] Board of Trade of Carrollton *v.* Central of Ga. Ry. Co., 28 I. C. C. 154. See also Mayor and Council of Boston, Ga. *v.* Atlantic C. L. R. Co., 24 I. C. C. 50; City of Montezuma *v.* Central of Ga. Ry. Co., 28 I. C. C. 280; Town of Pelham, Ga. *v.* Atlantic C. L. R. Co., 28 I. C. C. 433; Mayor and Council of Douglas, Ga. *v.* Atlanta, B. & A. R. Co., 28 I. C. C. 445; Mayor and Council of Vienna, Ga. *v.* Georgia, S. & F. Ry. Co., 28 I. C. C. 173; LaGrange Chamber of Commerce *v.* Atlanta & W. P. R. Co., 28 I. C. C. 178; Mayor and Council of Tifton, Ga. *v.* Louisville & N. R. Co., 9 I. C. C. 160; Columbia Grocery Co. *v.* Louisville & N. R. Co., 18 I. C. C. 502.

[137] Fourth Section Violations in the Southeast, 30 I. C. C. 153.

[138] Mr. Commissioner Harlan, in Commercial Club of Duluth *v.* Baltimore & O. R. Co., 27 I. C. C. 639, 650, 657. See also Sioux City Terminal Elevator Co. *v.* Chicago, M. & St. P. Ry. Co., 27 I. C. C. 457, 463.

Clark, for the Commission, said: "We are not impressed with the view that the system of making rates on certain basing lines should be abolished. No system of rate-making has been suggested as a substitute for it, except one based upon the postage stamp theory, or one based strictly upon mileage. Either of these would create revolution in transportation affairs and chaos in commercial affairs, that have been builded upon the system of rate-making now in effect. It must not, however, be assumed that a basing line for rates may be established and be made an impassable barrier for through rates, or that cities or markets located at or upon such basing line have any inviolable possession of, or hold upon, the right to distribute traffic in or from the territory lying beyond. Development of natural resources, increase in population, growth of manufacturing and producing facilities, and increased traffic on railroads create changed conditions which may warrant changes in rates and in rate adjustments in order to afford just and reasonable opportunity for interchange of traffic between points of production and points of large consumption."[139] The order of the Commission in the case in which the above announcement was made coming before the Supreme Court, this declaration was quoted by the court and, replying to the contention that the Commission had adopted illegal principles in arriving at its conclusions effective in the order, the Court said: "As we have said, the Commission is the tribunal that is intrusted with the execution of the interstate commerce law, and has been given very comprehensive powers in the investigation and determination of the proportion which rates charged shall bear to the services rendered, and this power exists, whether the system of rates be old or new. If old, interests will have probably become attached to them and, it may be, will be disturbed or disordered if they be changed. Such circumstance is, of course, proper to be considered and constitutes an element in the problem of regulation, but it does not take jurisdiction away to entertain and attempt to resolve the problem. And it may be that there can not be an accommodation of all interests in one proceeding."[140] The opinion of the Court refers to

[139] Burnham, Hanna, Munger Dry Goods Co. *v.* Chicago, R. I. & P. Ry. Co., 14 I. C. C. 299, 303, 313.

[140] Int. Com. Com. *v.* Chicago, R. I. & P. Ry. Co., 218 U. S. 88, 107, 108, 110, 54 L. Ed. 946, 30 Sup. Ct. 651, reversing the lower

the force "due to the judgments of a tribunal appointed by law and informed by experience." [141]

§ 110 **Comparisons between Different Lines as a Means of Determining Correct Rates.**—It is competent to compare rates, distances and general conditions on one road with those on another when considering the adjustment of rates, but in connection therewith all other factors which enter into the question of what constitutes a reasonable rate must be considered.[142] Rates should be relatively as well as absolutely reasonable, and a locality not widely dissimilar from another is *prima facie* entitled to the same rate.[143] When the circumstances and conditions are substantially dissimilar, comparison of rates are valueless.[144] Comparisons of "transportation rates in force on lines of rival companies or on different branches or lines of the same company have a bearing upon and are entitled to consideration in connection with the question of reasonable charges for transportation services rendered under like conditions." [145] And as said by Mr. Commissioner Harlan: [146]

"But while the revenue per ton per mile over other routes on other lines and to other destinations is often suggestive in arriving at a proper estimate of the reasonableness of a rate over a route complained of, it is by no means conclusive. Varying

court in Chicago, R. I. & P. Ry. Co. *v.* Int. Com. Com., 171 Fed. 680, and sustaining the Commission in Burnham, Hanna, Munger Dry Goods Co. *v.* Chicago, R. I. & P. Ry. Co., 14 I. C. C. 299.

[141] Illinois C. R. Co. *v.* Int. Com. Com., 206 U. S. 441, 454, 51 L. Ed. 1128, 27 Sup. Ct. 700, citing Louisville & N. R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 18 Sup. Ct. 502; East Tennessee, Va. & Ga. Ry. Co. *v.* Int. Com. Com., 181 U. S. 1, 27, 45 L. Ed. 719, 21 Sup. Ct. 516.

[142] Cannon *v.* Mobile & O. R. Co., 11 I. C. C. 537, 543; Lincoln Creamery Co. *v.* Union Pac. R. Co., 5 I. C. C. 156, 3 I. C. R. 794; Re Tariffs of Transcontinental Lines, 2 I. C. C. 324, 2 I. C. R. 203.

[143] Manufacturers' and Jobbers' Union *v.* Minneapolis & St. L. R. Co., 4 I. C. C. 79, 3 I. C. R. 115.

[144] Business Men's Asso. *v.* Chicago & N. W. R. Co., 2 I. C. C. 73, 2 I. C. R. 48; Evans *v.* Union Pac. R. Co., 6 I. C. C. 520; Marten *v.* Louisville & N. R. Co., 9 I. C. C. 581, 597, 12 I. C. C. 223.

[145] Morrell *v.* Union Pacific R. Co., 6 I. C. C. 121, 4 I. C. R. 469. See discussion of question in Freight Bureau of Cincinnati *v.* Cincinnati, N. O. & T. P. Ry. Co., 6 I. C. C. 195, 4 I. C. R. 592, 610, 611.

[146] Dallas Freight Bureau *v.* Gulf C. & S. F. Ry. Co., 12 I. C. C. 223, cited and followed, Clark & Co. *v.* Buffalo & S. Ry. Co., 18 I. C. C. 380.

conditions existing on different lines must of necessity justify differences in rates for hauls of the same distance. The real question in any such complaint is the reasonableness of the particular rate on the particular line between the points in question. In testing such a rate the rates on the same or adjacent lines in the immediate territory where the same conditions exist are of much greater significance and afford a much more accurate basis for our action."

A mere comparison of the rates attacked with rates in other parts of the country is not sufficient evidence upon which the commission may condemn a rate.

Nor does the mere fact that a lower rate is in force by a competing line "of itself establish the unreasonableness" of the rate by the line under investigation.[147]

As stated by the Commission: "There is no evidence that the rate charged was unreasonable, except that there was a lower rate to a nearby point via another line. This of itself has never been held sufficient to establish that the rate over a particular line is unreasonable."[148] While this is true, there is some probative value in evidence showing that between the same points there is another line over which a lower rate exists, and this evidence when supported by the fact that the rate complained of yields a comparatively high rate per ton mile may justify a finding that such rate is unreasonable.[149]

Comparing one rate with another is but a method of arriving at the fair value of a particular service. The underlying principle applied in making such comparisons is the same as is used when the market value of property is sought to be determined by comparisons with the value of other property similarly situated, and which value is indicated by prices that have been paid therefor in the open market. The method of judging rates by comparison is one that has been applied since tribunals have considered the question of what are reasonable charges.[150]

[147] Delray Salt Co. *v.* Michigan Cent. R. Co., 18 I. C. C. 245.

[148] Snyder-Malone-Donahue Co. *v.* Chicago, B. & Q. R. Co., 18 I. C. C. 498, 499. Also see Pankey & Holmes *v.* Central New England Ry. Co., 18 I. C. C. 578.

[149] Parfrey *v.* Chicago, M. & St. P. Ry. Co., 20 I. C. C. 104.

[150] Bacon's Abridgment, p. 243, title Carriers. 1 Com. Dig. C., citing 1 Sid. 36; Hutchinson on Carriers (2d Ed.) Sec. 447, 4 Elliott on Railroads Secs. 1560 *et seq.*

§ 111. **Car Load and Less than Car Load Movements as Affecting the Rate.**—It has been hereinbefore shown that cost and value of service both enter into the question of what constitutes a reasonable rate. "The hazard involved," [151] must also be considered in determining that question. It is indisputable that it costs more per hundred pounds to haul freight in less than car loads than it costs to haul the same freight in car load quantities. Among other reasons, this is true because the shipper loads and the receiver or consignee unloads car load shipments, while the carrier loads and unloads articles shipped in less than car loads. Usually a car load shipment is sealed by the consignor and unsealed by the consignee, and in the absence of the seals, showing that it has been tampered with, or that the car is in any way defective, there can be no such thing as a concealed loss chargeable to the carrier. The clerical expense of billing and the expense of delivering is much less in car load than in less than car load shipments, and the loss and damage on less than car load shipments is greater than on car load movements. This principle is recognized by the commission. In the Thurber case [152] the commission said: "It is a sound rule for carriers to adapt their classifications to the laws of trade. If any article moves in sufficient volume, and the demands of commerce will be better served, it is reasonable to give it a car load classification and rate. The car load is probably the only practicable unit of quantity."

While, as stated by the Commission in the Thurber case, *supra*, shippers usually load and unload car load freight, such is not the universal custom. Speaking of the practice, the Commission has said: "While there is every reason for holding that the shipper should load and unload freight handled as a strictly car load proposition, there seem to be many reasons why with respect to commodities handled by the package, the carrier should load and unload even though the rate applied may be the car

[151] Kindel *v.* Adams Express Co., 13 I. C. C. 475, 485.

[152] Thurber *v.* New York C. & H. R. R. Co., 3 I. C. C. 473, 2 I. C. R. 742, 752. See also Harvard *v.* Pennsylvania Co., 4 I. C. C. 212, 3 I. C. R. 257; Schultz-Hansen Co. *v.* Southern Pac. Co., 18 I. C. C. 234, 237; when the carrier does unload or load it must be without discrimination, Empire Fuel Co. *v.* Pennsylvania R. Co., 16 I. C. C. 219, 224.

load; and such we think has been the usual practice in the past. Our conclusion, therefore, is that no general and invariable rule can be laid down applying to all business which takes a car load rate." [153]

§ 112. **Establishing Car Load Rates.**—While the principle of a difference between car load and less than car load shipments is recognized by the commission, and while to prevent discrimination, it could prescribe such a differential, that tribunal is disinclined to exercise such power. Mr. Commissioner Clements, voicing the opinion of the commission, said: [154]

"The commission has held that differentiation by the carriers of carloads from less than car loads in the application of rates may be warranted under certain conditions. Here, however, we are asked to enter an affirmative order establishing a differential. What would be the effect upon all the business interests involved in this traffic should the commission take such action? No doubt its effect upon the jobbers at southeastern points would be beneficial; traffic would move into the southeast in such manner as to give the longest possible haul in car loads to the local dealers, who, securing these long haul car load rates, would be the beneficiaries. Other classes who would be affected by the change would be the small dealers and consumers, and it appears that the necessary operation of such a change would be to cut off these classes from purchasing in small quantities at Nashville and Ohio River points and compel them to deal with jobbers in their immediate vicinity, who would purchase in large enough quantities to secure the benefits of the lower rates on the long car load haul from the Ohio River and Nashville. The entire record points to the fact that a differential on this traffic would have the effect of enhancing the price of those products to the consumer. * * *

"A railroad can not be compelled, as prayed in this case, or even permitted to adopt a system of rate making which enables a large dealer to drive a smaller dealer out of the market. We must have some other motive upon which to act in a matter of this kind than that the trade of a particular community is a vested right belonging to any particular class in that community.

[153] Wholesale Fruit & Produce Assn. *v.* Atchison, T. & S. F. Ry. Co., 14 I. C. C. 410, 419.

[154] Duncan *v.* Nashville, C. & St. L. Ry. Co., 16 I. C. C. 590, 593, 594, 595.

We are not permitted so to narrow our view of all the interests involved as to look only to the interests of a particular class in the community, and this for the sole purpose of vesting in that class what they claim to be their inherent rights, more especially when the enjoyment thereof is to be at the expense of the community at large."

The Commission has, where any quantity rates were in force, distinguished the Duncan case, *supra*, and required that car load rates be established.[155]

§ 113. **Same Subject—Rule in Duncan Case Criticized.**—With great deference to the learned lawyer and experienced commissioner who wrote the opinion in the Duncan case, it is submitted that he failed to give due effect to the rule of cost of service. It does not necessarily follow that a higher rate on less than car loads increases the price to the consumer, and if it did, it does not necessarily follow that one man should receive for his money a greater service than another receives for the same amount of money. Carriers must ordinarily receive from the total of all commodities transported by them enough to pay all operating expenses and a fair return on the investment. If fifty per cent of these commodities are transported in less than car load lots, it is fair to say that more than sixty per cent of the cost of all transportation is caused by this moiety and less than forty per cent by the half transported in car lots. But while the car load shipper costs the carrier but forty per cent of the transportation charge, he pays fifty per cent thereof. If the car load shipper paid only the forty per cent the maximum which he should pay and the less than car load shipper should pay his sixty per cent and more, the total transportation charges paid by the consumer would be the same that he pays when there is no differential and there would be no discrimination. The jobber is sometimes regarded as a mere parasite, but this view of his function is incorrect. He fills an important position in commerce. Without him, or some other equally effective agency, the producer and the consumer could not be got together. The Kansas wheat farmer could never market his wheat directly by dealing with the Georgia

[155] Mutual Rice Trade & Development Assn. *v.* International & G. N. R. Co., 23 I. C. C. 219, 224. See also Taylor Dry Goods Co. *v.* M. P. Ry. Co., 28 I. C. C. 205.

consumer. There must be one or more intermediaries who collect the product and distribute it to the consumer. He who collects the grain at the primary markets of Kansas City, St. Louis, Omaha, Chicago, and perhaps other cities, the jobber at Nashville, Atlanta and other cities and the retail dealer who sells direct to the consumer, each performs a necessary service in enabling the producer to sell and the consumer to buy. When a producer controls all, or a large part, of a commodity, he may himself perform all these intermediary services, but such services must be performed by some agency. The agencies performing this necessary service will be compelled by the laws of trade not to charge more than is reasonable for the service. It is not a question of a large dealer driving out the small dealer, but a question of those intermediaries paying only for what service they obtain from the carriers. The total transportation charges which the consumer pays are not increased, but decreased and these charges are equitably distributed. The justice of a car load and less than car load differential is shown by the general application by the carriers themselves of such differential.

In the Western Classification case,[156] the rule for determining when a carload rating should be established was stated as follows: "A carload rating should be established for a commodity when that commodity can be offered for shipment in carload quantities, unless public interests or other valid considerations require the contrary." In a subsequent case this rule was quoted, the Duncan and other cases cited, and it was said: "The Commission has always recognized the propriety of carload ratings. It has in many cases established carload and less than carload rates upon the same commodity, but whether a carload rating should be accorded in a particular instance, depends not only upon whether that commodity is offered for shipment in carload quantities, but also upon other considerations."[157] What the Commission meant is, that when commercial usage makes a carload of a particular commodity a greater quantity than is ordinarily used by the average shipper, the advantages to be obtained by the lower cost of movements in carloads must yield to the customs of trade. Somewhat more liberal was the rule

[156] Re Suspension of Western Classification No. 51, 25 I. C. C. 442, 446.

[157] Taylor Dry Goods Co. *v.* M. P. Ry. Co., 28 I. C. C. 205, 207, 208, 209.

applied in permitting the carriers to increase the minimum car load for grain products.[158] The round bale cotton case[159] was based upon a special situation, and in declining to fix a carload rating which would have applied only to cotton compressed to a stated density, it can not be said that the Commission has determined that in no case will it require the establishment of car load ratings.

§ 114. **Same Subject—Proper Differential Between Rates on Car Load and Less Than Car Load Freight.**—On this subject the Commission has stated the rule as follows: The "differential, like the rate itself, should be fixed with a view to the just interests of all parties concerned. * * * In fixing upon a rate or a rate adjustment a carrier may always properly consider the cost of service, and that factor should have great influence with the commission in passing upon the reasonableness of the carrier's action. If it actually costs these carriers less to handle this transcontinental freight in carloads than in less than carloads we ought not in the absence of a controlling reason to the contrary, to deny the carrier the right to make a difference in its tariff corresponding to the difference of expense. The defendant carriers have somewhat elaborately estimated the relative expense of carrying this freight in carloads and less than carloads. The nature of that testimony fully appears in the statement of facts, and need not be repeated. We have found that it costs transcontinental carriers approximately 50 per cent more to handle transcontinental traffic in less than car loads than in carloads. The less than car load rate in many of the instances called to our attention by the complainant exceeds the carload rate by somewhat more than 50 per cent, but on the whole we are inclined to think that, on the average, the difference between carloads and less than carloads established by the tariff of June 25, 1898, does not generally, if at all exceed the actual difference of cost in the service rendered.[160]

§ 115. **Car Load Minima.**—It is usual for the carriers to pro-

[158] Western Rate Advance case 1915, 35 I. C. C. 497.

[159] American Round Bale Press Co. *v.* A. T. & S. F. Ry. Co., 32 I. C. C. 458.

[160] Business Men's League of St. Louis *v.* Atchison, T. & S. F. Ry. Co., 9 I. C. C. 318, 358, 359. See Sec. 156, *post.*

vide that a specified weight of a commodity shall be required to constitute a car load in order to obtain a rate different from the rate on the same commodity moving in less than car loads. This minimum must be reasonable and must not exceed the capacity of the car. Where no minimum was established the Commission said:

"The absence of a legally established minimum car load weight suggests the inquiry as to the quantity upon which a shipper might claim the benefit of the car load rate in preference to the less-than-carload rate. And for the purpose of laying down a general rule we hold that when a car is demanded and loaded by the shipper and is tendered and otherwise handled as a carload, and no minimum carload weight is legally provided, the carload rate, if it makes less than the l. c. l. rate, must be applied on the actual weight. It lies in the power of a carrier to protect its revenue by fixing, in the manner provided by law, minimum weights to be applicable under its published carload rates. If it fails to take this precaution we think it imposes no hardship upon it to give a shipper the benefit of the carload rate on the actual weight of the shipment tendered as a carload, whether it be more or less than an ordinary carload quantity."[161]

If the rate is for a carload, the greater the load the less the rate on each one hundred pounds, and the less the load the greater the rate a hundred. So "the minimum carload weight is a factor in determining the carload rate." [162]

§ 116. **Train Load Rates.**—The car load is a reasonable and practicable unit of quantity that may properly be adopted in determining rates. Perhaps logically the train load might also be considered, but in the actual movement of commodities the train load rarely occurs, and to adopt as a unit of quantity the train load would benefit very few shippers and would discriminate against a large number. Practicable units must be observed. So it has been said that lower rates by the hundred pounds for train loads than for car loads should not be estab-

[161] Sunderland Bros. Co. *v.* Missouri, K. & T. Ry. Co., 18 I. C. C. 425, 426.

[162] Georgia Fruit Exchange *v.* Southern Ry. Co., 20 I. C. C. 623, 630; Kansas City Hay Dealers Assn. *v.* Missouri Pac. Ry. Co., 14 I. C. C. 597, 603; Western Rate Advance Case 1915, 35 I. C. C. 497.

lished.[163] Applying the same principle, a rate on one hundred or one hundred thousand cars should not be less by the car than on one car.[164]

§ 117. **Relation of Through Rates to the Sum of the Local Rates.**—In December, 1906, the commission adopted and issued to all railroads the following ruling:

"Reduction of Joint Rate to Equal Sum of Locals (effective December 21, 1906). Where a joint rate is in effect by a given route, which is higher between any points than the sum of the locals between the same points, by the same or any other route, and such joint rate has been in effect thirty days or longer, such higher joint rate may, until further notice from the commission, be changed by reducing the same to the sum of such locals, but not otherwise, upon posting one day in advance a tariff of such reduced rate and mailing a copy thereof to the commission.

Many informal complaints are received in connection with regularly established through rates which are in excess of the sum of the locals between the same points. The commission has no authority to change or fix a rate except after full hearing upon formal complaint. It is believed to be proper for the commission to say that, if called upon to formally pass upon a case of this nature, it would be its policy to consider the through rate, which is higher than the sum of the locals between the same points as *prima facie* unreasonable, and that the burden of proof would be upon the carrier to defend such higher through rate."

The foregoing administrative order of the commission furnishes a general rule which has been frequently enforced.[165]

[163] Planters Compress Co. *v.* Cleveland, C. C. & St. L. Ry. Co., 11 I. C. C. 382; Paine Bros. Co. *v.* Lehigh V. R. Co., 7 I. C. C. 218; Richards *v.* Atlantic C. L. R. Co., 23 I. C. C. 239, 240.

[164] Carr *v.* Northern Pac. R. Co., 9 I. C. C. 1, 14; Woodward-Bennet Co. *v.* S. P. L. A. & S. F. R. Co., 29 I. C. C. 664, 665, and cases cited.

[165] Laning-Harris Coal & Grain Co. *v.* Missouri Pac. Ry. Co., 13 I. C. C. 148, 159; Burnham, Hanna, Munger Dry Goods Co. *v.* Chicago, R. I. & P. Ry. Co., 14 I. C. C. 299; Kindel *v.* New York, N. H. & H. R. R. Co., 15 I. C. C. 555; Randolph Lumber Co. *v.* Seaboard A. L. Ry. Co., 13 I. C. C. 601; Milburn Wagon Co. *v.* Lake Shore & M. S. Ry. Co., 18 I. C. C. 144; Windsor Turned Goods Co. *v.* Chesapeake & O. Ry. Co., 18 I. C. C. 162; Wells-Higman Co. *v.* Grand Rapids & I. Ry. Co., 19 I. C. C. 487; Webster Grocery Co. *v.* Chicago &

There have been and may be reasons which make the rule inapplicable.[166]

Carriers may not avoid the application of the general principle by making different minima on local and through shipments.[167] The amended fourth section making it unlawful "to charge any greater compensation on a through rate than the aggregate of the intermediate rates subject to the provisions" of the act to regulate commerce, makes statutory the prior rule frequently applied by the Commission.

"Penalty rates" which means charging a local rate as part of a through rate for the purpose of compelling a shipper to use the originating carrier for the total haul have been disapproved by the Commission.[167a]

§ 118. **Proportional Rates.**—A proportional rate is but a part of a rate charged for the haul over a portion of the through route. In recognition of the fact that there has been paid or will be paid another or subsequent transportation charge, the proportional rate is usually lower than the local rate for the same haul. That such proportion may be less than the local over the intermediate line is but an application of the principle that usually a through rate is less than the sum of the locals. It is, therefore, obvious that there is nothing illegal of itself in a proportional rate, although such rate like all other rates must not be unreasonable and must not result in unjust discrimination or undue preference.

The Commission in defining and stating the principles applicable to proportional rates, said:

"A proportional rate is nothing more or less than a separately established rate, as that phrase is used in section 6 of the amended act, applicable to through transportation. And it has

N. W. Ry. Co., 19 I. C. C. 493; and ordinarily the through rate should be somewhat less than the continuation of locals, Jubitz *v.* Southern Pac. Co., 27 I. C. C. 44, 45; Washington Milling Co. *v.* Norfolk & W. Ry. Co., 27 I. C. C. 546, 549; Appalachia Lumber Co. *v.* Louisville & N. R. Co., 25 I. C. C. 193, 194.

[166] Coffeyville Vitrified Brick & Tile Co. *v.* St. Louis & S. F. Ry. Co., 12 I. C. C. 498, 499; White Bros. *v.* Atchison, T. & S. F. Ry. Co., 17 I. C. C. 288; Winona Carriage Co. *v.* Pennsylvania R. Co., 18 I. C. C. 334.

[167] Lull Carriage Co. *v.* K. & S. Ry. Co., 19 I. C. C. 15, 16.

[167a] Mobile Chamber of Commerce *v.* M. & O. R. Co., 32 I. C. C. 272.

not been understood either by the Commission, or by others so far as we are informed, that a separately established rate can be other than an open rate available to all. The separately established or proportional rate is simply one way of making up the through charges between two points; but while we have made no criticism and, as at present advised, see no grounds for any criticism of proportional rates applicable only to through movements from a defined territory or group of points, we have never recognized as valid and, as at present advised, see no grounds upon which we could recognize as valid a proportional rate limited to shipments that come into the proportional rate point over the lines of a particular carrier. Proportional rates limited to through movements from defined territory, or from a group of points, seem to form a proper basis for making up through charges for transportation from those points and that territory. But a proportional rate, the use of which is limited to shipments over a particular line, would appear to be a rate that discriminates against shippers over another line."[168]

When the proportionals are unreasonable the Commission may order, and has ordered, a reduction therein.

Proportional rates should as a rule be less than corresponding local rates,[169] and such rates have a value when they promote and preserve wholesome competition between producing centers.[170] The shipper is not interested in the divisions of rates between the carriers unless the resultant through rate is unreasonable, and proportionals do not measure local rates.[171]

§ 119. **Through Rates Must Not Exceed Aggregate of Intermediate Rates.**—This amendment to the fourth section of

[168] Bascom Co. *v.* Atchison, T. & S. F. Ry. Co., 17 I. C. C. 354, 356, 357. See also Kansas City Transp. Bureau *v.* Atchison T. & F. R. Co., 16 I. C. C. 195, 201; Board of Trade of Kansas City *v.* St. Louis & S. F. R. Co., 32 I. C. C. 297, 307; Commodity Rates to Pacific Coast Terminals, 32 I. C. C. 611, 632; Hocking Valley R. Co. *v.* Lackawanna Coal & Lumber Co., 224 Fed. 930.

[169] Greater Des Moines Committee *v.* Chicago, R. I. & P. Ry. Co., 17 I. C. C. 54, 57; Ottumwa Commercial Assn. *v.* Chicago, B. & Q. R. Co., 17 I. C. C. 413, 414.

[170] R. R. Com. of Kansas *v.* Atchison, T. & S. F. Ry. Co., 22 I. C. C. 407, 415.

[171] Indianapolis Freight Bureau *v.* Cleveland, C. C. & St. L. Ry. Co., 15 I. C. C. 504, 512; Interior Iowa Cities Case, 28 I. C. C. 64, 73; Serry *v.* Southern Pac. Co., 18 I. C. C. 554, 556; Scott-Mayer Commission Co. *v.* Chicago, R. I. & P. Ry. Co., 28 I. C. C. 529, 532.

the original act provides: "It shall be unlawful for any common carrier subject to the provisions of this Act * * * to charge any greater compensation as a through rate than the aggregate of the intermediate rates *subject to the provisions of this Act.*"

It is further provided "that upon application," authority may be given "to charge less for longer than for shorter distances," and the "Commission may from time to time prescribe the extent to which such designated common carriers may be relieved from the operation of this section."[172]

Does the authority to grant relief apply to the whole section or only to the long and short haul clause thereof? Without the Amendment the Commission had applied as a general rule the principle that joint through rates should not exceed the sum of the locals, and [173] if the statute does not make universal this rule it means nothing.[174] It would seem that Congress had in

[172] *Post*, Sec. 355.

[173] Sec. 117, *supra*.

[174] The importance of this provision and the questions that will have to be determined thereunder, make it of interest to insert here the House and Senate provisions, that comparison may be had between the Section as passed and the provision in the Senate and House bills. Senate Bill: "That section four of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, be amended by striking out the words 'under substantially similar circumstances and conditions,' where the same appear in said section four, and further amend said section four of said Act by striking out all of said section four, beginning with the words 'Provided, however,' and further amend said section four so that when amended it will read as follows: 'Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the local rates; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance:

"'Provided, however, That the Interstate Commerce Commission may, from its knowledge, or from information, or upon application, ascertain that the circumstances and conditions of the longer haul are dissimilar to the circumstances and conditions of the shorter haul, whether they result from competition by water or rail; then it may authorize a common carrier to charge less for the longer than for the

mind, when the Senate and House bills were combined and both changed, that relief could be granted only from the long and

shorter distances for the transportation of passengers or property; but in no event shall the authority be granted unless the commission is satisfied that all the rates involved are just and reasonable and not unjustly discriminatory nor unduly preferential or prejudicial.

"'That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the commission, in accordance with the provisions of this section, until a determination of such application by the commission;

"'Provided that such determination is made within one year after the passage of this Act; Provided, further, That if more than one year, in the opinion of the Interstate Commerce Commission is needed to consider the questions and make such determination of them, the Interstate Commerce Commission may extend the time beyond one year; Provided, further, That when application is made to the said commission by a carrier to fix a lower rate for longer than for shorter distances on account of water competition, said application shall not be granted if the commission, after investigation, shall find that the lower rate asked for will destroy water competition.'"

House Bill: "Sec. 8. That section four of said Act to regulate commerce be amended so as to read as follows:

"'Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the local rates; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance;

"'Provided, however, That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; Provided, further, That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in

short haul clause, which clause as theretofore construed meant practically nothing, and that the words authorizing relief "from the operation of this section" meant that "section" was limited by the words "be authorized * * * to charge less for longer than for shorter distances."[175] However this may be, the Commission has applied the principle that through rates must not exceed the sum of the locals although implying that there might be conditions justifying a departure from the general rule.[176] Local rates that are not "subject to the provisions of"

any case where application shall have been filed before the commission, in accordance with the provisions of this section, until a determination of such application by the commission.'"

The Committee of the House, in reporting the original bill, said: "Section 6b proposes an amendment to section 4 of the interstate commerce act in relation to charges for long and short hauls. The existing law provides that the carrier shall not charge greater compensation 'under substantially similar circumstances and conditions' for a shorter than for a longer distance over the same line in the same direction, but authorizes the commission in special cases to relieve the carrier from the operation of this provision. The courts have so construed the meaning of the words 'under substantially similar circumstances and conditions' as to practically deprive section 4 of the existing law of real vitality. In the substitute recommended by your committee, section 4 of the existing law is amended so as to leave out the words 'under substantially similar circumstances and conditions' and to prohibit a carrier from receiving greater compensation for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, or to receive a greater compensation as a through route than the aggregate of the local rates, but authorizing the Interstate Commerce Commission to relieve a carrier upon application from the operation of this section; and in order not to unduly disturb existing conditions in an abrupt manner the amendment further provides that no rates or charges lawfully existing at the time of the passage of the proposed act shall be required to be changed by reason of this section prior to the expiration of six months after passage of the act, nor until any application made with the commission shall have been determined."

[175] The English Railway and Traffic Act of 1888, section 27, gave the Commissioners power to direct that no greater charge should be made for a shorter than a longer haul when the circumstances demanded such direction. Halsbury's Laws of England, vol. 4, p. 81.

[176] Arabol Mfg. Co. *v.* South Brooklyn Ry. Co., 25 I. C. C. 429, 430; Commercial Club of Duluth *v.* Baltimore & O. R. Co., 27 I. C. C. 639, 660.

the Act to Regulate Commerce are not necessarily a proper measure of the through rate. The Commission does, and properly should, give consideration to rates fixed by State Commissions but, were it bound by such rates the exclusive power of Congress over interstate commerce would be made subordinate to the action of the states.[177] In discussing this question the Commission has said:

"While state rates are valuable for comparative purposes in fixing a reasonable charge for a transportation service, the assumption of complainant that the action of the defendant in this case in maintaining higher transportation rates on interstate than intrastate traffic amounts to unlawful discrimination on the part of the carrier is not sound, for upon the record it is shown that the condition is one over which the carrier has no control."[178]

§ 120. **Through Routes and Joint Rates.**—If only the rates on the lines of each carrier considered separately were subject to the regulation of the commission, it would be very difficult to obtain reasonable rates on those commodities which move over two or more lines. For this reason, carriers subject to the act are required to establish through routes and joint rates. Joint rates must be reasonable and the principles relating to rates generally apply as well to these rates. Of the right of shippers to through routes and joint rates Mr. Commissioner Clements says:[179]

"The law does not require the commission in all cases where no through routes and joint rates exist to establish them, but only empowers it to do so in proper cases with the manifest intent of giving effect to the general purposes of the act to regulate commerce by securing reasonable facilities to the public and preventing unreasonable and unjust rates, practices, and discriminations, and in the exercise of this authority the commission is bound by the same considerations of justice and fairness as it is

[177] Cobb *v.* Northern Pac. Ry. Co., 20 I. C. C. 100, 102; Pulp & Paper Mfrs. Traffic Assn. *v.* Chicago, M. & St. P. Ry. Co. 27 I. C. C. 83, 96; Corp. Com. of Okla. *v.* A. T. & S. F. Ry. Co., 31 I. C. C. 532. Rates on Beer and Other Malt Products, 31 I. C. C. 544; Rates on Live Poultry In Western Trunk Line Territory, 32 I. C C. 380.

[178] Baxter & Co. *v.* Georgia, S. & F. Ry. Co., 21 I. C. C. 647, 648.

[179] Loup Creek Colliery Co. *v.* Virginian Ry. Co., 12 I. C. C. 471, 477.

in the exercise of the rate-making power in other respects. Where neither the interest of the public, nor the ends of justice as between parties directly interested, will be promoted by the establishment of through routes and joint rates and divisions thereof, a proper case for the exercise of the authority invoked has not been shown."

In discussing an order for a through route made by the Commission prior to the amendments of 1910 and 1912, the Supreme Court construing the statute said:

"We are of the opinion that the Commission had no power to make the order, if a reasonable and satisfactory through route already existed, and that the existence of such a route may be inquired into by the courts." [180]

§ 121. **Same Subject—Amendments of 1910 and 1912.** —Section one of the Act to Regulate Commerce, as amended by the Act of 1906, made it the duty of carriers "to establish through routes and joint and reasonable rates applicable thereto." [181]

The Amendment of August 24, 1912, known as the Panama Canal Act, provides that, "when property may be or is transported from point to point in the United States by rail or water through the Panama Canal or *otherwise* * * * in addition to the jurisdiction given by the Act to Regulate Commerce" other jurisdiction is given.[182] In the specified additional jurisdiction this is stated: "To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced." [183]

The Act of 1910 gave the Commission permission and power "after hearing" to "establish through routes and joint classification," and "to establish joint rates as the maximum to be charged" and to "prescribe the division of such rates," and to prescribe the "terms and conditions under which such through routes shall be operated;" and the provision was made to apply "when one

[180] Int. Com. Com. *v.* Northern Pac. Ry. Co., 216 U. S. 538, 544, 54 L. Ed. 608, 30 Sup. Ct. 417, affirming Circuit Court, Northern Pac. Ry. Co. *v.* Int. Com. Com. and setting aside the order of the Commission in Re Matter of Through Passenger Routes via Portland Oregon, 16 I. C. C. 300.

[181] Sec. 335, *post.*

[182] Sec. 375, *post.*

[183] Sec. 377, *post.*

of the connecting carriers is a water line."[184] There was a limitation on the power by the provision that "The Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management and control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established."[185]

The Act of 1906, limiting the Commission's power by this language, "provided no reasonable or satisfactory through route exists," was not reënacted in section 15 of the Act of 1910. This change in the statute makes inapplicable to the present law the decision of the Supreme Court in Interstate Commerce Commission *v.* Northern Pacific Railway, *supra*. The law as now written provides for a hearing with or without a formal complaint and invests in the Commission a discretion as to when and under what conditions through routes and joint rates may be established; the limitation quoted above, of course, controlling this discretionary power. Other than the quoted limitation the Commission now has like power over through routes and joint rates as over any other kind of a rate.[186] In exercising this discretion the Commission may permit one carrier to demand "financial security before entering into either joint rate arrangements or accepting freight under proportional rates."[187]

The Commission has construed the words "or otherwise" quoted from the Panama Canal Act, *infra*, and has held that it could thereunder establish through routes with a water carrier.[188]

[184] Sec. 400, *post*.

[185] Sec. 401, *post*. Downie Pole Co. *v.* N. P. Ry. Co., 31 I. C. C. 142; Lumber Rates from North Pacific Coast, 30 I. C. C. 111; Wheeler Lumber, Bridge & Supply Co. *v.* A. T. & S. F. Ry. Co., 30 I. C. C. 343; Cement Rates from Mason City, 30 I. C. C. 426; New York Dock Ry. *v.* B. & O. R. Co., 32 I. C. C. 568; St. L. I. M. & S. Ry. Co. *v.* U. S., 217 Fed. 80. Ogden Gateway Case, 35 I. C. C. 131.

[186] Truckers Transfer Co. *v.* Charleston & W. C. Ry. Co., 27 I. C. C. 275, 277; Crane Iron Works *v.* United States, Opinion Commerce Court No. 55, pp. 453, 464, 209 Fed. 238.

[187] Truckers Transfer Co. *v.* Charleston & W. C. Ry. Co., 27 I. C. C. 275, 279.

[188] Augusta & Savannah Steam-

The Commission in the case where such holding was first made said:

"If the above amendment applies to the traffic in question, the right of the Commission to establish this through route is clear. The defendants contend that it does not apply, for the reason that this amendment relates only to the traffic which passes through the Panama Canal. They argue that the words 'or otherwise' modify the phrase 'by rail and water' and not the phrase 'through the Panama Canal.' But the plain everyday reading of the act is 'through the Panama Canal or otherwise,' and the defendants have referred us to no canon of construction nor to any reason for disregarding the obvious meaning of those words. Indeed, a consideration of the situation to which the amendment applies would seem to conclusively demonstrate that the position of the defendants is not correct, since the words 'or otherwise' are pure surplusage if read as the defendants say they should be. Traffic through the Panama Canal can only move by rail and water, unless it moves from port to port, and in that case we have no jurisdiction. We hold, therefore, that the Commission has jurisdiction to establish the through routes and the joint rates prayed for."

§ 122. **Rates on Commodities Requiring Refrigeration.** —The charge made by a carrier for refrigeration must, like all of its other charges, be reasonable. To determine what is reasonable the general principle applied to other rates must be considered as well as the special circumstances peculiar to the shipment. On this subject the Commission has held:[189]

"In determining what is a reasonable charge for furnishing refrigeration for the movement of citrus fruits from California to eastern markets, nothing should be added by reason of the fact that a refrigerator car is used, since that has been taken into account in establishing the rate of transportation, nor for the service of inspection, which is substantially the same for all shipments; but the expense of transporting the additional weight of the ice and for repairs to the ice bunkers should be considered."

boat Co. *v.* Ocean Steamship Co., 26 I. C. C. 380, 384, 385; Decatur Navigation Co. *v.* L. & N. R. Co., 31 I. C. C. 281; Pacific Nav. Co. *v.* S. P. Co., 31 I. C. C. 472. Federal Sugar Refining Co. *v.* C. of N. J. R. Co., 35 I. C. C. 488.

[189] Arlington Heights Freight Exchange *v.* Southern Pac. Co., 20 I. C. C. 106; same styled case, 22 I. C. C. 149; at p. 156 see discussion of "postage stamp rates."

In the same case it was held that when the shipper pre-cooled his fruit, such fact must be considered in determining the rate.[190]

§ 123. **Rates on Returned Shipments.**—What the privilege of returning shipments at less than usual rates means and the origin and growth thereof are stated by the Commission:

"The returned-shipment privilege seems to have originated for the purpose of assisting the agricultural interests. Farm implements and machinery often prove defective or break down while in use, and if full tariff rates must be paid for their transportation to a point where repairs can be effected, the farmer is subjected to a serious handicap. Rules were therefore adopted permitting the return of agricultural implements, vehicles, and similar articles at one-half the regular rates.

"Through the operation of competitive forces the return-shipment rules became increasingly liberal and were gradually enlarged to cover the return of freight of every character and for every purpose. * * * The record shows that while returned shipments form but a small proportion of the carriers' entire traffic the privilege is of importance to several branches of industry."

After thus describing the rule and after discussing the question involved therein, the Commission condemned the privilege as having no legal or logical basis.[191]

In the same opinion, at page 418, it was shown that when the returned shipment was on "freight in an obviously deteriorated condition," the axiom "that rates depend largely upon value" should be considered, not because it was a returned shipment but because of the value. The difficulty of always considering value in this connection is manifest and was pointed out by Mr. Commissioner Clements as follows:

[190] The order of the Commission was sustained by the Commerce Court, Atchison, T. & S. F. Ry. Co. *v.* United States, 204 Fed. 647, Opinion Commerce Court No. 41, p. 627. For other applications of the rule, see Ozark Fruit Growers Assn. *v.* St. Louis & S. F. Ry. Co., 16 I. C. C. 106; Asparagus Growers Assn. *v.* Atlantic C. L. R. Co., 17 I. C. C. 423; Georgia Fruit Exchange *v.* Southern Ry. Co., 20 I. C. C. 623; Albree *v.* Boston & M. R. Co., 22 I. C. C. 303.

[191] Re Reduced Rates on Returned Shipments, 19 I. C. C. 409, 414, and discussion and cases cited at pp. 416, 417.

"We are not prepared to lay down the principle that old or secondhand articles must be treated differently from new or that value is the controlling element in making rates. Such of these articles or parts as are in fact scrap are entitled to the scrap rate, but if they have any value as the articles which they originally purported to be, we do not feel that we can require the carriers to transport them at other than the regular tariff rates applicable to the new or originally transported article." [192]

§ 124. **The Public Interest Must Be Considered in Making Rates.**—A rate made by a carrier, a legislative or an administrative body must not disregard the interests of the public, and the fact that a particular rate is necessary to enable the carrier to pay interest and dividends will not justify a rate which is unduly burdensome on the public.

The legislature of Kentucky having prescribed the maximum rate to be charged by turnpike roads in that state, the Supreme Court in determining whether or not such act was illegal, said: [193]

"It is proper to say that if the answer had not alleged, in substance, that the tolls prescribed by the act of 1890 were wholly inadequate for keeping the road in proper repair and for earning dividends, we could not say that the act was unconstitutional merely because the company (as was alleged and as the demurrer admitted) could not earn more than 4 per cent on its capital stock. It cannot be said that a corporation operating a public highway is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway,

[192] Minneapolis Traffic Assn. *v.* Chicago & N. W. Ry. Co., 23 I. C. C. 432, 437.

[193] Covington & L. Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 596, 597, 41 L. Ed. 560, 566, 567, 17 Sup. Ct. 198. Quoted and followed, Smyth *v.* Ames, 169 U. S. 466, 545, 42 L. Ed. 819, 848, 18 Sup. Ct. 418. See also Minneapolis & St. L. R. Co. *v.* Minnesota, 186 U. S. 257, 268, 46 L. Ed. 1151, 1158, 22 Sup. Ct. 900; Loftus *v.* Pullman Co., 18 I. C. C. 135, 140; "Having in mind the public interest;" R. R. Com. of Texas *v.* Atchison, T. & S. F. Ry. Co., 20 I. C. C. 463, 484; R. R. Com. of Kansas *v.* Atchison, T. & S. F. Ry. Co., 22 I. C. C. 407, 410. As to what is a "fair return" see *post,* Sec. 131. *Supra,* Sec. 83.

stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. 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 its property. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. 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."

A particular service falling within the absolute duties of the carrier may be required of a public carrier, when it is necessary to the public convenience, where the whole service performed yields a fair compensation, even though such particular service must be furnished at a loss to the carrier.[194]

§ 125. **General Principles Applicable to the Question, What Is a Reasonable Rate?**—It was a maxim of traffic managers that "all the traffic could bear" was the only definite principle applicable to rate making. Kirkman, in the Science of Railways, vol. 8, at p. 11, says: "In the practical operation of railroads such rates are made as the traffic will bear." If this rule were adopted there would be little difficulty in fixing rates. But it is apparent that such a rule, in view of the fact that the business of transportation companies is affected with a public use, would be unfair. Mr. Commissioner Clements, in Tift

[194] Atlantic Coast Line R. Co. *v.* North Carolina Corporation Commission, 206 U. S. 1, 51 L. Ed. 933, 27 Sup. Ct. 585. See in this connection Sec. 100, *supra*.

v. So. Ry. Co., 10 I. C. C. 548, 582, says: "This claim * * * on the part of the carriers is based upon the erroneous assumption, so prevalent among traffic managers, that a rate may be as high as 'the traffic will bear.'" What "the traffic will bear" is, by force of economic law, the maximum. It has been seen that a particular service may, under some circumstances, be required of a common carrier at less than cost, but ordinarily cost of service fixes the minimum rate. It is interesting and instructive to group what has been said by the courts and the commission with reference to this problem. The Supreme Court, speaking of the basis of a whole schedule of rates, said:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." [195]

In the same case the court said:

"'In passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in con-

[195] Texas & P. R. Co. *v.* Int. Com. Com., 162 U. S. 197, 40 L. Ed. 940, 5 I. C. R. 405, 16 Sup. Ct. Rep. 666.

sidering whether any particular locality is subjected to an undue preference or disadvantage the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment."

In a later case Covington & L. Turnpike Co. *v.* Sandford, 164 U. S. 578, 596, 597, 41 L. Ed. 560, 566, 567, 17 Sup. Ct. 198 section 124 *supra,* it was held, that "the rights of the public are not to be ignored."

The Supreme Court in the Minnesota rate cases,[196] speaking of how to determine the "fair value" upon which a fair return was legally required, said: "The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

There is, however, a flexible limit of judgment which belongs to the power to fix rates,[197] and, as to rates within the Interstate Commerce Acts, "the Commission is the tribunal that is intrusted with the execution" of such laws.[198]

§ 126. **Same Subject—Some Statements of the Commission as to Such General Principles.**—The Commission in Delaware State Grange *v.* New York, P. & N. R. Co., 4 I. C. C. 588, 3 I. C. R. 554, 560, 561, speaking of the general principles to be considered in rate making, says:

"The mandate of the statute is that all rates must be reasonable and just, but how the reasonableness and justice of a rate are to be determined is not prescribed by the statute, nor has any satisfactory test been evolved by transportation experts. Conflicts about rates arise from the conflicting interests of carriers and shippers. As carriers make their own rates, they have primary regard for their own interests, and often give less weight than they ought to the interests of those they serve. This is more frequently the case in the absence of competition. Under stress of competition, or sometimes for the purpose of develop-

[196] Simpson *v.* Shepard, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729.

[197] Atlantic C. L. R. Co. *v.* North Carolina Corp. Com., 206 U. S. 1, 26, 51 L. Ed. 933, 27 Sup. Ct. 585.

[198] Int. Com. Com. *v.* Chicago, R. I. & P. Ry. Co., 218 U. S. 88, 108, 54 L. Ed. 946, 30 Sup. Ct. 585.

ing business, rates that are equitable or even very low are likely to be made. But when a controversy arises between the public and a carrier, the question of the reasonable limit of a rate usually involves many considerations, and is often difficult to determine. A rate that might be regarded as reasonable and just by a producer and shipper, might, from a carrier's standpoint, be deemed extremely unreasonable and unjust, and, so, conversely, a rate that a carrier might claim to be reasonable in itself, and that it might support with strong reasons based upon the cost of the service, the quantity of the business and the characteristics of its line of road, might exhaust the greater part of the proceeds of the producer's commodity and be destructive to his interests. It is only stating a truism, therefore, to say there is no recognized test of a rate mutually reasonable for a carrier and for the producer of the traffic.

"The reasonableness of a rate must consequently be ascertained in every instance in which the question arises, by its relations both to the carrier and to the shipper, and by comparison with rates normally charged for like or similar service."

In Thompson Lumber Co. *v.* Illinois C. R. Co., 13 I. C. C. 657, 664, the commission says:

"In determining what is a reasonable and just rate many considerations are involved. Among these are the general financial and physical condition of the road, the character of the commodity in question, whether it constitutes a large or small part of the business of the carrier, whether it is economical or expensive to handle, how it compares with other commodities hauled, and, as evidencing the railroad's own judgment, whether a different rate has been in effect on this commodity at some other time."

Cost and value of service are discussed by the commission in Boston Chamber of Commerce *v.* Lake Shore & M. S. R. Co., 1 I. C. 436, 1 I. C. R. 754, 760, 761, as follows:

"The element of cost of service which may at one period have been recognized as controlling in fixing rates has long ceased to be regarded as the sole or most important factor for that purpose. The value of the service with respect to the articles carried, the volume of business, and the conditions and force of competition are justly considered to have controlling weight in determining the charges for transportation. But even with re-

gard to the cost of service the cost is at least somewhat greater to Boston than to New York."

Import tariff duties should not be counted as part of a transportation charge.[199]

"A railroad company may be operated with a less return than it ought to enjoy or even at a loss, but neither condition of affairs would justify the exaction by it of rates that are higher than they reasonably should be for services performed, all things being considered." [200]

The problem is difficult, the facts to be considered multitudinous and of an infinite variety of modifying conditions, from which the commission, without applying any policy which runs counter to the power granted and the duty imposed upon it, seeks by "slow evolution" to develop a satisfactory system of rates.[201]

In the Eastern Advance Rate case [202] the Commission said:

"This Commission is called upon to deal with rates as they exist, and in so doing we ordinarily consider them, not from the revenue standpoint, but rather from the commercial and traffic standpoint. At the same time it is now the settled law that there is a limit below which the revenue of railroads can not be reduced by public authority, and if there were no such constitutional limitation it would nevertheless behoove every regulating body to permit the existence of such rates, when possible, as will yield just earnings to the railways. The question of revenue is therefore fundamental and ever-present in all considerations as to the reasonableness of railroad rates, although it may not be and seldom is, where single rates are presented, the controlling question."

§ 127. **Same Subject—Illustrative Cases.**—It has been the purpose of this chapter to give as comprehensively as possible the decisions both of Commission and Courts which show the principles which have been considered and applied in making rates. The principles stated herein illustrate the difficulty of the problem, but they furnish data from which some generalizations

[199] Florida Fruit & Vegetable Assn. *v.* Atlantic C. L. R. Co., 17 I. C. C. 552, 561.

[200] R. R. Comrs. of Iowa *v.* Illinois Cent. R. Co., 20 I. C. C. 181, 186, citing Canada Southern Ry. Co. *v.* International Bridge Co., 8 App. Cas. 731.

[201] Advances in Rates—Western Case—20 I. C. C. 307, 379.

[202] Advance in Rates—Eastern Case—20 I. C. C. 243, 248.

may be drawn. In recent volumes of the reports of the decisions of the Commission there is in the index a title, Measure of Rates. Under this general title may be found references to the Commission's rulings relating to the "adjustment of rates," "advantages and disadvantages," "basis of rates," "branch line through thinly populated region," "burden of transportation," "capacity of boats," "car earnings," "categorical answers," "channels, depth of," "charging what traffic will bear," "circumstances and conditions," "classification," "commercial and economic conditions," "comparison of rates," "competition," "competitive rates," "cost," "cost of carriage," "cost of construction," "cost of handling," "cost of maintenance," "cost of operation," "cost of production," "cost of transportation," "cost of service," "density of traffic," "distance," "division of rates," "division of through rates," "earnings," "empty car movement," "equipment," "erroneous rates," "factor in through rates," "free movement of traffic," "harbor, condition of," "length of haul," "local rates," "long as well as short haul," "main line rates," "nature of commodity," "navigation, condition of," "paper rates," "past rates," "raw material," "relative rates," "return haul," "risk," "state rates," "three line haul," "ton mile earnings," "ton per mile rate," "tonnage," "train mile earnings," "transportation conditions," "trunk line rates," "two line haul," "use," "value of commodity," "value of service," "volume of traffic," "voluntary rates," "voluntary reductions," "weak line," and "wharf and dock facilities."

And in one case the question of how a rate on a locomotive moving on its own wheels should be constructed was discussed.[203] Many other facts have been discussed in the opinions of the Commission. These but illustrate the correctness of the statement that "multitudinous facts must be considered."

§ 128. **Same Subject—Discussion of Principles in Chicago Live Stock Exchange Case.**—In speaking of the factors to be considered in rate-making,[204] Judge Bethea, citing authorities, said:

[203] Re Investigation of Advance on Transportation of Locomotives and Tenders, 21 I. C. C. 103.

[204] Int. Com. Com. *v.* Chicago G. W. R. Co., 141 Fed. 1003, 1015, 1016. Sustained in Supreme Court, Int. Com. Com. *v.* Chicago G. W. Ry. Co., 209 U. S. 108, 52 L. Ed. 705, 28 Sup. Ct. 493. In this case the order of the Commission in Chicago Live Stock Exchange *v.* Chicago G. W. R. Co., 10 I. C. C. 428, was held invalid.

"A careful examination of the opinions of that court (as well as the evidence taken in these cases) shows that there are a great many factors and circumstances to be considered in fixing a rate. Noyes, Am. R. R. Rates, pp. 61 et. seq., 85-109. Among other things: (1) The value of the service to the shipper, including the value of the goods and the profit he could make out of them by shipment. This is considered an ideal method, when not interfered with by competition or other factors. It includes the theory so strenuously contended for by petitioners, the commission, and its attorneys, of making the finished product carry a higher rate than the raw material. This method is considered practical, and is based on an idea similar to taxation. Interstate Commerce Commission *v.* B. & O. Ry. Co. (C. C.) 43 Fed. 37, 53; Noyes, Am. R. R. Rates, 53. (2) The cost of service to the carrier would be an ideal theory, but it is not practical. Such cost can be reached approximately, but not accurately enough to make this factor controlling. It is worthy of consideration, however. Interstate Commerce Commission *v.* Baltimore & O. Ry. Co., 43 Fed. 37, 3 I. C. R. 192; Ransome *v.* Eastern Counties Railway Company (1857) I. C. B. N. S. 437, 26 L. J. C. P. 91; Judson on Interstate Commerce, §§ 148, 149; Western Union Telegraph Co. *v.* Call Publishing Co., 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765; Interstate Commerce Commission *v.* Detroit, Grand Haven & Milwaukee Railroad Co., 167 U. S. 633, 17 Sup. Ct. 986, 42 L. Ed. 306. (3) Weight, bulk and convenience of transportation. (4) The amount of the product or the commodity in the hands of a few persons to ship or compete for, recognizing the principle of selling cheaper at wholesale than at retail. Interstate Commerce Commission *v.* B. & O. Ry. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. (5) General public good, including good to the shipper, the railroad company and the different localities. Interstate Commerce Commission *v.* B. & O. Ry. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. (6) Competition, which the authorities, as well as the experts, in their testimony in these cases, recognize as a very important factor. Pickering Phipps *v.* London & Northwestern Railway Company, 2 Q. B. D. (1882) 229 (this case construes section 2 of the English act of 1854, which is almost like section 3 of our interstate commerce act); Interstate Commerce Commission *v.*

B. & O. Ry. Co., *supra.*; Cincinnati, New Orleans & Texas Pacific Railway Company *v.* Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; Interstate Commerce Commission *v.* Alabama Midland Railway Company, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414; Louisville & Nashville Railroad Co. *v.* Behlmer, 175 U. S. 648, 20 Sup. Ct. 209, 44 L. Ed. 309; East Tennessee, Virginia & Georgia Railway Company *v.* Interstate Commerce Commission, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. Ed. 719; Texas & Pacific Railway Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940; Interstate Commerce Commission *v.* Louisville & Nashville Railroad Co., 190 U. S. 273, 23 Sup. Ct. 687, 47 L. Ed. 1047. The Supreme Court has also held that it may be presumed that Congress, in adopting the language of the English act, had in mind the construction given to the words "undue preference" by the courts of England. Interstate Commerce Commission *v.* B. & O. Ry. Co., 145 U. S. 284, 12 Sup. Ct. 844, 36 L. Ed. 699.

"None of the above factors alone are considered necessarily controlling by the authorities. Neither are they all controlling as a matter of law. It is a question of fact to be decided by the proper tribunal in each case as to what is controlling."

§ 129. **Same Subject—Rate Considered in and of Itself.**—With reference to a rate "in and of itself," the commission has said:[205]

"It is said that the rate from St. Cloud is reasonable in and of itself. A rate can seldom be considered "in and of itself." It must be taken almost invariably in relation to and in connection with other rates. The freight rates of this country, both upon different commodities and between different localities, are largely inter-dependent, and it is the fact that they do not bear a proper relation to one another, rather than the fact that they are absolutely either too low or too high which most often gives occasion for complaint."

In the Cattle Raisers' Asso. case,[206] the commission discusses the cost to the carriers at originating and delivering points, cost and maintenance of equipment, expense of loading and reloading in transit incident to feeding, watering and resting the stock, char-

[205] Tileston Mill Co. *v.* Northern P. R. Co., 8 I. C. C. 346, 361.

[206] Cattle Raisers' Asso. *v.* Missouri, K. & T. R. Co., 11 I. C. C. 296.

acter of the movement, number of cars in trains, average loading, volume and desirability of the traffic, return of empty cars, liability to damage, cost of carriage, increased cost of producing live stock, decreased selling price, method of making the advanced rates, disappearance of competition, cost of railroad labor and supplies, improved methods of operation and increased general traffic, mileage revenue per ton per car and per train, and other pertinent circumstances and conditions.

§ 130. **Same Subject—Commission Not Bound by Technical Rules.**—In the investigation of these questions the commission is not hampered by technical rules. The Supreme Court, said: [207]

"The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation, and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law, where a strict correspondence is required between allegation and proof."

The Commission's right to consider the problem in all its phases was clearly stated by the Supreme Court, as follows:

"The Commission is the tribunal that is intrusted with the execution of the interstate commerce laws, and has been given very comprehensive powers in the investigation and determination of the proportion which the rates charged shall bear to the service rendered, and this power exists, whether the system of rates be old or new. If old, interests will have probably become attached to them and, it may be, will be disturbed or disordered if they are changed. Such circumstance is, of course, proper to be considered and constitutes an element in the problem of regulation, but it does not take jurisdiction away to entertain and attempt to resolve the problem. And it may be that there can not be an accommodation of all interests in one proceeding." [208]

[207] Int. Com. Com. *v.* Baird, 194 U. S. 25, 44, 48 L. Ed. 860, 869, 24 Sup. Ct. 563.

[208] Int. Com. Com. *v.* Chicago R. I. & P. R. Co., 218 U. S. 88, 108, 54 L. Ed. 946, 30 Sup. Ct. 669. See also Atlantic C. L. R. Co. *v.* Florida, 203 U. S. 256, 51 L. Ed. 174, 27 Sup. Ct. 108. See also Seaboard A. L. Ry. Co. *v.* Florida, 203 U. S. 261, 51 L. Ed. 175, 27 Sup. Ct. 109; and *post*, Section, 189.

The Commission in discussing its own power said:

"It must be borne in mind that this Commission is not a court of law; its function is to apply the mandatory and restrictive provisions of the Act to Regulate Commerce to stated conditions of fact. We must regard the problems presented to us from as many standpoints as there are public interests involved." [209]

§ 131. **Same Subject—Summary.**—The statement so frequently made and reiterated that the problem of rate-making is a difficult one, means no more than that there is no definite scientific rule by which it can, with certainty, be determined just what is a reasonable rate.

The "tribunal appointed by law and informed by experience" has evolved and is evolving principles which will furnish sufficient data to justify generalizations broad enough to authorize the deduction of scientific principles. In making these deductions, the first consideration is the agency which performs the service. This agency performs a public service, devotes its property to a public use and must, therefore, submit to public regulation; but the capital of this agency is private capital entitled to protection as such. From these facts the law deduces the principle that those who furnish such private capital so devoted to a public use are entitled to receive a fair return from such investment. What is a "fair return" involves economic considerations such as the risks involved in the investment, the security of the investment because it is a practical monopoly, returns which capital may secure from other investments, as well as the public necessity that capital shall be devoted to this special use. "Fair return" necessarily involves the question of the value of the property so devoted to the public use. In determining this value there must be considered the investment, that made originally and that added in permanent improvements, the present market value of the stocks and bonds, which are but symbols of the investment, the question of the cost of the property, its reproduction cost and the methods of making the investment, that is, was the investment made wisely and honestly or otherwise. The character of the territory served by the carrier is not infrequently a fact which must not be lost sight of. The extent and regularity of the whole movement is determined by

[209] Advances in Rates—Western Case—20 I. C. C. 307, 315.

the character of the inhabitants and the kinds of business conducted by them. The physical situation of the agency as to grades, curves, etc., may materially affect the cost of the service and thereby determine the amount of the return which should be received.

The attitude of the agency to the question is not without value; the way the problem has been solved by the agency in a long course of dealing would indicate that such agency has found a solution not unfair to itself.

The thing transported must be considered. Is it heavy as compared with the space it occupies? Does it require any special equipment? Is it subject to loss or injury in transporting? Is there much or little of it? The answers to these questions furnish facts which must be considered in classifying commodities so as to fix rates or charges for their transportation.

The places from and to which the commodities move are factors in the problem. The distance a thing is hauled must be considered, as the greater the distance the less ordinarily is the cost for each mile of the haul, and the service of loading and unloading applies the same to a short as to a long haul.

The situation of the man who owns the thing moved and the purpose of the movement frequently affects the question of the rate. This does not mean that rates must be determined by the use to which the commodity is put; it means that a producer of a commodity which is also produced by others in the same general territory, the market for all the producers being the same, can not ship otherwise than upon rates not greatly higher than his competitors. This principle is similar to the one that justifies a rate basis made to meet market competition. A thing may grow or be mined in widely different localities, and the sale of the thing may be in the same market. Obviously that this market may have the benefit of competition and that producing localities may have the benefit of a market, distance can not be made an absolute measure for the rates.

So the public interest must not be disregarded in determining what this public agency shall receive for performing the duties which society has farmed out to it. Rates must not be so adjusted as to deprive the public of the service, commodities must be moved and they can not be moved if the charge therefor exceeds the value to be derived from the movement. One producer

must not be permitted a monopoly in serving the public. That charges may not exceed the value of the service is an economic law depending upon neither court nor commission for its enforcement.

Carriers may with propriety and for the good of the general public make rates barely more than the cost of the particular movement, in order to develop industries, create and maintain competition and serve those who because of their location distant from the point of production can not be otherwise served. Rate-making tribunals may not make rates so low as to deprive private capital of a substantial return on the fair value of the property devoted to the public use.

While long existing wrongs do not become rights and no one can have a vested interest in a wrong, the fact that in the slow evolution toward a science of rate-making there have grown up rate situations inconsistent with the principles which must exist when there is such a science, does not justify an abrupt and radical alteration of these situations. Existing conditions are facts which must be recognized in the application of all abstract economic principles, and while the principle is not destroyed by such recognition, it may be inapplicable to the particular situation.

To determine what is a reasonable rate, the law must be applied, economics considered and ethics invoked, and while the facts to be weighed are multitudinous and the scientific principles few, we may say that it is not fanciful to anticipate that a system of rate-making will be evolved which will approach justice. Shippers and carriers contending each with the other, sometimes selfishly, but not infrequently with an earnest desire for a right solution, presenting their theories to a disinterested and unbiased tribunal, "appointed by law and informed by experience," may furnish data which, being sifted, studied and classified in its reports, will enable that tribunal to solve the problem.

CHAPTER IV.

Equality in Rates.

§ 132. Scope of Chapter.
133. Common Law as to Equality in Rates by Carriers.
134. Same Subject. Damages.
135. Comparison of the English Railway and Canal Act with the Act to Regulate Commerce.
136. Discrimination Forbidden.
137. Discrimination against Individuals.
138. Same Subject.
139. Same Subject. Construction by the Commission.
140. Same Subject. Allowances to Shippers.
141. Trap Car Service.
142. Peddler Cars.
143. Car Spotting.
144. Undue Preferences in Favor of Persons or Localities.
145. Same Subject. Application of Section Made by the Commission.
146. Discrimination against Traffic.
147. Same Subject. Discrimination Beyond the Control of the Carrier.
148. Facilities for Interchange of Traffic and Rates and Charges to Connecting Lines Must Be without Undue or Unreasonable Preference.
149. Same Subject. Statute.
150. Same Subject. Statute and Proviso.
151. Through Routes and Joint Rates.
152. Discrimination by Charging More for a Shorter than a Longer Haul.
153. Long and Short Haul. Old Law Construed. Definite Construction.
154. Long and Short Haul Clause under Act of 1910.
155. Fourth Section. Relationship between Through Rates and Intermediate Rates.
156. Discrimination between Car Loads and Less than Car Loads.
157. Bulked Shipments.
158. Car Loads, Ownership of.
159. Train Loads.
160. Classification of Commodities Should Be without Discrimination.
161. Uniform Classification.
162. Power of the Commission over Classification.
163. Milling in Transit.
164. Rebilling.

165. Rebilling—Found Illegal.
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167. Rebilling. Conclusion.
168. Payments to Elevators.
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173. Commodities Clause of Act of 1906.
174. Cars Must Be Furnished without Discrimination.
175. Same Subject. Principles Applied by the Commission.
176. Freight Charges Must Be Collected without Discrimination.
177. Right of Carrier to Route Shipments Beyond Its Own Terminus.
178. Discrimination in Billing.
179. Tariffs of Rates Must Be Printed, Posted and Maintained.
180. Same Subject. Misquoting Rates.
181. Different Rates over the Same Line in Opposite Directions.
182. Discrimination by Granting Free Service.
183. Basing Points, Group Rates and Zone Rates.
184. How Far a Rate Made by a State Relieves a Carrier from the Duty to Serve Communities with Legal Equality.
185. Commutation, Mileage and Party Rate Tickets.
186. Rebates.
187. Same Subject. Corporation Punishable.
188. Summary.

§ 132. **Scope of Chapter.**—A rate may be reasonable, and yet, because of its relation to other rates, unlawful as violative of the provisions of the Act to Regulate Commerce requiring a just equality in rates.

Many of the facts affecting the reasonableness of rates must be considered in determining whether or not a rate is unlawfully discriminatory or preferential. While this is true, there are certain principles which have been specially applied to the question of equality in rates. It is the purpose of this chapter to state these principles with the application thereof that has been made, and to deduce therefrom, to the extent that may be, such rules as can be legally and properly applied. In doing so, it must not be forgotten that the facts to be considered are numerous and of constantly varying force, that a definite measure for the determination of the legality of a rate has not been fixed and that a flexible judgment must be applied to situations as they arise, and that long established and generally accepted conditions can not

be abruptly changed, but that slow evolution is the concomitant of rate regulation.

§ 133. **Common Law as to Equality in Rates by Carriers.** —The common law rule as to the reasonableness of rates we have seen *supra*, sec. 61, was undisputed. Equality in rates was not so definitely provided for in that system of laws, and it has been doubted whether or not a carrier was bound to charge equal rates to all its customers. Discussing this question Mr. Justice Brown said:[1]

"Prior to the enactment of the act of February 4, 1887 (24 Stat. at L. 379), to regulate commerce, commonly known as the Interstate Commerce Act, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service: (Fitchburg R. Co. *v.* Gage, 12 Gray, 393; Baxendale *v.* Eastern Counties R. Co., 4 C. B. N. S. 63; Great Western R. Co. *v.* Sutton, L. R. 4 H. L. 226, 237; Ex parte Benson, 18 S. C. 38; Johnson *v.* Pensacola & P. R. Co., 16 Fla. 623); though the weight of authority in this country was in favor of an equality of charge to all persons for similar services."

That the common law required equality of service and charges under the same or similar circumstances more clearly appears from a subsequent decision of the Supreme Court in Western Union Tel. Co. *v.* Call Publishing Co.,[2] where Mr. Justice Brewer said:

"Common carriers, whether engaged in interstate commerce or in that wholly within the state, are performing a public service. They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to serv-

[1] Int. Com. Com. *v.* Baltimore & O. R. Co., 145 U. S. 263, 36 L. Ed. 699, 703, 12 Sup. Ct. 844. See 3 Fed. Stat. Ann. 813.

[2] Western Union Tel. Co. *v.* Call Publishing Co., 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561.

ice and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of difference, and can not be so great as to produce an unjust discrimination. To affirm that a condition of things exists under which common carriers anywhere in the country, engaged in any form of transportation, are relieved from the burdens of these obligations, is a proposition which, to say the least, is startling."

Further in the opinion it was stated that "the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional action," and, we may conclude, that such principles required "equal rights both in respect to service and charges," when the circumstances and conditions were the same; and where the circumstances and conditions were different, the difference in services and charges should bear a reasonable relation thereto.

§ 134. **Same Subject—Damages.**—In the Parsons case [3] the question discussed was not the *right* to "equality of charge * * * for similar services," but that opinion had reference to plaintiff's right to recover damages under the special facts there involved. That inequality of charges for similar services was wrong was not questioned for, said the court: "Before any party can recover under the act he must show, not merely the wrong of the carrier, but that that wrong has in fact operated to his injury. If he had shipped to New York and been charged local rates he might have recovered any excess thereon over through rates. He did not ship to New York and yet seeks to recover the extra sum he might have been charged if he had shipped."

The same comment applies to the decision in the Coal case. That case was based upon the fact that the carrier had given what was decided to be a rebate to certain shippers and had not

[3] Parsons v. Chicago & N. W. R. Co., 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. 887.

given the same allowances to the plaintiff suing. In the District Court the plaintiff recovered,[4] and the recovery was sustained by the Circuit Court of Appeals.[5] In the Supreme Court the judgment of the Circuit Court of Appeals was reversed and a new trial ordered, not because the plaintiff did not have a right of action, but because it had not shown that it had suffered legal damages.[6]

Neither of these cases denies that at common law a shipper had a right to equality of charges under similar circumstances, and in this respect neither conflicts with the statement of Mr. Justice Brown quoted in the preceding section. That equality of service from a public service company or corporation was a right at common law, seems to be, so far as the Supreme Court of the United States has spoken, undisputed. In order to recover damages for an invasion of this right proof of the fact of having suffered legal damages is necessary.

Where as under the Constitution of the United States a schedule of rates may not be fixed less than will yield a fair return on the property employed in the public use, every customer of a public carrier is, to some extent, interested in what is charged every one else. It is true that an individual may not have a cause of action so long as what he pays is reasonable, unless the preference granted others damages him.

Neither under our statute nor under the common law is mere discrimination prohibited, but it will be found upon an examination of the English authorities, that where the circumstances and conditions were the same those who dealt with a common carrier were entitled to equal treatment.

§ 135. **Comparison of the English Railway and Canal Act with the Act to Regulate Commerce.**—The remark of the Supreme Court in Int. Com. Com. *v.* Baltimore & O. R. Co.,[7] "that Congress in adopting the language of the English act, had in mind the construction given to these words by the English

[4] International Coal Mining Co. *v.* Pennsylvania R. Co., 162 Fed. 996.

[5] Pennsylvania R. Co. *v.* International Coal Co., 173 Fed. 1, 97 C. C. A. 383.

[6] Pennsylvania R. Co. *v.* International Coal Co., 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893. See, following this case and citing authorities, New Orleans Board of Trade *v.* Illinois C. R. C., 29 I. C. C. 32.

[7] Int. Com. Com. *v.* Baltimore & O. R. Co., 145 U. S. 263, 36 L. Ed. 699, 703, 12 Sup Ct. 844.

courts" had reference to section three of our act, although to a lesser extent the same could be said of section two.

Section two of the act of February 4, 1887, *post*, § 345, known as the unjust discrimination clause, is based upon § 90 of the English Railway Clauses Act of 1845.[8] The section of the English act, called the Equality Clause, provided that "tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances." Section two of the Interstate Commerce Act used the words "under substantially similar circumstances and conditions," which phrase is not so exclusive as the words of the English act which requires equality only when the transportation is "over the same portion of the line of railway." The American act is, therefore, broader in its scope than the English act, but each act recognizes that "different circumstances" may justify different rates. The English statute uses the word "same" before "circumstances," ours uses the word "similar." This difference and the broader scope of the American act should be kept in mind when considering the English decisions. Section two of the English Railway and Canal Traffic Act of 1854,[9] furnished the model of section three of our act.[10] The English and the American sections just referred to are each designated as the "undue preference clause." The fourth section of the American act, known as the "long and short haul clause," was unlike any section of the English act prior to 1887. In 1888 the Railway and Canal Traffic Act of that year gave the English Commissioners power to prohibit a higher charge for a less distance where the service is similar. The provision is the third paragraph of section twenty-seven and reads as follows:[11]

[8] Browne & Theobald Law of Railways (English), p. 312. Trammell, Railroad Commissioners of Georgia *v.* Clyde S. S. Co., 5 I. C. C. 324, 4 I. C. R. 120, 140.

[9] Browne & Theobald, *supra*, p. 405. Trammell Case, *supra*, note 5, this chapter.

[10] *Post*, Sec. 346, note 7, *supra*, this chapter.

[11] Browne & Theobald, *supra*, p. 771; see also sections 25 to 27 English Railway and Canal Traffic Act of 1888; Browne & Theobald, pp. 765 to 772.

"The court or the commissioners shall have the power to direct that no higher charge shall be made to any person for services in respect of merchandise carried over a less distance than is made to any other person for similar services in respect of the like description and quantity of merchandise carried over a greater distance on the same line of railway."

This comparison may be concluded by quoting the language of the commission as follows:[12]

"In a case purely of alleged undue preference or prejudice the English cases have direct application. Even in cases under our second and fourth sections, English cases brought under the undue preference clause in which the decision has held undue preference to exist, have value as showing how strictly the English commission or court has applied the broader language of the clause to a particular set of facts, but when English decisions under the undue preference clause are cited by a carrier in justification of its action under the strict language of our second and fourth sections, the citations have greatly diminished force. These sections apply only against rates in specific cases, but the undue preference clause or third section is inclusive; it applies both to rates and facilities, and says generally to the carrier, you shall not in any manner unduly prefer one person or kind of traffic over another, and leave it to the commission or the court to say when the undue preference is given. In the second and fourth sections what is unlawful is clearly defined, the circumstances and conditions of the transportation being similar in substance. We think, therefore, that while English cases are valuable as defining undue preference or prejudice their value is greatly limited in cases where the statute itself describes the offense it declares unlawful."

§ 136. **Discrimination Forbidden.**—Equality of rights and privileges under "substantially similar circumstances and conditions" is sought to be guaranteed shippers and "particular descriptions of traffic" by sections two, three and four of the act to regulate commerce. These sections, which were in the original act and have been retained in the amendments, announce the principles of law fixing equality of charges and service by common carriers. These principles are supported and enforced

[12] Trammell, Railroad Commission of Georgia *v.* Clyde S. S. Co., 5 I. C. C. 324, 4 I. C. R. 120, 143, 144.

by the provisions of the act to regulate commerce which prohibit free passes, except under certain prescribed limitations, prohibit carriers from transporting commodities in which they are interested; require the making of switch connections; making criminal the pooling of freights; require schedules of rates to be printed, posted and maintained; prevent changes in rates without at least thirty days notice unless where special permission is given to make changes on less notice; provide punishment for granting, receiving, or inducing the payment of rebates; punish false billing; require witnesses to testify, and prescribe methods of procedure for the public enforcement of the act and the protection of individuals who may suffer from its violation.

Inequality of charges is an evil that is more readily seen and keenly felt than are charges unjustly high. A difference in a freight charge of a few cents per hundred pounds on a particular commodity may mark the line between a reasonable and an unreasonable rate and the higher charge may be unjust and unreasonable. The injustice, however, is so distributed that no one feels seriously hurt and no complaint is made. A preferential or discriminatory charge may make or unmake cities and individuals and may hurt some to the benefit of others. Such charges, therefore, are not only unjust and contrary to the very spirit of the American people, but they are sufficiently injurious to arouse to action those who are injured. The consumer usually pays the unjustly high rate, but the shipper or the community is injured, sometimes ruined, by the discriminatory rate. Under the once prevalent system of rebating, businesses were built up or destroyed by carriers. Even since rebating has practically ceased, cities are helped or injured by privileges given the one and withheld from the other. Rarely would carriers have complaints of rates if all rates and practices were adjusted without undue discrimination and unjust preference. Speaking of the evils existing before the act to regulate commerce was passed by Congress and which evils the states had ineffectually attempted to remedy, the Supreme Court said:[13]

"These evils ordinarily took the shape of inequality of charges made, or of facilities furnished, and were usually dictated by or tolerated for the promotion of the interests of the

[13] Int. Com. Com. *v.* Baltimore & O. R. Co., 145 U. S. 263, 36 L. Ed. 699, 703, 12 Sup. Ct. 844.

officers of the corporation or of the corporation itself, or for the benefit of some favored persons at the expense of others, or of some particular locality or community, or of some local trade or commercial connection, or for the destruction or crippling of some rival or hostile line."

The problem of giving shippers a just equality is not an easy one of solution by the carriers. It is easier to know what is just equality than to adopt such rates and practices as will accomplish that end. Long existing injustice is hard to dislodge. A particular discrimination that has long continued in favor of a community, has become in the eyes of that community a vested right. It is hard for the beneficiary of a wrong to see that wrongs do not become rights by mere lapse of time. Carriers frequently welcome the aid of the commission to help rid themselves of practices that are unjustly discriminatory.

§ 137. **Discrimination against Individuals.**—Section two of the act to regulate commerce, *post* section 345, was intended to prevent different charges for different persons for a like and contemporaneous service to a like kind of traffic under substantially similar circumstances and conditions. Under the "same circumstances" and "goods of the same description" used in the English law are not used with reference to the contents of the parcels but to the parcels themselves, that is, like or different for the purposes of carriage. They are also used with reference to the conveyance of goods and not to the persons themselves.[14] This means, and the act to regulate commerce has also been so construed, that competition, however great, can not justify charges to one person greater than those to another. Two shippers, shipping a like kind of traffic at the same time, over the same road, are entitled to the same rate. It makes no difference that one may be in a position to ship over another line, or that his total shipments may greatly exceed those of the other. In Wight *v.* United States,[15] the Supreme Court, speaking of the phrase "under substantially similar circumstances and conditions," said:

"For this case, it is enough to hold that that phrase as found

[14] G. W. Ry. Co. *v.* Sutton, 38 L. J. Ex. 177, L. R. 4 H. L. 226, 22 L. T. 43, 18 W. R. 92.

[15] Wight *v.* United States, 167 U. S. 512, 42 L. Ed. 258, 17 Sup. Ct. 822. See also Int. Com. Com. *v.* Detroit G. H. & M. Ry. Co., 167 U. S. 633, 42 L. Ed. 306, 310, 17 Sup. Ct. 986; Re Restricted Rates, 20 I. C. C. 426, 433.

in section 2, refers to the matter of carriage, and does not include competition."

In the Troy Alabama case,[16] the Supreme Court advanced the same ruling as follows:

"To prevent misapprehension, it should be stated that the conclusion to which we are led by these cases, that, in applying the provisions of the 3d and 4th sections of the act, which make it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than a longer distance over the same line, in the same direction, competition which affects rates is one of the matters to be considered, is not applicable to the 2d section of the act.

"As we have shown in the recent case of Wight *v.* United States, 167 U. S. 512 (42 L. Ed. 258, 17 Sup. Ct. 822), the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor, and we there held that the phrase "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage, and does not include competition between rival routes.

"This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for what we hold is that, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but that in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that

[16] Int. Com. Com. *v.* Alabama M. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45; Pennsylvania R. Co. *v.* International Coal Mining Co., 173 Fed. 1, 97 C. C. A. 383; reversed on another point, Pennsylvania R. Co. *v.* International Coal Mining Co., 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893.

have a legitimate bearing on the situation—among which we find the fact of competition when it affects rates."

Kirkman, in the Science of Railways, vigorously argues against any governmental regulation of railroads, but he admits that there is no justice in distinguishing between persons. He says:[17]

"If a railroad refuses to one shipper what it concedes to another, everything being alike, article, place, time, quantity, risk, and service, that is not discrimination, but robbery. Petty instances of this kind have occurred in the history of railway management. But they are only instances. They are, however, the stock in trade of railway critics. They are unworthy of notice. They form no appreciable element, and are not to be compared for a moment to the benefits that grow out of the ability of carriers to adapt their properties to the varying needs of those they serve."

§ 138. **Same Subject.**—The equality required by section two of the Act is as to all persons for performing "a like and contemporaneous service" relating to a "like kind of traffic" transported "under substantially similar circumstances and conditions." The three quoted provisions are limitations on or exceptions to the general principle of equality. What then is meant by these phrases? In Mitchell Coal & Coke Co. *v.* Penn. R. Co.[18] the contention was made that "contemporaneous" must be confined to shipments made practically at the same moment of time, and that shipments as much as a month apart were too remote to come within the meaning of the statute. Obviously such a construction would destroy the practical effect of the law, and the court properly held that the word referred to rates in effect and meant "at the same time with the offending rates." In affirming this case in part, the Supreme Court recognized and applied this construction.[19]

"Like kind of traffic" permits a classification of different commodities but the phrase refers to the traffic itself, and not to the use to which it should be put nor to its ownership.

In Sec. 89 chapter three hereof is discussed the cases referring to the use of a commodity. Under the holdings of the Com-

[17] Vol. 8, p. 110.

[18] Mitchell Coal Co. *v.* Pennsylvania R. Co., 181 Fed. 403, 411.

[19] Mitchell Coal & Coke Co. *v.* Pennsylvania R. Co., 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916.

mission and the decisions of the courts, in the words "like kinds of traffic," like modifies traffic and not the use to which the traffic may be put.[20]

How "similar circumstances and conditions" has been construed is shown in the next preceding section. That different persons may own the commodities shipped constitutes no different circumstance or condition.[21] The words relate to the circumstance of carriage only.[22] The provision requires the same equality as to the incidents of transportation, the accessorial services; thus it is illegal to give a shipper a preference by the devise of leasing to him at a nominal charge land used in the transportation of his commodities.[23] So it is illegal to concede a favored shipper the privilege of giving notes in payment of freight due.[24] The rule of equality extends to demurrage.[25] The provisions of the Elkins Act prohibiting rebates will be discussed in a subsequent section.[26]

§ 139. **Same Subject—Construction by the Commission.** —In Capital City Gas Co. *v.* Central V. R. Co.[27] Mr. Commissioner Knapp, speaking for the commission and having under consideration rates, one of which was made for coal when delivered to a connecting carrier for "railroad supply," and the other and higher of which was a combination rate applicable to coal used for commercial purposes and purposes other than "railroad supply," said:

"When bituminous coal is carried by defendants from Norwood to Montpelier the service is performed under substantially

[20] Int. Com. Com. *v.* Baltimore & O. R. Co., 225 U. S. 326, 57 L. Ed. 1107, 32 Sup. Ct. 742. See also Business Men's Ass'n *v.* Chicago, St. P. M. & O. R. Co., 2 I. C. C. 52, 2 I. C. R. 41.

[21] Int. Com. Com. *v.* Delaware, L. & W. Ry. Co., 220 U. S. 235, 55 L. Ed. 448, 31 Sup. Ct. 392, reversing Delaware, L. & W. Ry. Co. *v.* Int. Com. Com., 166 Fed. 499. See as to persons, Re Advances on Manganese Ore, 25 I. C. C. 663, 668; Re Commutation Tickets to School Children, 27 I. C. C. 144.

[22] Pennsylvania R. Co. *v.* International Coal Mining Co., 173 Fed. 1, 97 C. C. A. 383. See Same Case, 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893.

[23] Southern Pacific Terminal Co. *v.* Int. Com. Com., 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279.

[24] United States *v.* Sunday Creek Co., 194 Fed. 252; affirmed same Styled Case, 210 Fed. 747.

[25] Lehigh Valley R. Co. *v.* United States, 188 Fed. 879.

[26] Sec. 371.

[27] Capital City Gas Co. *v.* Central Vermont R. Co., 11 I. C. C. 104, 105, 106, 107.

similar circumstances and conditions whether transported for a connecting railroad or for complainant and other consumers. * * * * * * * * *

"We are constrained to hold that these facts, which are wholly undisputed, establish a discrimination forbidden by the second section of the act. In transporting bituminous coal from Norwood to Montpelier at 90 cents a ton for "railroad supply" the same service is performed and the circumstances and conditions of carriage are the same in every material effect as in transporting coal at $1.85 per ton for complainant and other consignees. This appears to be conceded since no proof was offered that the fact is otherwise. It follows, as we think, that the difference in rates is a violation of the statute.

Wight *v.* United States, 167 U. S. 512, 42 L. Ed. 258, 17 Sup. Ct. Rep. 822; Interstate Commerce Commission *v.* Alabama Midland R. Co., 168 U. S. 144, 166, 42 L. Ed. 414, 423, 18 Sup. Ct. Rep. 45.

"In the former case it was held that the phrase 'under substantially similar circumstances and conditions,' as used in the second section, refers to the matter of carriage, and the decision therein rendered, as explained and confirmed in the subsequent case, condemns as unlawful the discriminating charges here considered. It is not permissible under this section for two or more carriers to establish a joint through rate, less than the sum of their locals, which is available only to a particular shipper or class of shippers, while denying such lower rate to other shippers of like traffic between the same points of origin and destination. In such case it may be said that the law presumes a common injury to those compelled to pay the higher rate because of the concession to the interest favored. If those defendants obtain only reasonable returns from their entire coal traffic, it may be well claimed that the rates charged complainant and other Montpelier consumers are higher than they would be but for the much lower rates allowed on coal for "railroad supply."

"Moreover, if this view is correct, the absence of actual prejudice to complainant would not excuse the defendants. The most salutary law may doubtless be disregarded in some cases without injury and inflict a degree of hardship in other cases by its enforcement. Whatever may be said in that regard in the present instance, we are convinced, upon the authority of the decisions above cited, that the regulating statute does not permit

the discrimination shown in this case and our ruling must so declare."

The discrimination meant by the Act is everything that may affect the shipper, for, says the Commission: "That one shipper may not enjoy at the hands of a carrier advantages that are denied to other shippers is a principle asserted in the Act throughout its various provisions,"[28] or, as subsequently stated by the Commission: "The fundamental principle of this Act, (the Act to Regulate Commerce), as so often stated by the Supreme Court, is one of fair play." [29]

§ 140. **Same Subject—Allowances to Shippers.**—Under the amendment of June 29, 1906, to the Act to Regulate Commerce, the owner of property transported rendering services in connection with the transportation or furnishing an instrumentality used therein is entitled to charge therefor.[30] Such charge must be stated in the published tariffs,[31] must not violate any of the sections of the Act requiring reasonable and non-discriminating rates. Whatever allowances are made, being published in a tariff, are subject to complaint to the Commission and may be investigated by the Commission on its own initiative, and that tribunal may determine what allowance is legal and reasonable.[32] Whether or not the amount allowed is reasonable must, like all

[28] Brook-Rauch Mill & Elevator Co. *v.* Missouri Pac. Ry. Co., 17 I. C. C. 158, 164, citing Eichenberg *v.* Southern Pac. Co., 14 I. C. C. 250, which latter case was approved by the Supreme Court in Southern Pac. Terminal Co. *v.* Int. Com. Com., 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279.

[29] Mobile Chamber of Commerce *v.* Mobile & O. R. Co., 23 I. C. C. 417, 426. See Kaufman Commercial Club *v.* T. & N. O. R. Co., 31 I. C. C. 167, 171, where it was said: "A just equality of opportunity for shipper and locality is required by law."

[30] For statute see Sec. 404, *post.*

[31] American Sugar Refining Co. *v.* Delaware, L. & W. Ry. Co., 200 Fed. 652. While there have been rulings on the subject of this case not in accord with the general opinion on this point, the decision is correct. See Re Allowances for Transfer of Sugar, 14 I. C. C. 619; Federal Sugar Refining Co. *v.* B. Baltimore & O. R. Co., 20 I. C. C. 200; Baltimore & O. R. Co. *v.* United States, 200 Fed. 779, Opinion Commerce Court No. 38, p. 499; United States *v.* B. & O. R. Co., 231 U. S. 274, 58 L. Ed. 218, 34 Sup. Ct. 75; Langdon *v.* Pennsylvania R. Co., 194 Fed 486, 496.

[32] Suffern Grain Co. *v.* Illinois Cent. R. Co., 22 I. C. C. 178, 183; Union Pac. R. Co. *v.* Updike Grain Co., 222 U. S. 215, 218, 56 L. Ed. 171, 32 Sup. Ct. 39.

charges relating to transportation, be determined by the facts and circumstances in each particular case having in view all relevant principles applicable to questions relating to the determination of the reasonableness and validity of rates. It is equally true that whether or not a particular allowance unjustly discriminates against other shippers presents a question determinable from the particular facts applicable to the special case. The Commission may not, when the shipper is within the provisions of the statute, deny to him a proper allowance.

The shipper who owns instrumentalities used in transportation or who is in a position to render services in connection therewith, who receives compensation for his services or pay for the use of his instrumentalities, can not be said to be unfairly favored so long as the allowance or pay is not unreasonable and so long as others rendering like services or furnishing like instrumentalities are treated in the same way.

Examples of allowances are, for compressing cotton,[33] grain doors,[34] elevation of grain,[35] staking cars,[36] lighterage,[37] transportation by tap lines and industrial lines.[38] The question will be treated more in detail in later sections of this chapter where is discussed the question of whether or not the specific service or instrumentality upon which the claim for allowance is based justifies any allowance.

§ 141. **Trap Car Service.**—The Commission has defined this service as follows:[39] "The term trap or ferry, strictly speaking, is applied to a car placed at an industry or commercial house

[33] Merchants Cotton Compress & Storage Co. *v.* Illinois Cent. R. Co., 17 I. C. C. 98; Anderson, Clayton & Co. *v.* Chicago, R. I. & P. Ry. Co., 18 I. C. C. 340.

[34] Balfour, Guthrie & Co. *v.* Oregon W. R. & N. Co., 21 I. C. C. 539.

[35] Union Pac R. Co. *v.* Updike Grain Co., 222 U. S. 215, 56 L. Ed. 171, 32 Sup. Ct. 39; Traffic Bureau Merchants Exchange *v.* Chicago, B. & Q. R. Co., 22 I. C. C. 496.

[36] Duluth Log Co. *v.* Minnesota & I. R. Co., 15 I. C. C. 627.

[37] United States *v.* B. & O. R. Co., Federal Sugar Refining Co. Cas., 231 U. S. 274, 58 L. Ed. 218, 34 Sup. Ct. 75. See also Lighterage and Storage Regulations at New York, 35 I. C. C. 47.

[38] Louisiana & P. Ry. Co. *v.* United States, 209 Fed. 244; Tap Line Cases, 234 U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 741; Industrial Railways Case, 29 I. C. C. 212; Car Spotting Charges, 34 I. C. C. 609.

[39] Trap or Ferry Car Service Charges, 34 I. C. C. 516.

having a private siding, and there loaded by a shipper with less-than-carload shipments, and hauled by a carrier to its local freight or transfer station for handling and forwarding of contents; and also is applied to a car loaded with less-than-carload shipments which is hauled to and placed upon the private track of an industry or commercial house by the carrier from a local freight or transfer station. Where such cars are loaded to a prescribed minimum, the practice of respondent has been to make no charge for the service. In the eastern part of the territory involved the name 'ferry' is given to a car used as above described, and in the western part the name 'trap' is applied. The origin of the names is not clear. Both mean the same thing, and for convenience the word trap will be hereinafter used."

In the Five Per Cent Case[40] the Commission suggested that the carriers investigate special services being rendered by them with a view to eliminating those that were discriminatory and making proper charges for those which were legal. In Conference Ruling 97, the Commission said: "The Commission condemns as unlawful a practice under which a carrier provides an empty car at factory sidings in which the shipper may load less-than-carload shipments which the carrier then moves to its regular freight station, where the shipments are assorted and placed in other cars to be forwarded to their respective destinations. Such a practice is lawful only under definite and clear tariff authority, nondiscriminatory in terms and in its application."

Ostensibly in compliance with the suggestion and the ruling of the Commission, but with a real desire that the practice be continued, tariffs were filed by the carriers in which charges were proposed for the trap car service. In the Trap Car Case *supra,* these tariffs were ordered canceled. The advantages from the service, both to the public and to the carriers, were shown, and it was held that the service when offered without undue preference or unjust discrimination, was not illegal. It is hardly open to successful contradiction that this service lessens the congestion which, without the service, would result to the carriers' terminal facilities.

§ 142. **Peddler Cars.**—In some parts of the United States the carriers have for many years maintained what has come to be called a peddler car service. This service has been defined in 32 I. C. C. 429, note 41, below as follows:

[40] Five Per Cent Case, 31 I. C. C. 351, 408.

"The original arrangement permitted the sale from the cars, as peddlers from wagons, of fresh meats and packing-house products, but the growth of the business and economy of operation demanded that sales should be made prior to the shipment of the car, and that each package should be consigned to a particular consignee. The cars move from the packing houses, usually on certain days of each week, and the loading depends on sales made in advance, generally by salesmen of the packers who canvass the territory served by the peddler-car routes. When a packer has orders for a sufficient tonnage he makes arrangements with the carrier for the shipment and loads at his packing plant a refrigerator car owned by him which is usually equipped with meat hooks and other necessary appliances. Each car contains on the average less than 100 consignments, which are loaded in station order. The car is then forwarded by fast freight to the first destination to which there is a consignment, after which it is handled as way freight and the various consignments are unloaded by the carriers at the stations to which they are billed. * * * It appears that the service rendered by the respondents in connection with the peddler cars is generally not greater, and in some instances less, than the service which they render in connection with less-than-carload traffic handled through their freight houses; that for the peddler-car service the user pays the regular less-than-carload rates, guarantees the carriers a minimum per-car earning, saves the carrier the expense of refrigeration, reduces loss and damage claims, and gives to the carrier a volume of traffic which could not be satisfactorily transported in its own equipment."

Such a service when performed without discrimination is not illegal.[41]

§ 143. **Car Spotting.**—Similar in principle to the trap car service is what has been called car spotting which is defined:[42] "'Spotting' service is the service beyond a reasonably convenient point of interchange between road haul or connecting carrier and industrial plant tracks, and includes: (a) One placement of a

[41] Investigation of Alleged Unreasonable Rates on Meats, 23 I. C. C. 656; Rules Governing Shipments of Freights in Peddler Cars, 32 I. C. C. 428; Rates and Rules on Shipments Packing House Products, 36 I. C. C. 62.

[42] Car Spotting Charges, 34 I. C. C. 609, 614; Alan Wood Iron & Steel Co. *v.* P. R. Co., 22 I. C. C. 540.

loaded car which the road haul or connecting carrier has transported, or (b) The taking out of a loaded car from a particular location in the plant for transportation by road haul or connecting carrier. (c) The handling of the empty car in the reverse direction."

While the shipper where shipments are delivered at his plant or warehouse saves drayage, the carrier who makes the delivery is not using its terminals and the advantage is mutual. It is therefore a service which is not illegal per se and only becomes illegal when granted to one and refused to another under circumstances which cause that discrimination prohibited by law.[43]

§ 144. **Undue Preferences in Favor of Persons or Localities.**—Section three of the act to regulate commerce we have seen is substantially the same as section two of English Railway and Canal Traffic Act of 1854.[44] This section is broader than section two of the English Act and prohibits undue or unreasonable preference. The words "undue" and "unreasonable" in the section show that in the legislative mind there could be a preference that was not unreasonable and that was legal. This has been the construction both of the English and the American statutes. The Supreme Court discusses English cases in the Party Rate Case,[45] and also construes both sections two and three. The Supreme Court in the case referred to refused to enforce an order of the commission and held that a party of ten or more could be legally carried on one ticket at a less rate for each individual than was charged for one person. In the course of the opinion Mr. Justice Brown said:

"In order to constitute an unjust discrimination under section 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but, in either case, it must be for a 'like and

[43] General Elec. Co. *v.* N. Y. C. & H. R. Co., 14 I. C. C. 237; Los Angeles Case, 18 I. C. C. 310; Order sustained by Supreme Court, Los Angeles Switching Case, 234 U. S. 294, 58 L. Ed. 1319, 34 Sup. Ct. 814; Atchison, T. & S. F. Ry. Co. *v.* U. S., 232 U. S. 199, 58 L. Ed. 568; 34 Sup. Ct. 291; Iowa & S. W. Ry. Co. *v.* C., B. & Q. R. Co., 32 I. C. C. 172.

[44] Sec. 135, *infra.*

[45] Int. Com. Com. *v.* Baltimore & O. R. Co., 145 U. S. 263, 36 L. Ed. 699, 705, 12 Sup. Ct. 844, 4 I. C. R. 92.

contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions.' To bring the present case within the words of this section, we must assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible.

"In this connection we quote with approval from the opinion of Judge Jackson in the court below: 'To come within the inhibition of said sections (2 and 3), the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons, or classes, between whom differences in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue advantage to the other, in order to constitute unjust discrimination.'

"The English Traffic Act of 1854 contains a clause similar to section 3 of the Interstate Commerce Act, that 'no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company; or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or, company, or any particular description of traffic, to any undue or unreasonable prejudice, or disadvantage in any respect whatsoever.'

"In Hozier *v.* Caledonian R. Co., 17 Sess. Cas. 303, 1 Nev. & McN. R. Cas. 27, complaint was made by one who had frequent occasion to travel, that passengers from an intermediate station between Glasgow and Edinburgh were charged much greater rates to those places than were charged to other through passengers between these termini; but the Scotch Court of Session held that the petitioner had not shown any title or interest to maintain the proceeding; his only complaint being that he did not choose that parties traveling from Edinburgh to Glasgow should enjoy the benefit of a cheaper rate of travel than he himself could enjoy. 'It provides,' said the court, 'for giving undue

preference to parties *pari passu* in the matter, but you must bring them into competition in order to give them an interest to complain.'

"This is in substance holding that the allowance of a reduced through rate worked no injustice to passengers living on the line of the road, who were obliged to pay at a greater rate. So, in Jones *v.* Eastern Counties R. Co., 3 C. B. N. S. 718, the court refused an injunction to compel a railway company to issue season tickets between Colchester and London upon the same terms as they issued them between Harwich and London, upon the mere suggestion that the granting of the latter, the distance being considerably greater, at a much lower rate than the former, was an undue and unreasonable preference of the inhabitants of Harwith over those of Colchester. Upon the other hand, in Ransome *v.* Eastern Counties R. Co., 1 C. B. N. S. 437, where it was manifest that a railway company charged Ipswich merchants who sent from thence coal which had come thither by sea, a higher rate for the carriage of their coal than they charged Peterboro merchants, who had made arrangements with them to carry large quantities over their lines, and thus the sums charged the Peterboro merchants were fixed so as to enable them to compete with the Ipswich merchant, the court granted an injunction upon the ground of an undue preference to the Peterboro merchants, the object of the discrimination being to benefit the one dealer at the expense of the other, by depriving the latter of the natural advantages of his position. In Oxlade *v.* Northeastern R. Co., 1 C. B. N. S. 454, 26 L. J. C. P. 129, 1 N. & Mac. 72, a railway company was held justified in carrying goods for one person for a less rate than that at which they carried the same description of goods for another, if there be circumstances which render the cost of carrying the goods for the former less than the cost of carrying them for the latter, but that a desire to introduce northern coke into a certain district was not a legitimate ground for making special agreements with different merchants for the carriage of coal and coke at a rate lower than the ordinary charge, there being nothing to show that the pecuniary interests of the company were affected; and that this was an undue preference.

"In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any

fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. But so far as relates to the question of 'undue preference,' it must be presumed that Congress, in adopting the language of the English act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute. McDonald *v.* Harvey, 110 U. S. 619 (28 L. Ed. 269, 4 Sup. Ct. 142)."

In the same case Circuit Judge Jackson, afterwards Mr. Justice Jackson, said:[46] "In passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interest of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company and the situation and circumstances of the respective customers with reference to each other, as competitive or otherwise."

§ 145. **Same Subject—Application of Section Made by the Commission.**—There have been a great many cases in which the Interstate Commerce Commission has applied section 3 of the Commerce Act. A clear and fair reading of the law, says the Commission, "is one which credits Congress with the intention of stopping all undue discrimination by interstate carriers. It may be said without exaggeration that it is the paramount duty of interstate carriers under this Act to avoid discrimination."[47]

The law is not satisfied because a rate may not be unreasonably high for, as said by the Commission:

"A community is entitled to something more than a reasonable rate; it is entitled to a nondiscriminatory rate. The carrier may not say, 'We will give to this community a reasonable rate' and meet the full requirements of the law; it must view its rates as

[46] Int. Com. Com. *v.* Baltimore & O. R. Co., 43 Fed. 37, 53, 54, 3 I. C. R. 192.

[47] R. R. Com. of Louisiana *v.* St. Louis S. W. Ry. Co., 23 I. C. C. 31, 41 (Shreveport Case); Order sustained by the Supreme Court, Houston E. and W. *v.* United States, 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833.

a whole and see to it that they affect no advantage or preference to one community over another which does not arise necessarily out of the transportation advantages which the one has over the other."[48]

The prohibitions of the section apply to all the carrier's duties and obligations, to facilities and to through routes, for, as said by the Supreme Court and quoted by the Commission, the carrier "is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons upon an absolute equality."[49]

Nor does the fact, that removing unjust discrimination may reduce revenues, constitute an answer to the claim for "fair play."[50]

"Nor is it the view of the Commission that a carrier can not be held to discriminate against a community or territory which it does not reach by its own rails. If it participates in a joint rate from the territory affected and is in such position that it may either join in such rates or decline to do so, it is then liable for the discrimination which may result from its action in joining with the other carriers in the discriminatory rate or regulation."[51]

The Commission has no power to compel carriers to advance rates, so when there is discrimination in rates between two communities, unless the carrier removes such discrimination, the high rate must be reduced.[52] Whether or not a preference or advantage is undue or unreasonable within the meaning of the

[48] R. R. Com. of Nevada *v.* Southern Pac. Co., 21 I. C. C. 329, 366, quoted with approval in Topeka Traffic Assn. *v.* Alabama & V. Ry. Co., 27 I. C. C. 428, 436.

[49] Union Pac. R. Co. *v.* Goodridge, 149 U. S. 680, 37 L. Ed. 896, 13 Sup. Ct. 970, quoted in Re Wichita Falls System Joint Coal Rates, 26 I. C. C. 215, 223.

[50] Cardiff Coal Co. *v.* Chicago, M. & St. P. Ry. Co., 13 I. C. C. 460, 467.

[51] Partridge & Sons *v.* Pennsylvania R. Co., 26 I. C. C. 484, 486, 487 citing: Indiana Steel & Wire Co. *v.* Chicago, R. I. & P. Ry. Co., 16 I. C. C. 155; Southern Furniture Mnfrs. Assn. *v.* Southern Ry. Co., 25 I. C. C. 379; Rates from the Walsenberg Coal Field, 26 I. C. C. 85. See also Chamber of Commerce of Ashburn, Ga., *v.* Georgia, S. & F. R. Co., 23 I. C. C. 140, and a summary of Commission cases cited pp. 148, 149, 150.

[52] Rates Transportation of Fresh Meats & Packing House Products, 23 I. C. C. 652, 655; Scott Paper Co. *v.* Pennsylvania R. Co., 26 I. C. C. 601, 603.

section is "primarily for the investigation and determination of the Interstate Commerce Commission and not for the courts. The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose."[53]

§ 146. **Discrimination against Traffic.**—The section prohibits "any undue or unreasonable preference or advantage to * * * any particular description of traffic."

In discussing classification, section 81 *supra*, it has been shown that different commodities have been classified or given a special commodity rating. The necessity and propriety of this is there shown. When, however, a particular "description of traffic" is classified, it must be without undue or unreasonable preference.

In determining the reasonableness of rates, comparisons may be made between commodities of like weight, bulk, value, etc., regardless of whether or not those commodities come in competition the one with the other.

In determining whether or not particular descriptions of traffic are so rated by the carrier as to violate the provisions quoted herein, it is material to determine whether or not the different commodities in any way compete. This principle has been applied by the Commission. Illustrative of the application are:

Wall plaster and cement were sought to be compared, and it was said: "It is admitted that a charge of undue discrimination may not be predicated on the lower cement rates, because the commodities are not competitive."[54] In denying relief where competition between localities was alleged, the Commission said: "It does not appear that there is such a competitive relation between Baton Rouge and New Orleans in respect to the com-

[53] Simpson *v.* Shepard, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729, citing Texas & P. R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Ann. Cas. 1075; Baltimore & O. R. Co. *v.* United States, 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164; Robinson *v.* Baltimore & O. R. Co., 222 U. S. 506, 56 L. Ed. 288, 32 Sup. Ct. 114; United States *v.* Pac. & A. R. N. Co., 228 U. S. 87, 57 L. Ed. 742, 33 Sup. Ct. 443.

[54] Acme Cement Plaster Co. *v.* Lake Shore & M. S. Ry. Co., 17 I. C. C. 30, 36.

modity in question that different rates to these points are prima facie unlawful."[55]

Between the rates on wheat and coarse grain, which are "competitive in no practical sense,"[56] and between rates on poles and lumber,[57] there can be no undue or illegal preference because of lack of competition.

§ 147. **Same Subject—Discrimination Beyond the Control of the Carrier.**—On this subject the Supreme Court has said:[58]

"The prohibition of the 3d section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers."[59]

What conditions come within the description "beyond the control" of the carriers will be subsequently discussed. Suffice it to say that many past discriminations have been defended on the ground that the particular carrier complained against could not remedy the situation; the claim being made that the conditions had grown up and existed without the aid and contrary to the wishes of the carrier.

Length of time that an unreasonable preference has existed will not justify it. Judge Taft, in East Tenn., Va. & Ga. Ry. Co. *v.* Int. Com. Com., note 59, *supra,* said:

"We are pressed with the argument that to reduce the rates to Chattanooga will upset the whole southern schedule of rates, and create the greatest confusion; that for a decade Chattanooga has been grouped with towns to the south and west of her, shown in the diagram; and that her rates have been the key to the southern situation. The length of time which an abuse has continued does not justify it. It was because time had not cor-

[55] Southern Bitulithic Co. *v.* Illinois C. R. Co., 17 I. C. C. 300.

[56] Board of Trade of Chicago *v.* Chicago & A. R. Co., 27 I. C. C. 530, 535.

[57] California Pole & Piling Co. *v.* Southern Pac. Co., 27 I. C. C. 670.

[58] East Tenn., Va. & Ga. Ry. Co. *v.* Int. Com. Com., 181 U. S. 1, 18, 45 L. Ed. 719, 725, 21 Sup. Ct. 516.

[59] East Tenn., Va. & Ga. Ry. Co. *v.* Int. Com. Com., 99 Fed. 52, 63, 39 C. C. A. 413, 425. See also Board of Trade of Chicago *v.* Chicago & A. R. Co., 4 I. C. C. 158, 3 I. C. R. 233.

rected abuses of discrimination that the Interstate Commerce Act was passed."

From these authorities it is seen that in determining whether or not undue preference exists all the surrounding facts and circumstances must be considered, including competition and the interests of the public and the carriers. The commerce of this vast country could not be transacted unless carriers were allowed to meet market and other competition by taking all traffic that increases receipts more than expenditures. Nor are shippers seemingly discriminated against by this lower competitive traffic, really subjected to unjust and unreasonable discrimination or preference. If this cheaper rate traffic pays any profit, it, to that extent, increases the revenues of the carrier and enables it better to perform its public duties. As said by W. B. Dabney (The Public Regulations of Railways, 111, 113): "Discrimination which produces no injury can not be considered unjust; if it can be shown that discrimination may in certain cases be actually beneficial to the community apparently discriminated against, it should, instead of being denounced, be encouraged. It is not the commerce of one nation or continent alone, that determines the conditions of transportation within its limits, but that of the civilized world." Carriers, however, can not use these arguments to do more than meet the situations presented by the circumstances and conditions, and any discrimination in excess of that required by the different conditions is unjust and unreasonable.[60]

§ 148. **Facilities for Interchange of Traffic and Rates and Charges to Connecting Lines Must be Without Undue or Unreasonable Preference.**—Prior to the statute a carrier was not compelled to form a business connection with another carrier and was not compelled to "afford all reasonable, proper, and equal facilities for the interchange of traffic" with connecting carriers. In Atchison, T. & S. F. R. Co. *v.* Denver & N. O. R. Co.,[61] a bill was brought by the Denver company to compel the Atchison company to unite with it in forming a through line of railroad transportation with all the privileges as to exchange

[60] As to competition see *post*, Sec. 201. Rates made by a state, Sec. 44 ante.

[61] Atchison, T. & S. F. Ry. Co. *v.* Denver & N. O. R. Co., 110 U. S. 667, 28 L. Ed. 291, 4 Sup. Ct. 185.

of business that were customary with connecting carriers and that were then conceded to a competitive line of complainant. It appears from the evidence that it was the custom of connecting lines to make arrangements with reference to the interchange of business and the formation of through lines. Of the facts, the court said:

"A large amount of testimony is found in the record, as to the custom of connecting roads in respect to the interchange of business and the formation of through lines. From this it appears that, while through business is very generally done on through lines formed by an arrangement between connecting roads, no road can make itself a part of such a line, so as to participate in its special advantages, without the consent of the others. Oftentimes new roads, opening up new points, are admitted at once on notice, without a special agreement to that effect or in reference to details; still, if objection is made, the new road must be content with the right to do business over the line in such a way as the law allows to others that have no special contract interest in the line itself. The manner in which its business must be done by the line will depend not alone on the connection of its track with that of the line, but upon the duty which the line as a carrier owes to it as a customer. No usage has been established which requires one of the component companies of a connecting through line to grant to a competitor of any of the other companies the same privileges that are accorded to its associates, simply because the tracks of the competing company unite with its own and admit of a free and convenient interchange of business. The line is made up by the contracting companies to do business as carriers for the public; and companies, whose roads do not form part of the line, have no other rights in connection with it than such as belong to the public at large, unless special provision is made therefor by the legislature or the contracting companies."

The decree entered by the trial court had fixed in detail, rules and regulations for the working of the Atchison, Topeka and Santa Fe and Denver and New Orleans roads, in connection with each other as a connecting through line and, in effect, required the Atchison, Topeka and Santa Fe Company to place the Denver and New Orleans Company on an equal footing as to the interchange of business with the most favored of the competitors of that company, both as to prices and facilities, except in

respect to the issue of through bills of lading, through checks for baggage, through tickets and, perhaps, the compulsory interchange of cars.

The Supreme Court goes somewhat at length into the history of state legislation with reference to connections between carriers and holds that "such matters are and always have been proper subjects for legislative consideration" and that remedies for failure to make connections or to make connections without discrimination "can only be obtained from the legislative branch of the government." The court then discussed the "undue preference clause" of the English Railway and Canal Traffic Act of 1854 and said:

"Were there such a statute in Colorado, this case would come before us in a different aspect. As it is, we know of no power in the judiciary to do what the Parliament of Great Britain has done and what the proper legislative authority ought perhaps to do, for the relief of the parties to this controversy.

"All the American cases to which our attention has been called by counsel relate either to what amounts to undue discrimination between the customers of a railroad, or to the power of a court of chancery to interfere, if there be such a discrimination. None of them hold that, in the absence of statutory direction or a specific contract, a company having the power to locate its own stopping places can be required by a court of equity to stop at another railroad junction and interchange business, or that it must under all circumstances give one connecting road the same facilities and the same rates that it does to another with which it has entered into a special contract relations for a continuous through line and arrange facilities accordingly. These cases are all illustrative in their analogies, but their facts are different from those we have now to consider."

The decree of the circuit court was reversed, with instructions to dismiss the bill without prejudice. This case was decided in 1883, and clearly points out the evils sought to be remedied by this section of the act to regulate commerce. In Wisconsin, M. & P. R. Co. *v.* Jacobson,[62] the Supreme Court had before it a case from the Supreme Court of Minnesota to review the judgment of that court affirming the judgment of the district court, directing the plaintiff in error and the Willmar & Sioux Falls

[62] Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. Ed. 194, 21 Sup. Ct. 115.

Railway Company to make track connections with each other at Hanley Falls, in the state of Minnesota, where their respective tracts intersected.

The judgment of the state court declared as follows:

"That it is the duty of the defendants, the Wisconsin, Minnesota & Pacific Railroad Company and the Willmar & Souix Falls Railway Company, and they should be and are required to forthwith provide at the place of intersection of their said roads at said Hanley Falls, ample facilities by track connections for transferring any and all cars used in the regular business of their respective lines of road from the line of tracks of one of said companies to those of the other, and to forthwith provide, at said place of intersection, equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding, and delivering property and cars to and from their respective lines."

The court discussed somewhat at length the legal principle that railroads are public highways, upon which fact rests the right and duty of the government to regulate, in a reasonable and proper manner, the conduct of their business, and the substance of its opinion affirming that of the state Supreme court is contained in two paragraphs of the opinion, as follows:

"We think this case is a reasonable exercise of the power of regulation in favor of the interests and for the accommodation of the public, and that it does not, regard being had to the facts, unduly, unfairly, or improperly affect the pecuniary rights or interests of the plaintiff in error."

"In this case the provision is a manifestly reasonable one, tending directly to the accommodation of the public, and in a manner not substantially or unreasonably detrimental to the ultimate interests of the corporation itself."

§ 149. **Same Subject—Statute.**—The second paragraph of section three of the act to regulate commerce[63] requires common carriers subject to the act to afford reasonable, proper and equal facilities for the interchange of traffic and prohibits discrimination in the rates and charges of connecting lines, but does not require them to give the use of their tracks or terminal facilities to another carrier engaged in like business. This provision of the law does not apply where the circumstances and

[63] Sec. 347, *post.*

conditions are dissimilar.[64] As to its tracks and terminal facilities, a common carrier was under the former law left free to allow their use by one or more connecting lines to the exclusion of others;[65] but as will be seen in a subsequent section, this right of selection has been limited by subsequent enactments and decisions.

This section did not compel a carrier to establish through routes and joint rates, and any carrier could select from two or more connecting carriers those whom it would employ as its agents to send freight beyond its own line.[66] This power to require the establishment of through routes and joint rates has been given to the Commission by sections one and fifteen of the Act as amended by the Act of June 29, 1906. The owner of a private wharf, however, can not be compelled, except by condemnation and upon compensation being made for the taking of the property, to allow its use by others.[67]

Since the Amendment of 1906 it has been the duty of each carrier subject to the Act to Regulate Commerce to "hold itself impartial as between shippers and give to each one equal terminal facilities and service."[68] It is not illegal for a carrier to give an exclusive privilege to a public auctioneer to conduct auctions.[69]

[64] Kentucky & I. Bridge Co. *v.* Louisville & N. R. Co., 37 Fed. 567, 624, 2 L. R. A. 289, 2 I. C. R. 351; New York & N. Ry. Co. *v.* New York & N. E. Ry. Co., 50 Fed. 867.

[65] Little Rock & M. Ry. Co. *v.* St. Louis, I. M. & S. Ry. Co., 59 Fed. 400. Affirmed. 63 Fed. 775, 11 C. C. A. 417, 26 L. R. A. 192. Oregon S. L. & U. N. Co. *v.* Northern Pac. R. Co., 51 Fed. 465. Affirmed. 61 Fed. 158, 9 C. C. A. 409; Atchison, T. & S. F. Ry. Co. *v.* Denver & N. O. R. Co., 110 U. S. 667, 28 L. Ed. 291, 4 Sup. Ct. 185; Gulf, C. & S. F. Ry. Co. *v.* Miami S. S. Co., 86 Fed. 407, 30 C. C. A. 142.

[66] Kentucky & I. Bridge Co. *v.* Louisville & N. R. Co., 37 Fed. 567, 630; Prescott & A. C. R. Co. *v.* Atchison, T. & S. F. R. Co., 73 Fed. 438.

[67] Louisville & N. R. Co. *v.* West Coast Naval Stores Co., 198 U. S. 483, 49 L. Ed. 1135, 25 Sup. Ct. 745; Weems Steamboat Co. *v.* People's Co., 214 U. S. 345, 53 L. Ed. 1024, 29 Sup. Ct. 661.

[68] Enterprise Fuel Co. *v.* Pennsylvania R. Co., 16 I. C. C. 219, 224; Baltimore Butchers Abattoir & Live Stock Co. *v.* Philadelphia, B. & W. R. Co., 20 I. C. C. 124, 128; Buffalo Union Furnace Co. *v.* Lake Shore & M. S. Ry. Co., 21 I. C. C. 620.

[69] Southwestern Produce Distributers *v.* Wabash R. Co., 20 I. C. C. 458.

§ 150. **Same Subject—Statute and Proviso.**—Section three of the Act to Regulate Commerce, discussed in the next preceding section thereof, has a proviso as follows:

"But this shall not be construed as *requiring* any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

In discussing this proviso, the Commission held, that where carriers allowed the "use of their tracks, or terminal facilities, the proviso of section 3 can have no application;" and in the further course of the opinion in the same case it was said:

"Terminals are either open or they are not; and if a carrier holds itself out as ready to permit the use of its tracks at a certain charge, the fact that such charge may be prohibitive does not mean that the terminals are not open. On the contrary, it would seem to be a potent argument for the reduction of charges for the use of tracks or terminal facilities already extended."

And, said the Commission, concluding the argument:

"It follows, that having elected to perform this service, the charge therefor must be reasonable."[70]

In another case, the Commission said:

"It is not our view that the inhibition in section 3 was intended to give, or that it does give, defendant the privilege to accord one carrier an interchange of traffic and to deny such interchange to a competitor of such carrier, or to accord one carrier the use of its terminal facilities and deny such use to another."

And, in the further course of the opinion it was said:

"The terminal properties of carriers, like all other parts of their property, are devoted to the public use and must be treated exactly as all other parts of the property of common carriers are treated in carrying out the spirit and letter of regulatory statutes. Respondent is not asked to 'give' the use of its terminal properties, nor any part of them, to any other carrier. It is asked to perform a service upon reasonable and just terms. The performance of such a service is the very reason of its existence. If the contention of respondent to the effect that its terminal properties are absolutely subject to its determining will were to be upheld, every community in this country would to that extent be absolutely at the mercy of those who control the exist-

[70] Merchants & Mnfrs. Assn. *v.* Pennsylvania R. Co., 23 I. C. C. 474, 476. See note 72 below.

ing terminals. Terminal properties are devoted to the public use of the whole of the communities in which they have been created. They are not a preempted domain, against which the public can assert no rights and upon which it may impose no duties. If such a doctrine were to be accepted every growing community would find it impossible to accept and encourage the service of carriers still to be created at reasonably convenient points within their respective boundaries, and thus many of the larger purposes of the act would be defeated."[71]

In the Pennsylvania Switching case[72] the Commission to remove an unjust discrimination directed the Pennsylvania Company to switch the cars of all connecting lines. The road relied on the proviso of section 3 quoted above, but the court held that the Pennsylvania Company was required so to use its own terminals as not to effect an unjust discrimination.

§ 151. **Through Routes and Joint Rates.**—The statutory duty of the carriers to establish and maintain through routes and joint rates, together with the statutory power of the Commission in respect thereto, will be discussed in another connection.[73] The question of discrimination is the subject of this section.

Mr. Commissioner Lane, in an opinion of the Commission dealing with the question, asked: "What is the duty of the carriers with respect to the operation of through routes?" And he also asks: "What power has been vested in the Commission to enforce the requirements of the law?" Answering the first question he said:

"There can be little doubt as to the duty of the carriers under the present act. The commerce of the country is regarded as national, not local, and the railroads are required to serve the routes which they have established, or which they have been required to establish." The statute is then quoted, and analyzed and in further answer to the first question, the opinion proceeds: "Reading these provisions together, there can be no doubt as to the intent of Congress. Our railroads are called upon to unite themselves that they will constitute one national system; they must establish through routes, keep these routes open and in operation, furnish the necessary facilities for transportation, make

[71] St. Louis, S. & P. R. Co. *v.* Peoria & P. U. R. Co., 26 I. C. C. 226, 236, 237.

[72] Penn. Co. *v.* United States, 236 U. S., 351, 59 L. Ed. —, 35 Sup. Ct. Rep. 370; affirming Same Styled Case, 214 Fed. 445.

[73] *Post*, Sec. 195.

reasonable and proper rules of practice as between themselves and the shippers, and as between each other. The full burden of this great obligation is in the first instance cast upon the carriers themselves."

As to the second question, it was there said:

"The law's requirements as to the duty of the carrier to the shipper to furnish equipment and maintain its through routes carries with it necessarily the power on the part of the Commission to enforce rules which will permit the free interchange of traffic as between carriers. The carriers must keep their through routes open, and if they fail to do this because of the diversion or appropriation of cars this Commission has it within its power to prescribe the conditions upon which such through routes shall be operated." [74]

The duty exists to maintain through routes without undue discrimination and, should the carriers fail in the performance of that duty, the Commission has power to enforce it. [75]

In pursuance of this power, aided by the additional power granted in the Panama Canal Act,[76] the Commission has held that it could enforce through routes with a water carrier.[77]

§ 152 **Discrimination by Charging More for a Shorter Than a Longer Haul—Old Law.**—Section four of the Act to Regulate Commerce as originally enacted, known as the long and short haul clause, prohibited carriers from charging or receiving a greater compensation from transportation of passengers or "likekind of property under substantially similar circumstances and conditions" for a shorter than for a longer distance over the same line, in the same direction, the shorter being included in the longer. The proviso of the section authorizes the Commission, in special cases, after investigation, to permit a less charge for a longer than a shorter haul. The meaning of this proviso was first discussed by Judge Cooley, then chairman of the Commission, In re Petition of Louisville and Nash-

[74] Missouri & Illinois Coal Co. *v.* Illinois C. R. Co., 22 I. C. C. 39, 44, 45, 46, 49.

[75] Re Coal Rates on Stony Fork Branch, 26 I. C. C. 168; St. Louis, S. & P. R. Co. *v.* Peoria & P. U. Ry. Co., 26 I. C. C. 226.

[76] *Post*, Sec. 377.

[77] Augusta & Savannah Steamboat Co. *v.* Ocean Steamship Co., 26 I. C. C. 380; Decatur Nav. Co. *v.* L. & N. R. Co., 31 I. C. C. 281 and cases cited; Port Huron & D. S. S. Co. *v.* P. R. Co., 35 I. C. C. 475.

ville Railroad Co. and Southern Ry. & S. S. Co., 1 I. C. C. 31, 57, 1 I. C. R. 278. The carriers, not knowing just what would be the construction of the section, thought it wise to appeal to the discretion granted by the Commission in the proviso. The proceedings before the Commission in the case cited, *supra* are given at length in the Interstate Commerce Reports, vol. I. beginning at page 76.

The first case under this section to reach the Supreme Court is what is known as the Social Circle case.[78] In that case the first contention was that as the charge to Social Circle was made up, of the joint rate to Atlanta, the long haul, plus the local rate over an intrastate road from Atlanta to Social Circle, the whole of the local rate going to the state road, the shipment was not within the provisions of the act to regulate commerce. This contention was held unsound, the court saying: "that when goods are shipped under a through bill of lading, from a point in one state to a point in another, and when such goods are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce." Having held that the Georgia Road was subject to the provision of the section, the court proceeded to define the power of the Commission, and to state the effect of its decision that the section had been violated. The court said:

"Subject, then, as we hold the Georgia Railroad Company is, under the facts found, to the provisions of the act to regulate commerce, in respect to its interstate freight, it follows, as we think, that it was within the jurisdiction of the Commission to consider whether the said company, in charging a higher rate for a shorter than a longer distance over the same line, in the same direction, the shorter being included within the longer distance, was or was not transporting property in transit between states, under 'substantially similar circumstances and conditions.'

"We do not say that, under no circumstances and conditions, would it be lawful, when engaged in the transportation of foreign freight, for a carrier to charge more for a shorter than a longer distance on its own line; but it is for the tribunal ap-

[78] Int. Com. Com. v. Cincinnati, N. O. & T. P. Ry. Co., 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700.

pointed to enforce the provisions of the statute, whether the Commission or the court, to consider whether the existing circumstances and conditions were or were not substantially similar."

§ 153. **Long and Short Haul—Old Law Continued—Definite Construction.**—In the Troy Alabama case,[79] the Supreme Court held that competition between rival routes which affects rates must be considered in determining whether or not the circumstances and conditions were substantially similar under section four of the act, although such competition was not a pertinent fact in considering discrimination under section two. It was there said by Mr. Justice Shiras:

"We are unable to suppose that Congress intended, by the 4th section and the proviso thereto, to forbid the common carriers, in cases where circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them so to do, much less do we think that it was the intention of Congress that the decision of the Commission, if applied to, could not be reviewed by the courts. The provisions of section 16 of the act, which authorizes the court to 'proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity but in such manner as to do justice in the premises, and to this end, such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition,' extend as well to an inquiry or proceeding under the 4th section as to those arising under the other sections of the act."

After reviewing the evidence, the order of the commission was set aside. This decision put it in the power of rail carriers practically to destroy the force of section four. If competition of rival lines will relieve from the section, it is always possible for the line that reaches the longer distance point, and not the shorter, to make such competition as will release from the obligation of the statute the carrier that serves both points. This result was clearly pointed out by Mr. Justice Harlan in his dissenting opinion, in language as follows:

[79] Int. Com. Com. *v.* Alabama M. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45.

"I dissent from the opinion and judgment in this case. Taken in connection with other decisions defining the powers of the Interstate Commerce Commission, the present decision, it seems to me, goes far to make that 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. The Commission was established to protect the public against the improper practices of transportation companies engaged in commerce among the several states. It has been left, it is true, with power to make reports, and to issue protests. But it has been shorn, by judicial interpretation, of authority to do anything of an effective character. It is denied many of the powers which, in my judgment, were intended to be conferred upon it. Besides, the acts of Congress are now so construed as to place communities on the lines of interstate commerce at the mercy of competing railroad companies engaged in such commerce. The judgment in this case, if I do not misapprehend its scope and effect, proceeds upon the ground that railroad companies, when competitors for interstate business at certain points, may, in order to secure traffic for and at those points, establish rates that will enable them to accomplish that result, although such rates may discriminate against intermediate points. Under such an interpretation of the statutes in question, they may well be regarded as recognizing the authority of competing railroad companies engaged in interstate commerce—when their interests will be subserved thereby—to build up favored centers of population at the expense of the business of the country at large. I can not believe that Congress intended any such result, nor do I think that its enactments, properly interpreted, would lead to such a result."

It would seem that the dissenting opinion of Mr. Justice Harlan, *supra*, more nearly applied the legislative intent than that arrived at by the majority of the court. But it should be remembered that, as has been said by the Supreme Court, the act to regulate commerce was experimental, and its purpose was not to prevent, but promote, competition. Competition of markets is a force that carriers can not disregard, it affects all transportation to a greater or less extent. As said by Arthur T. Hadley, Railroad Transportation, p. 65: "The wheat of Dakota, the wheat of Russia, and the wheat of India come into direct competition. The supply at Odessa is an element in determining the

price at Chicago. * * * Cabbages from Germany contend with cabbages from Missouri in the markets of New York." Nor does this lower rate to the competitive point injure the non-competitive point, so long as there is any profit in the competitive rate. This point is clearly pointed out in the LaGrange case.[80] The higher rate for the local haul is sometimes necessary in order that a community may have railroad transportation. To quote again from Hadley's Railroad Transportation, at p. 115:

"Suppose it is a question whether a road can be built through a country district, lying between two large cities, which have the benefit of water communication, while the intervening district has not. The rate between these points must be made low to meet water competition; so low that if it were applied to the whole business of the road it would make it quite unprofitable. On the other hand, the local business at intermediate points is so small that this alone can not support the road, no matter how low or how high the rates are made. So that, in order to live at all, the road must secure two different things—the high rates for its local traffic, and the large traffic of the through points which can only be attracted by low rates. If the community is to have the road, it must permit the discrimination."

The burden of proof to show dissimilarity in circumstances is on the carrier.[81] "Line" used in the statute means a physical line, not a mere business arrangement.[82]

[80] Int. Com. Com. *v.* Louisville & N. R. Co., 190 U. S. 273, 47 L. Ed. 1047, 23 Sup. Ct. 687.

[81] Spartanburg Board of Trade *v.* Richmond & D. R. Co., 2 I. C. C. 304, 2 I. C. R. 193.

[82] Boston & A. R. Co. *v.* Boston & L. R. Co., 1 I. C. C. 158, 1 I. C. R. 500, 571; Daniels *v.* Chicago, R. I. & P. R. Co., 6 I. C. C. 458, 476. For other cases discussing the subject see: Railroad Com. of Georgia, Trammell et al. *v.* Clyde S. S. Co., 5 I. C. C. 324, 4 I. C. R. 120, 150; Tex. & P. Ry. Co. *v.* Int. Com. Com., 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666; Parsons *v.* Chicago & N. W. Ry. Co., 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. 887; Int. Com. Com. *v.* Detroit, G. H. & M. Ry. Co., 167 U. S. 633, 42 L. Ed. 306, 17 Sup. Ct. 986; Louisville & N. R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209; East Tenn., Va. & Ga. Ry. Co. *v.* Int. Com. Com., 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516. See also Int. Com. Com. *v.* Clyde S. S. Co., 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512; Brewer *v.* Central of Ga. R. Co., 84 Fed. 258; Int. Com. Com. *v.* Western & A. R. Co., 88 Fed. 186.

§ 154. **Long and Short Haul Clause under Act 1910.**—Congress in 1910 for the first time since the passage of the Act to Regulate Commerce, amended the so-called Long and Short Haul Clause of the Act (Sec. 4). The Amendment struck out the words of the former law "under substantially similar circumstances and conditions," but gave the Commission power, upon application and after investigation, to grant relief from the operation of the section as amended.[83]

Construing the Amended Act the Commission held it constitutional; held that its provisions granted the Commission power to determine how far relief should be extended, power to determine whether or not a wrong resulted from a particular application of rates and power to correct that wrong if found to exist. The history of the old and the new law was given and the conclusion reached that, while in determining what relief should be granted under the power conferred by the proviso, the Commission could not act arbitrarily, but must apply the principles controlling in administering other portions of the Act. Applying this conclusion to transcontinental transportation, the Commission divided the United States into zones and fixed a rate percentage between the different zones.[84] Suit being filed in the Commerce Court, that court enjoined the order of the Commissions.[85] An appeal being taken to the Supreme Court, that court reversed the Commerce Court and sustained the validity of the statute, thus leaving in force the orders of the commission.[86]

The right primarily to determine for themselves the existence of circumstances as a basis of charging higher rates for shorter than for longer distances, was taken from the carriers and vested in the Commission by the amendment of 1910. This

[83] Sec. 348, *post*. Also old and new law contrasted, Atchison, T. & S. F. Ry. Co. *v.* United States, 191 Fed. 856, 857, and Railroad Com. of Nev. *v.* So. Pac. Co., 21 I. C. C. 329, 332, 333.

[84] Railroad Com. of Nevada *v.* Southern Pac. Co., 21 I. C. C. 329; City of Spokane *v.* Northern Pac. Ry. Co., 21 I. C. C. 400.

[85] Atchison, T. & S. F. Ry. Co. *v.* United States, 191 Fed. 856.

[86] United States *v.* Atchison, T. & S. F. Ry. Co., 234 U. S. 476, 58 L. Ed. 1408, 34 Sup. Ct. 986, reversing Atchison, T. & S. F. Ry. Co. *v.* United States, 191 Fed. 856 *supra* and sustaining order of the Commission in 21 I. C. C. 329 and 400 *supra*, Opinion Commerce Court Nos. 50, 51, p. 229—("Intermountain Case").

fact was stated by the Supreme Court, following which statement it was said:[87] "This results from the fact that by the amendment in question the original power to determine the existence of the conditions justifying the greater charge for a shorter than was expected for a longer distance, was taken from the carriers and primarily vested in the Interstate Commerce Commission, and for the purpose of making the prohibition efficacious it was enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted."

§ 155. **Fourth Section—Relation between Through Rates and Intermediate Rates.**—That through rates should not exceed the sum of the local rates and that prima facie the through rates should be less than the aggregate of the locals, were general principles announced and applied by the Commission prior to the Act of 1910. The amendment contained in that Act made it illegal for a carrier "to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of" the Act.[88]

The Commission has assumed to grant relief from this clause of the Fourth section as it has and was certainly authorized to do as to the provision relating to long and short hauls. The purpose of the Amendment was to fix one method of measuring rates and to prevent unjust discrimination. Obviously two or more hauls over intermediate lines should cost more than one haul over the same lines; therefore, to charge more for what costs less is unjust discrimination. The subject has been discussed *supra,* sections 119, 120 and 121.

§ 156. **Discrimination between Car Loads and Less than Car Loads.**—A differential between car load and less than car load shipments is not prohibited by the act to regulate commerce, and the Commission has said:[89] "It is a sound rule for carriers to adapt their classifications to the laws of trade. If an article moves in sufficient volume, and the demands of commerce will be better served, it is reasonable to give it a car load classification and rate. The car load is probably the only prac-

[87] United States *v.* L. & N. R. Co., 235 U. S. 314, 59 L. Ed. —, 35 Sup. Ct. 113, citing Intermountain Case, note *supra.*

[88] Sec. 200, *post.*

[89] Thurber *v.* New York C. & H. R. R. Co., 3 I. C. C. R. 473, 2 I. C. R. 742.

ticable unit of quantity." Whether or not there should be a differential and, if any, what, between car loads and less than car loads depends upon the facts and circumstances of each particular case. One of the most important facts to be considered is the difference, if any, in the cost of service.

Noyes, in his excellent work on American Railroad Rates[90] says: "Shipments in car load lots furnish a large paying freight relative to dead weight, and smaller proportionate expense for loading and unloading, billing and collecting, than small shipments." The differential, like a rate, should be reasonable and should be fixed with a view to the just interests of all concerned and the adjustment of this difference rests primarily with the carriers.[91] This principle has been very generally recognized by carriers.

The number of commodities taking car load classifications has materially increased.

This progressive recognition of the law that it is discrimination to charge for a less expensive movement the same as for a more expensive one, would seem to justify the hope that this form of discrimination may eventually be abolished. There is no equitable reason for a different rate per car on car loads and trainloads.[92] While the Commission has always shown reluctance to require the establishment of car load ratings, it has to prevent discrimination ordered carriers to make such a rating.[93] The question is discussed in sections 112, 113, and 116 *supra,* and there is a full review of the authorities in the Taylor Dry Goods Case.[94]

§ 157. **Bulked Shipments.**—It has been held[95] in England that a railway company can not legally charge a greater sum for the carriage of a package containing several parcels belong-

[90] Noyes, American Railroad Rates, 73.

[91] Business Men's League of St. Louis *v.* Atchison, T. & S. F. Ry. Co., 9 I. C. C. 318, 358, 359, 368; California Com. Asso. *v.* Wells Fargo Ex. Co., 14 I. C. C. 422; Scofield *v.* Lake S. & M. S. R. Co., 2 I. C. C. 90, 2 I. C. R. 67.

[92] Burlington, C. R. & N. Ry. Co. *v.* Northwestern Fuel Co., 31 Fed. 652; Paine Bros. *v.* Lehigh V. R. Co., 7 I. C. C. 218.

[93] Spokane *v.* N. P. R. Co., 19 I. C. C. 162.

[94] Taylor Dry Goods Co. *v.* M. P. Ry. Co., 28 I. C. C. 205.

[95] Crouch *v.* G. N. R. Co., 11 Ex. 742, 25 L. J. Ex. 137, Baxendale *v.* L. & S. W. Ry., 4 H. & C. 130, 35 L. J. Ex. 108, L. R. 1 Ex. 137, 12 Jur. (N. S.) 274, 14 L. T. 26, 14 W. R. 458.

ing to different persons than for a package containing several parcels all belonging to one person. The English rule was held by the majority of the Commission, Mr. Commissioner Lane writing the opinion, to be the law in the United States.[96] From this rule Commissioners Knapp and Harlan dissented. The question coming before the circuit court, Circuit Judges Lacombe, Ward and Noyes adopted the dissenting opinion of Mr. Commissioner Knapp.[97] It is difficult to see what interest a carrier has in the question of whether or not the several packages constituting a car load of freight belong to one or more persons. When only one bill of lading is issued and only one person is dealt with, why should a carrier ask as to the title to the several parcels? Does not the rule announced by the court, *supra,* open an opportunity for illegal devices? Suppose a shipper claims he owns all the packages and they are billed to one consignee, it would, in some cases, be impossible to prove that the shipper's statement was not true. In a case where a shipper concealed the true ownership, he would get a car load rating, while the more honest shipper would pay the higher rate. Discrimination refers to the matter of carriage and character of the commodity, not to the question of title. If the shipments move in the same way, with the same expense to the carrier, and are of like kind of traffic, it should make no difference whether the shipper is the real owner or only trustee for the real owners.

§ 158. **Car Loads—Ownership of.**—The next preceding section taken from the first edition of this book was written prior to the decision of the Supreme Court in the Bulked Shipment case.[98] In that case, decided April 3, 1911, the rule announced in the text was stated to be the law. In the course of the opinion it was said:

"The contention that a carrier when goods are tendered to him

[96] California Com. Asso. *v.* Wells Fargo Ex. Co., 14 I. C. C. 422; Export Shipping Co. *v.* Wabash R. Co., 14 I. C. C. 437, and cases cited in the prevailing and dissenting opinions.

[97] Delaware, L. & W. R. Co. *v.* Int. Com. Com., 166 Fed. 499.

[98] Int. Com. Com. *v.* Delaware, L. & W. R. Co., 220 U. S. 235, 252, 253, 55 L. Ed. 448, 31 Sup. Ct. 392, citing as construing the English Equality Clause, Great Western R. Co. *v.* Sutton, 1869—L. R. 4, H. L. 226, 38 L. J. Ex. 177, 22 L. T. 43, 18 W. R. 92; Evershed *v.* London & N. W. Ry. Co., 1878—33 App. Cas. 1029, and Denaby Main Colliery Co. *v.* Manchester, etc., R. Co. 1885—11 App. Cas. 97.

for transportation can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers as to demonstrate the unsoundness of the proposition by its mere statement."

In giving the reason for the conclusion reached, the court said:

"Moreover, the unsoundness of the contention is demonstrated by authority. It is not open to question that the provisions of Section 2 of the act to regulate commerce were substantially taken from Section 90 of the English Railway Clauses Consolidated Act of 1845, known as the Equality Clause."

The principle being thus established, is universally followed.

It has been held that in such shipments the forwarding agent is so far the agent of the shipper as to bind him by a contract for released rates.[99]

§ 159. **Train Loads.**—The usual course of business must be considered in determining questions of discrimination, and while there may be some basis in logic for the claim that a lower rate a car should be made on train loads than on car loads, in fact train loads are rarely used and such a unit of quantity would not be equitable or justified. This principle is well expressed by the Commission as follows:

"Whatever difference there may be in the cost to the carrier between traffic in train loads and traffic in car loads, it appears from the general course of legislation with respect to commerce between the states, from the debates and reports of the various committees in Congress when the act to regulate interstate commerce was under consideration, from the better considered court opinions, and from the reports and opinions of this Commission, that to give greater consideration to train-load traffic than to carload traffic would create preference in favor of large shippers and be to the prejudice of small shippers and the public."[100]

[99] Great Northern Ry. Co. *v.* O'Connor, 232 U. S. 508, 58 L. Ed. 703, 34 Sup. Ct. 380.

[100] Anaconda Copper Mining Co. *v.* Chicago & E. R. Co., 19 I. C. C. 592, 596; Carstens Packing Co. *v.* Oregon S. L. R. Co., 17 I. C. C. 324, 328. See also Sec. 116, *supra*.

§ 160. **Classification of Commodities Should Be Without Discrimination.**—Classification of commodities, like any other act of the carrier affecting the rate to be charged, must be reasonable and such classification must be based on a real distinction.[101] Unless the distinction is real, it would violate section two of the interstate commerce act and discriminate between "like kinds of traffic." A uniform classification would be much better than the differences now existing in that respect and the commission "has sought as far as practicable to secure the establishment throughout the country of a uniform classification of freight."[102] We have seen section 90 ante, that low class traffic of prime utility and moving in large quantities demands a low rate. The principles of classification are so important and are so clearly stated by Prof. Henry C. Adams, former Statistician of the Interstate Commerce Commission,[103] that it is valuable to reproduce them here:

"Principles underlying freight classifications.—It was discovered early that the charges for transportation of different articles of freight could not be apportioned among such articles with regard alone to the cost of carriage. The basis of determining the charges, it was found, would confine to narrow limits the movement of different articles, whose bulk or weight was large in comparison to their value, while heavier articles with less bulk would be made to pay disproportionately low rates.

"Under the system of apportioning the charges strictly to the cost, some kinds of commerce which have been very useful to the country and have a tendency to bring different sections into more intimate business and social relations could never have amounted to any considerable magnitude, and in some cases could not have existed at all, for the simple reason that the value at the place of delivery would not equal the purchase price with the transportation added. The traffic would thus be precluded, because the charge for carriage would be greater than it could bear. On the other hand, the rates for the carriage of articles which, with small bulk or weight, concentrated great value would, on that system of making them, be absurdly low when compared to the value of the articles, and perhaps not less so when the

[101] Stowe-Fuller Co. *v.* Pennsylvania Co., 12 I. C. C. R. 215, 220.

[102] Duluth Shingle Co. *v.* Duluth, etc., R. Co., 10 I. C. C. R. 489, 504.

[103] Railways in United States, part 2, pp. 14, 15.

comparison was with the value of the service in transporting them.

"Accordingly, it was found not to be unjust to distribute the entire cost of service among all articles carried on a basis that gave greater consideration to the relative value of the service than to the cost. Such a method would be most beneficial to the country; it would enlarge commerce and extend communication, and would be better for the railroads because of the increased traffic which would be brought to them.

"The value of the article carried under this system would be the most important element in determining what freight charge it should bear. Other considerations, however, equally important must not be overlooked when the freight classification is to be made. The classification as now constructed have for their foundation the following elements:

"The competitive element or the rates made necessary by competition.

"The volume of the business—that is, the tonnage movement.

"The direction in which the freight moves, that is, whether it moves in the direction in which most of the freight is transported or in the reverse direction in which empty cars are running.

"The value of the article.

"The bulk and weight.

"The degree of risk attending transportation.

"The facilities required for particular or special shipments.

"The conditions attending transportation, such as furnishing special equipment, as in the case of private dressed-beef cars or cars specially adapted for freight of a perishable nature, or cars of large size for freight of extraordinary bulk.

"Another condition which has also received consideration is the analogy which the new articles to be classified bear to other articles found in the classification.

"The conditions under which railroad companies can afford to transport traffic have a large influence in determining the classification.

"These are the general rules under which classifications are constructed, and while to a large extent controlling, the classifications are, notwithstanding, in a great measure a series of compromises, the participants in which are not alone the railroads, but also the shippers and representatives of business interests throughout the country, the latter being afforded ample

opportunity to join with the railroads in the discussion as to the proper classification of articles of shipment affecting their interests.

"While the pressure for reductions is very strong from certain localities, concessions are not now so readily granted, as the territory covered by the freight classifications is so large that great care in the assignment of articles to particular classes must be taken in order to avoid working an injury to any particular section. The commercial and transportation interests are regarded as identical, and the welfare of the whole territory and all interests affected must be considered. It is, however, occasionally observed that particular localities are, to some extent, preferentially served by the action of carriers who resist proposed changes in the classification for the reason that, in their opinion, they will operate to the prejudice of certain patrons. Thus exceptions to the classification are created by a road continuing to carry some articles at one class, while, in the opinion of a majority of the roads using the classification, the articles could well stand a higher rating."

§ 161. **Uniform Classification.**—Efforts to obtain uniformity in the classification of commodities have been made since the date of the original Act to Regulate commerce, and probably even before that date. Some success has attended these efforts but uniformity is far from being accomplished. Beginning at page 453 of volume 25 of the Interstate Commerce Commission Reports is given a history of these efforts since 1887. In the same case in which that history is given the Commission stated some principles which should be applied to all attempts to reach uniformity. Says the Commission: "The making of a freight classification is a great public function," and further: "No great reform like classification reform, which touches every interest in the country, can ever hope to be carried into effect without causing disturbances, annoyance, and opposition, and some injustice. It is therefore especially important that before a classification committee publishes new rules, descriptions, packing requirements, and ratings, full public hearings shall have previously been given after sufficient notice. It is not necessary to hear *everybody*. In making a classification that would mean endless repetition and interminable controversy without ever reaching a conclusion. Rather is it important to hear *everything*. In other

words a body of experts in classification should hear and know everything and then form their conclusions."[104]

Should a uniform classification result from the efforts therefor now being put forward, the benefit would extend to both carriers and shippers. We now have three general classifications:

First. The official classification, which, speaking generally, applies north of the Ohio and Potomac Rivers and East of Chicago and Mississippi river.

Second. Southern classification, applying generally to the territory south of the Ohio and Potomac Rivers and east of the Mississippi River.

Third. The western classification, applying to that territory not included in the other two classifications.

Besides the three general classifications referred to there are classifications published by the railroad commissions of the States of Illinois, Iowa, Georgia, North Carolina and Florida, applying locally on shipments moving between points in those states. Between points in the State of Texas the western classification governs in connection with an exception sheet published by the railroad commission of that state. There is also a classification known as the New England Freight Classification, which governs the class rates between points on the eastern, western and northern divisions of the Boston and Maine Railroad.

§ 162. **Power of Commission over Classification.**—The Commission has the power to prohibit a classification that works a discrimination. This power was exercised by the commission and a forcible and illustrative opinion written by Mr. Commissioner Knapp in Proctor & Gamble *v.* Cincinnati, H. & D. Ry. Co.[105] This order of the Commission was enforced.[106] The Supreme Court, Mr. Justice White delivering the opinion, concluded the discussion of the question by saying:

"Whatever might be the rule by which to determine whether an order of the Commission was too general where the case with which the order dealt involved simply a discrimination as against an individual, or a discrimination or preference in favor of or

[104] Re Western Classification, 25 I. C. C. 442, 450, 451, et seq.; Western Trunk Line Rules, 34 I. C. C. 554. See also Sec. 160, *supra*.

[105] Proctor & Gamble *v.* Cincinnati, H. & D. Ry. Co., 9 I. C. C. 440.

[106] Cincinnati, H. & D. Ry. Co. *v.* Int. Com. Com., 206 U. S. 142, 51 L. Ed. 995, 27 Sup. Ct. 648.

against an individual or specific commodity or commodities or localities, or as applied to territory subject to different classifications, and we think it is clear that the order made in this case was within the competency of the Commission, in view of the nature and character of the wrong found to have been committed and the redress which that wrong necessitated. Finding, as the Commission did, that the classification by percentage of common soap in less than car load lots operating throughout official classification territory, brought about a general disturbance of the relations previously existing in that territory, and created discriminations and preferences among manufacturers and shippers of the commodity and between localities in such territory, we think the Commissions was clearly within the authority conferred by the act to regulate commerce in directing the carriers to cease and desist from further enforcing the classification operating such results."

The subject is one which involves so many facts that only the general principles come within the purview of this book. In a report of nearly two hundred pages the Commission has discussed the subject, cited illustrative decisions, given the history of efforts for uniform classification, and announced applicable principles.[107]

§ 163. **Milling in Transit.**—The Interstate Commerce Act in force prior to the amendment of June 29, 1906, was construed as giving the Commission no power to compel carriers to grant the privilege known as milling in transit.[108] This privilege is described and its legality discussed by Mr. Commissioner Prouty as follows:[109]

"Generally in its application the raw material pays the local rate into the point of manufacture; when afterwards the manufactured product goes forward it is transported upon a rate which would be applicable to that product had it originated in its manufactured state at the point where the raw material was received for transportation, whatever has been paid into the mill being accounted for in this final adjustment. Under this or some equivalent arrangement at the present time grain of all

[107] Re Western Classification, 25 I. C. C. 442, 609. See also Interior Iowa Cites Case, 28 I. C. C. 64.

[108] Diamond Mills Co. *v.* Boston & M. R. Co., 9 I. C. C. 311.

[109] Central Yellow Pine Assn. *v.* Vicksburg, S. & P. R. Co., 10 I. C. C. 193, 213, 214.

kinds is milled and otherwise treated in transit; flour is blended, cotton is compressed, lumber is dressed and perhaps otherwise manufactured; live stock is stopped off to test the market.

"It may be argued with much force that the act to regulate commerce does not sanction arrangements of this kind and the Commission early in its history intimated that such might finally be its conclusion. Crews *v.* Richmond & D. R. Co., 1 I. C. C. Rep. 401, 1 Inters. Com. Rep. 703. Such practices were, however, in use to a considerable extent at the time of the passage of the act and since then they have become universal. To abrogate these privileges would be to confiscate thousands and probably millions of dollars in value by rendering worthless industrial plants which have been constructed upon the faith of their continuation. Nor is it a forced construction of the statute to hold that when the product finally goes forward to the point of consumption it but completes the journey upon which it entered when the raw material was taken up. There can be no doubt that the application of this principle has cheapened the cost of transportation and probably of manufacture. The commission finally held, In re Unlawful Rates in the Transportation of Cotton, 8 I. C. C. Rep. 121, that cotton might be compressed in transit."

The Commission has said: [110]

"The stopping of a commodity in transit for the purpose of treatment or reconsignment is in the nature of a special privilege which the carrier may concede, but which the shipper can not, in the present state of the law, demand as a matter of lawful right. Carriers may not, however, discriminate between markets nor between individuals in the granting of such privileges."

In the Diamond Mills case, *supra,* the Commission said: "A complete system of interstate railway regulation would probably give the regulating body authority to determine when privileges of this kind should be accorded, and upon what terms, for they all enter into and are really part of the rate."

The Hepburn amendment has given to the Commission the right and power to regulate these matters. Section one of the act to regulate commerce as it now exists[111] provides: "The term 'transportation' shall include * * * all instrumentalities

[110] St. Louis Hay & Grain Co. *v.* Mobile & O. R. Co., 11 I. C. C. R. 90, 101.

[111] *Post,* Sec. 335.

and facilities of shipment or carriage * * * and all services in connection with the receipt, delivery, elevation, and transfer in transit * * * storage and handling of property transported," and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto. Under this amended law the Commission has required milling in transit to be extended so as to prevent discrimination.[112]

In the 1915 Western Rate Advance case,[113] it appeared that the grain rates then sought to be advanced were sufficiently high, that the flour rates which were the proportional or remainder of the through rates were too low. The carriers having offered their proof on the theory that the milling in transit privilege should continue, it was pointed out by the Commission that the owner of the grain who paid the high local rate to the mill or the market should not have his rates increased, because the remainder of the through rate was too low.

§ 164. **Rebilling.**—Rebilling is a privilege granted to certain markets and consists of the right to ship a commodity from the point where it is produced to a distributing market where the shipper may unload, sort and clean the commodity, thereafter shipping the same amount of the same kind of commodity to his customers, not at the local rate from the distributing point to the final destination but at the remainder of the through rate. Commissioner Prouty illustrates the practice at Kansas City as follows:[114]

"During the period covered by this investigation, which was from April 1st to July 7th, 1896, and for a considerable period prior thereto, the rate on corn from Kansas City to Chicago was 20 cents per 100 pounds. Hutchinson, Kansas, is a station upon the Santa Fe Railway, which runs from there through Kansas City to Chicago, Ill. The through rate from Hutchinson to Chicago was 25 cents, and the local rate from Hutchinson to Kansas City 13½ cents. A shipper from Hutchinson would

[112] Southern Illinois Miller's Asso. *v.* L. & N. R. Co., 23 I. C. C. 672, 678.

[113] Western Rate Advance Case 1915, 35 I. C. C. 497.

[114] Re Alleged Unlawful Rates and Practices in the Transportation of Grain, 7 I. C. C. R. 240, 241, 242, 247. See also Re Substitution of Tonnage at Transit Points, 18 I. C. C. 280.

forward a car load of corn to Kansas City and pay the local rate of 13½ cents. If afterwards he concluded to send this car load on to Chicago he might ship it by the Santa Fe Road, or by any other road between the two points, at the balance of the through rate from Hutchinson. The Chicago & Alton Railroad, for instance, would transport this car load of corn from Kansas City to Chicago, not for 20 cents per 100 pounds, but for 11½ cents. If the grain was sold at Kansas City, the purchaser succeeded to the right of sending it forward at the reduced rate.

"When the shipper shipped this car load of corn to Kansas City he had, as an ordinary thing, no idea or purpose as to its ultimate destination. It might be eaten in Kansas City; it might be sent to the Chicago market, or it might go to the Gulf; there was nothing upon any of the papers connected with its transportation to indicate what its destination beyond Kansas City was, or that it was destined to any point beyond; but if he did subsequently elect to ship it beyond Kansas City, the rate to any point he might select was the difference between the through rate from Hutchinson to the point of destination and the local rate which he had already paid from Hutchinson, and this rate was always different from the rate between Kansas City and the point of destination.

"The result, of course, was that nearly all grain was shipped into Kansas City upon a local bill of lading in the first instance and was afterward sent forward, if it finally went forward, upon a new bill of lading at the balance of the through rate. The difference between the through rate from the point of origin to the point of destination and the local rate from the point of origin to Kansas City was not the same in all cases, nor, indeed, in most cases, and consequently the balance of the through rate continually varied."

In the same case the practice was declared illegal and this rule was stated:

"An indispensable element in every through shipment would seem to be a contract for such through service; an agreement between the parties at the inception of the carriage that the freight shall be transported to the point of destination at the through rate."

Its disapproval of the practice was indicated by the commission in the cases of Mayor, etc., of Wichita *v.* Atchison, T. & S.

F. Ry. Co., 9 I. C. C. 534, and Cannon Falls Elevator Co. *v.* Chicago, etc., R. Co., 10 I. C. C. 650.

§ 165. **Rebilling—Found Illegal.**—In the Duncan case [115] the Commission, speaking through Mr. Commissioner Clements, describes the practice and states the conclusion of the Commission as follows:

"It is contended by defendants that rebilling or reshipping is on the same basis as milling in transit and similar privileges. There is no case before us in this case against milling in transit, but it appears from the record that the privilege of milling in transit is accorded uniformly throughout the southeastern territory and is in no sense applied to Nashville or any other particular point alone.

"We are not convinced that the circumstances and conditions under which the reshipping privilege is accorded at Nashville are so dissimilar from those obtaining at the other points involved in this traffic as to justify giving it our sanction on that ground. However, there are other aspects independent of this which lead us to regard this privilege with disfavor.

"Illustrating the second feature of the complaint as to the alleged illegality of this privilege, the following example is given: A Nashville dealer buys 2 cars of grain, 1 at Memphis and 1 at Louisville. He pays, up to Nashville on a Memphis car, 11 cents per 100 pounds and on the Louisville car 10 cents. Should this Memphis car burn, after being put in the warehouse, or be sold at Nashville, he would have two expense bills and one car of grain. Should he sell a car at Atlanta, the Nashville merchant would naturally use the Memphis bill which shows a payment of 11 cents, paying the balance of the through rate from Memphis to Atlanta of 9 cents. He has, therefore, shipped the Louisville car to Atlanta for a total of 19 cents, when the through rate from Louisville to Atlanta is 24 cents and the combination of locals 27 cents. It is further alleged that as considerable grain is consumed in Nashville there is always a surplus of expense bills which may be manipulated in order to secure a cheaper rate than that provided in the tariffs. In answer to this defendants say that the operation of the reshipping privilege, as described in this example, is limited by the fact that the Memphis car of grain is worth more to the dealer at Nash-

[115] Duncan *v.* N. C. & St. L. Ry. Co., 16 I. C. C. 590.

ville than the St. Louis car, by reason of the difference in the freight rate, and, therefore, Memphis grain is not sold at Nashville proper, but is all reshipped to the southeast. It is to be noted that the tariffs of the carriers contain a rule which prohibits trading in expense bills, and it is hardly probable that such a rule would appear if the manipulation of expense bills is impossible, as contended by defendants.

"While this manipulation of expense bills may not be practiced to the extent apprehended by complainants, we may remark that prohibitions of law are not invariably directed against illegal acts because they may be numerous; a statute may be considered equally necessary by the legislature to prevent sporadic or isolated acts in contravention of public policy. A practice or privilege which permits the movement of a single shipment at less than the rate lawfully applicable to such movement is one which the Commission has, under the law, no alternative but to condemn.

"In considering a practice at Kansas City similar to the one under consideration (Alleged Unlawful Rates and Practices, 7 I. C. C. 240), it was found that the practice of handling grain in connection with this privilege was manifestly open to many abuses. On several occasions the Commission has considered practices of a more or less similar nature and has uniformly regarded them with disfavor. In the case above referred to the finding was based upon the fact that the movement upon which the through rate was applied was in no essential sense a through movement, and we find the same to be true with respect to rebilling or reshipping at Nashville. The grain upon its arrival at Nashville loses its identity, and in every respect may be regarded as a local shipment. There is hardly a single incident of a through shipment involved in the transaction—the bill of lading is local, the rate is local, and there is nothing upon paper connected with the transaction indicating that the grain is to be carried beyond Nashville. If it is the intention to carry it beyond, there is no present idea as to the point of destination.

"We are of the opinion that the reshipping or rebilling privilege and the application of rates thereunder obtaining at Nashville is an illegal device by means of which grain, grain products, and hay may be transported at less than the tariff rate applicable thereto; and further, that it gives to Nashville undue and illegal preference and advantage and subjects other points

in the southeast to unjust and unreasonable prejudice and disadvantage.

§ 166. **Rebilling—Illegal Only When Unjustly Discriminatory.**—Subsequently to its first opinion in the Duncan Case *supra,* the Commission in an investigation "did not * * * condemn rebilling or reshipping as such," and in a second opinion there was entered a finding and holding that the privilege there under discussion "constituted an unreasonable preference or advantage and undue and unreasonable prejudice and disadvantage in violation of section 3 of the act to regulate commerce."[116]

The Supreme Court, reversing the Commerce Court, sustained the Commission's order in the second case, placing its conclusion more on section 4 than on section 3 of the act, although section 3 was the section relied on by the shippers and in the opinion of the Commission.[117] Upon further hearing the Commission reiterated its order.[118] The Supreme Court has indicated that such practice is discriminatory, and that when shipments are made at the remainder of the through rate, carriers are estopped to say that such remainder is not a fair rate on all traffic. That court, speaking through Mr. Justice Brewer, said:[119]

"Under the guise of a rebilling rate, the Vicksburg merchant who dealt with this western road was given a rate of 3½ per cent on any grain that he might see fit to ship to Meridian. While it may be true that a local railway's share of an interstate rate may not be a legitimate basis upon which a state railroad commission can establish and enforce a purely local rate, yet, whenever, under the guise or pretense of a rebilling rate, some merchants are given a low local rate, the Commission is justified in making that rate the rate for all. It is not bound to inquire whether it furnishes adequate return to the railway

[116] Duncan *v.* N. C. & St. L. Ry. Co., 21 I. C. C. 186.

[117] United States *v.* L. & N. R. Co., 235 U. S. 314, 59 L. Ed. —, 35 Sup. Ct. 113.

[118] Duncan *v.* N. C. & St. L. Ry. Co., 35 I. C. C. 477. For the further history of the case, see Louisville & N. R. Co. *v.* United States, 197 Fed. 58, Opinion Commerce Court No. 47, p. 173. For same case on application for preliminary injunction, see Nashville Grain Exchange *v.* United States, 191 Fed. 37, Opinion Commerce Court No. 46, p. 165. On appeal to Supreme Court, see United States *v.* L. & N. R. Co., 235 U. S. 314, 59 L. Ed. —, 35 Sup. Ct. 113.

[119] Alabama & V. R. Co. *v.* Railroad Com. of Mississippi, 203 U. S. 496, 51 L. Ed. 298, 27 Sup. Ct. 163.

company, for the state may insist upon equality, to be enforced under the same conditions against all who perform a public or *quasi* public service."

§ 167. **Rebilling. Conclusion.**—That rebilling offers opportunity for manipulation of expense bills can not be doubted, although that fact is insufficient to show that the practice is illegal. The decision of the Supreme Court sustaining the second order in the Duncan case *supra,* compares a reshipping or rebilling rate with a local rate, and holds in effect that when such rates are so compared, the lower reshipping rate for the longer haul may result in a violation of the fourth section, where the local rate for the shorter haul is higher. That such might be the result is true. If there are no reasons why there should be a reshipping rate lower than a local rate, the reshipping rate by whatever name called may be in substance but a local rate. Properly considered, the opinion of the Supreme Court applies the well known principle that substance and not form should be the determining factor. Rebilling rates are not illegal per se, and such rates become unlawful only when they produce a discrimination prohibited by section 3 or when they are in substance local rates and violate section 4. The final opinion of the Commission in the Duncan Case accords with this conclusion.

§ 168. **Payments to Elevators.**—Elevator payments mean that when a carrier brings grain to the markets from the producing territory and delivers it to an elevator to be sacked and graded, it pays the elevator for such service a stated amount. In some cases the same payment is made to stores and warehouses having sacking facilities. When the matter first came before the Commission, it was not declared illegal, although there Mr. Commissioner Lane dissented in a strong opinion. Subsequently, in the same case, the particular allowance then under investigation was declared unlawful.[120] The whole practice was declared illegal in Traffic Bureau Merchants' Exchange of St. Louis *v.* Chicago, B. & Q. R. Co.[121] These elevator payments were shown in the Duncan case *supra,* to have been made not only to elevators but to warehouses and even stores having sack-

[120] Re Allowances to Elevators by Union Pac. R. Co., 14 I. C. C. 315.

[121] Traffic Bureau Merchants Exchange of St. Louis *v.* Chicago, B. & Q. R. Co., 14 I. C. C. 317, 331.

ing facilities. Such payments are made at some cities and denied to others. Some men ship grain who can not obtain the payments because they may not have "sacking or elevator" facilities.

Discrimination when it exists violates both sections two and three of the act to regulate commerce.

There is a provision of section 15 of the Act to Regulate Commerce under which the owner of property transported who renders any service connected with the transportation or who furnishes any instrumentalities used therein, may be by the carriers compensated therefor.[122] Applying this section, the Supreme Court has held that carriers may and must pay the owners of grain transported for elevating such grain.[123] Of course the provisions of sections 1, 2 and 3 apply and the payments must be reasonable and free from undue or unreasonable preference or advantage.

§ 169. **Transit Privileges—Generally.**—Ordinarily the through rate from point of origin to point of destination is less than the aggregate of the intermediate rates. The result of this generally applied and now statutory rule is that jobbers and manufacturers at cities intermediate between the points of production and of consumption can not compete with those located at the cities at or near to the points of consumption. That such competition may be made possible, transit rates have been accorded under which the commodity may be stopped at the intermediate point for cleaning, milling, sorting, manufacturing or otherwise treating. After such stoppage the same commodity, or the same kind of commodity, or the product of the commodity, may be transported to the farther destination at a rate less than the local rate. This difference between the remainder of the through rate or the transit rate being accorded because the commodity had paid a charge up to the intermediate point. The justification for this practice is commercial, and not based on cost of service, because it costs no more to move a commodity originating at a particular place than it costs to transport the same commodity

[122] See Sec. 404, *post.*

[123] Int. Com. Com. *v.* Diffenbaugh, 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22, modifying decree in Peavey & Co. *v.* Union Pac. R. Co., 176 Fed. 409; Union Pac. R. Co. *v.* Updike Grain Co., 222 U. S. 215, 56 L. Ed. 171, 32 Sup. Ct. 39, affirming same styled case, 178 Fed. 223, 101 C. C. A. 583.

which has received a prior transportation service. In speaking of the practice the Commission said:[124] "Transit in many cases is beneficial in its application. When it can be applied without discrimination it results in the diffusion of business, in giving to rival communities the relative advantages to which they are entitled, and which can be accorded them in no other way, and, generally speaking, in the application of lower transportation charges. The commercial operations of this country have in many instances grown upon the exercise of transit privileges and could have been developed in no other way. This Commission has never held that transit was to be condemned in so far as it was beneficial and could properly be applied."

There are possibilities of misusing the transit rates, these the Commission has sought to guard against. Rules have been announced and principles stated for the government of carriers in respect to transit. On this subject the Commission has said:[125] "The business man who employs the transit privilege looks upon it as a useful and in many cases as an exceedingly profitable practice. Indeed, we recognize that in most instances transit is now a commercial necessity, because of its almost universal application and on account of the development which certain lines of business have taken entailing heavy investments." There is only one way to minimize violations of the law at transit points and that is by the adoption of unambiguous rules and the proper policing thereof to reduce the opportunity for such violations."

Reshipping rates, transit rates and proportional rates, all rest upon the same principles and are not illegal merely because local rates may be higher. When these special rates are accorded to one market they can not lawfully be withheld from another.

Import and export rates are made on proportionals, and "a carrier may lawfully make an import rate from a port in the United States to an interior destination less than its domestic rate from the same port to the same destination," but different rates can not be made on the proportional in the United States based

[124] Transportation of Wool, Hides and Pelts, 23 I. C. C. 151, 171.

[125] Transit Case, 24 I. C. C. 340, 349. See also Fabrication-in-Transit Charges, 29 I. C. C. 70; Re Substitution of Tonnage at Transit Points, 18 I. C. C. 280; Transit Case, 25 I. C. C. 130, 26 I. C. C. 204; National Casket Co. *v.* S. Ry. Co., 31 I. C. C. 678.

upon the foreign port from which the traffic starts.[126]

§ 170. **Allowances to Tap Line Railroads.**—What are called tap lines were described by the Commission as follows:[127] "While these logging roads are almost or quite without exception mill propositions at the outset, built exclusively for the purpose of transporting logs to the mill, they soon reach a point where they engage in other business to a greater or less extent. As the length of the road increases, as the lumber is taken off and other operations obtain a foothold along the line, various commodities besides lumber are transported, and this business gradually develops until in several cases what was at first a logging road pure and simple has become a common carrier of miscellaneous freight and passengers. Almost all these lines, even where they are run as private enterprises, do more or less outside transportation, and it would be difficult to draw any line of demarkation between the logging road as such and the logging road which has become a general carrier of freight."

In many instances carriers paid divisions of the through rates to these tap lines, which allowances or divisions were usually for the benefit of the lumber manufacturing plant generally the owner of the tap line. This practice was described by the Supreme Court as follows:[128] "The railroads west of the Mississippi make a certain allowance to the mills which have 'logging roads'—that is, roads by which logs are hauled from the timber to the mills. This is called 'tap-line allowance or division.' * * * The mills east of the river have logging roads also, but appellants make no allowance to them. * * * There does not appear to be any reason for such allowance west of the Mississippi which does not apply east of that river, *and it amounts to a rebate* or reduction from the regularly published rate, and gives an advantage to the mills west of the Mississippi over those east, although the published rates from both are the same."

The Commission entered into a general investigation as to the character of tap lines and the legality of allowances thereto, after which it was determined that most of such allowances were

[126] Texas & P. Ry. Co. *v.* Int. Com. Com., 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666; New Orleans Board of Trade *v.* Illinois C. R. Co., 23 I. C. C. 465.

[127] Central Yellow Pine Asso. *v.* V. S. & P. Ry. Co., 10 I. C. C. 193, 199.

[128] Illinois C. R. Co. *v.* I. C. C., 206 U. S. 441, 444, 51 L. Ed. 1128, 27 Sup. Ct. 700.

unlawful, amounting in effect, when paid to a tap line owned by the manufacturing plant to a departure from the lawful rate.[129]

The Supreme Court, referring to the fact that the transportation of lumber was excepted from the commodities clause [130] of the Commerce Act, reversed the Commission and held that if the tap line, although owned by the manufacturing plant was a common carrier the payment of a division thereto was not illegal. The Court also held that not the extent to which a railroad is used, but the right of the public to demand service of it, determined its character as a common carrier.[131] The holding of the Supreme Court does not deprive the Commission of the power to regulate tap lines participating in interstate commerce. As to rates, rules and practices, the Commission has power over these short lines to the same extent as over other common carriers subject to its jurisdiction.[132]

§ 171. **Allowances to Industrial Tracks.**—Except for the proviso of the Commodities clause which excepts from its provisions thereof "timber and the manufactured products thereof," the principles applicable to allowances to industrial railroads are similar to those applicable to divisions to tap line roads. In the first Industrial Railways case [133] the Commission said: "The allowances are made to the industries or to their subsidiary railways in the form of (a) divisions out of the rate, (b) per diem reclaims, (c) remission of demurrage and (d) furnace allowances." It was held that these various allowances depleted the revenues of the carriers and were generally unlawful. Following the decision of the Supreme Court in the tap line cases, the Commission modified its holding, saying: [134] "Since the Supreme Court decided the tap line cases, we have given effect to the court's decision by fixing the maximum divisions of rates or switching allowances which the tap line roads may receive from the trunk line carriers. Since that time we have also decided In

[129] Tap Line Cases, 23 I. C. C. 277, 549. Kaul Lumber Co. *v.* C. of Ga. Ry. Co., 20 I. C. C. 450.

[130] Sec. 343, *post*.

[131] Tap Line Cases, 234 U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 741.

[132] Tap Line Case, 31 I. C. C. 490; Joint Rates with Birmingham Southern R. Co., 32 I. C. C. 110.

[133] Industrial Railways Case, 29 I. C. C. 212.

[134] Industrial Railways Case, 32 I. C. C. 129, 131; and see Manufacturers Railway Case, 32 I. C. C. 100; General Elec. Co. *v.* N. Y. C. & H. R. R. Co., 14 I. C. C. 237; Solvay Process Co. *v.* D. L. & W. R. Co., 14 I. C. C. 246.

re Joint Rates with the Birmingham Southern R. R. Co., 32 I. C. C. 110, and the Manufacturers Railway Case, 32 I. C. C. 100, giving effect, in each instance, under the facts there found, to the principles announced by the Supreme Court. The General Electric Company case, *supra,* the Solvay Process Company case, *supra,* and the Crane Iron Works case, 17 I. C. C. 514, were decided upon the facts, circumstances, and conditions appearing in connection with each. Those cases, however, differed from the tap line cases and from the instant case in that in each of the former cases the industrial railway, or the industrial corporation which in fact owned it, sought to have us require the trunk line roads to accord the industrial roads allowances or divisions which the trunk line roads were unwilling to accord and which they contended would be unlawful."

While allowances may be made to some industries and denied to others similarly situated, and may be made when no real service is performed therefor and thus be unlawful, such allowances are not per se unlawful. The Commission may not prohibit all allowances to industrial railroads, but it may regulate the practice and thereby prevent unlawful discrimination and improper payments when no service is rendered.[135]

§ 172. **Illegal for Carriers to Transport Commodities Produced or Owned by Them or in Which They Are Interested.** —The ownership or control by carriers of a particular commodity gives such carriers an opportunity to transport such commodity and sell it at less than can its competitors who have no means of transportation and must pay the carrier to transport these commodities of like kind. The carrier can do this because it can forego some of the rate its competitor must pay, and, therefore, undersell all others. This evil was prevalent and the Commission had sought to remedy it so far as it could with the limited power it had in this respect before the passage of the Hepburn law. Prior to the passage of the Hepburn amendment containing this clause the Interstate Commerce Commission brought its bill seeking to enjoin a contract described in the allegation as follows:[136]

[135] Car-Ferry Allowances, 32 I. C. C. 578; St. Louis Terminal Case, 34 I. C. C. 453; Second Industrial Railways Case, 34 I. C. C. 596, and cases there cited.

[136] New York, N. Y. & H. R. Co. *v.* Int. Com. Com., 200 U. S. 361, 50 L. Ed. 515, 26 Sup. Ct. 272.

"In the spring of 1903 the Chesapeake & Ohio made a verbal agreement with the New Haven to sell to that road 60,000 tons of coal, to be carried from the Kanawha district to Newport News, and thence by water to Connecticut, for delivery to the buyer at $2.75 per ton, and that a considerable portion had already been delivered and the remainder was in process of delivery. It was averred that the price of the coal at the mines where the Chesapeake & Ohio bought it, and the cost of transportation from Newport News to Connecticut, would aggregate $2.47 per ton, thus leaving to the Chesapeake & Ohio only about 28 cents a ton for carrying the coal from the Kanawha district to Newport News, whilst the published tariff for like carriage from the same district was $1.45 per ton."

Upon this allegation, the court formulated the question involved as follows:

"The question, therefore, to be decided is this: Has a carrier engaged in interstate commerce the power to contract and sell and transport in completion of the contract the commodity sold, when the price stipulated in the contract does not pay the cost of the purchase, the cost of delivery, and the published freight rates?"

The evils of carriers engaging in the purchase and sale of commodities transported by them were forcibly pointed out in the course of the opinion.

Cases were cited, and the conclusion was to direct the court below to issue a decree "perpetually enjoining the Chesapeake & Ohio from taking less than the rates fixed by its published tariff of freight rates, by means of dealing in the purchase and sale of coal."

§ 173. **Commodities Clause of Act 1906.**—It is obvious that the evils pointed out so forcibly by the Supreme Court apply equally where the carrier puts the ownership of the commodity in a corporation in which the carrier owns all the stock, and that the difference is only in degree and not in kind where the carrier has only a part of the stock in the corporation owning the commodity. Congress, by virtue of its plenary power to regulate interstate commerce, sought to prevent these evils, and the prohibition was made to apply where the carrier had an interest, direct or indirect, in the commodity transported. This clause the circuit court held unconstitutional, but the Supreme

Court, upon appeal, held the provision valid[137] as construed, which construction is as follows:

"We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (a) When the article or commodity has been manufactured, mined or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (b) When the carrier owns the article or commodity to be transported in whole or in part; (c) When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced or owned, etc., by a bona fide corporation in which the railroad company is a stockholder."

"In my judgment the act, reasonably and properly construed, according to its language, includes within its prohibitions a railroad company transporting coal, if, at the time, it is the owner, legally or equitably, of stock—certainly, if it owns a majority or all the stock—in the company which mined, manufactured or produced, and then owns, the coal which is being transported by such railroad company. Any other view of the act will enable the transporting railroad company, by one device or another, to defeat altogether the purposes which Congress had in view, which was to divorce, in a real, substantial sense, production and transportation, and thereby to prevent the transporting company from doing injustice to other owners of coal."

In construing the clause when brought before it the second time the Supreme Court held that when the carrier so exercised its power as a stockholder in a corporation owning the commodity as to deprive such corporation of actual independent existence, that the commodities so owned were within the prohibition of the law.[138]

When a carrier organized a coal company to which its coal properties were leased and, although the stock of the company

[137] United States *v.* Delaware & H. Co., 213 U. S. 366, 415, 53 L. Ed. 836, 29 Sup. Ct. 527. For opinion of lower court, see 164 Fed. 215.

[138] United States *v.* Lehigh Valley R. Co., 220 U. S. 257, 55 L. Ed. 458, 31 Sup. Ct. 387.

so organized was not owned by the carrier, such company was in substance controlled by the carrier, it was held that the commodities clause was violated.[139]

§ 174. **Cars Must Be Furnished Without Discrimination.** —Transportation includes in its meaning "cars," and section one of the Act provides: "Cars shall be furnished irrespective of ownership or any contract, express or implied, for the use thereof."[140] It, therefore, is the duty of carriers subject to the Act to furnish cars without any unlawful preference.

In the Pitcairn Coal case,[141] the Circuit Court of Appeals prescribed rules for coal car distribution. The Supreme Court, however, held that the courts had no jurisdiction prior to action by the Interstate Commerce Commission, and the lower court was reversed. The Supreme Court said:

"The distribution to shippers of coal cars including those owned by the shippers and those used by the carrier for its own fuel is a matter involving preference and discrimination and within the competency of the Interstate Commerce Commission, and the courts can not interfere with regulations in regard to such discriminations until after action thereon by the commission."[142]

In the Morrisdale Coal Co. case, cited note *supra*, it was contended that *"all cars in the district* should be distributed according to the capacity of the mine, without deducting private cars, foreign fuel cars, or the carrier's own fuel cars." Answering this contention, the Supreme Court said: "Whether this should be done as a general rule, or under the peculiar conditions prevailing on defendant's road at that time, was, as we have seen, an administrative question, and to be decided by the Commission as preliminary to the right to maintain this suit."

[139] *Post*, Sec. 343, U. S. *v.* Delaware, L. & W. R. Co., 238 U. S. 516, 59 L. Ed. —, 35 Sup. Ct. 873. For further history of the litigation relating to this clause, see U. S. *v.* L. V. R. Co., 225 Fed. 399.

[140] *Post*, Sec. 337.

[141] United States ex rel. Pitcairn Coal Co. *v.* Baltimore & O. R. Co., 165 Fed. 113.

[142] Baltimore & O. R. Co. *v.* United States, 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164. The same ruling was made in Int. Com. Com. *v.* Illinois C. R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. 155; Morrisdale Coal Co. *v.* Pennsylvania R. Co., 230 U. S. 304, 57 L. Ed. 1474, 33 Sup. Ct. 938

While the question of the reasonableness of a rule for the distribution of cars is an administrative one over which, when interstate commerce is involved, the Commission alone has primary jurisdiction; the courts, state or federal, have jurisdiction to determine whether or not a plaintiff has been damaged by the failure of a carrier to furnish cars "upon the basis of the carrier's own rule of distribution."[143] In other words, what is a reasonable rule is for determination by the Commission; whether or not an established rule has been violated with resulting damage is a judicial question within the purview of the courts.

A state statute requiring a railroad corporation to furnish cars within a reasonable time after they are required, recognized that "a reasonable time in any case would depend upon all the circumstances and conditions existing, including the requirements of the interstate commerce carried on by the corporation," was held valid by the Supreme Court in a suit originally brought in a state court, in which court plaintiff made no attack whatever upon the carrier's rules for car distribution.[144]

The Commission in a decision rendered prior to the court's decision in the Mulberry Coal case (note *supra*), said:[145] "It is the duty of carriers to furnish cars suitable to transport in safety traffic which they hold themselves out to carry."

The claim of exclusive jurisdiction made in that case is probably too broad a claim, although there is little doubt that the Commission has concurrent jurisdiction with the courts in cases where there is a refusal upon reasonable request to furnish cars for interstate transportation. "Cars must be furnished" is the language of the statute, and for any violation of the statute the shipper may recover damages. If the claim presents an administrative question, the Commission alone has jurisdiction. If no administrative question is presented, the "person or persons claiming to be damaged * * * may either make complaint to the Commission * * * or may bring suit * * * in any district or circuit court of the United States," or under the res-

[143] Penn. R. Co. *v.* Puritan Coal Co., 237 U. S. 121, 59 L. Ed. —, 35 Sup. Ct. 484; affirming same styled case, 237 Pa. 420, 85 Atl. 426, Ann. Cas. 1914B, 37.

[144] Illinois C. R. Co. *v.* Mulberry Hill Coal Co., 238 U. S. 275, 59 L. Ed. —, 35 Sup. Ct. 760; affirming same styled case 257 Ill. 80, 100 N. E. 151.

[145] Vulcan Coal & Mining Co. *v.* I. C. C. Co., 33 I. C. C. 52, 64.

ervation of section 22, in any state court of competent jurisdiction.[146]

§ 175. **Same Subject—Principles Applied by the Commission.**—It being within the administrative functions of the Interstate Commerce Commission to determine whether or not a particular distribution violates the law, the same question is presented as in other cases of discrimination. In determining the question as to coal cars the Commission has accepted and applied certain general rules. Obviously one coal mine may need and be entitled to more cars than another. This fact makes necessary the rating of mines. This rating can be made by determining the physical and commercial capacity of the mine. Clearly to consider only the physical capacity would be unjust, as that capacity might not be even approximately reached. How this physical capacity has been determined was described by the Commission as follows:

"The physical capacity is determined by the thickness of the coal seam, the number of rooms or working places, the capacity of the underground tram tracks, and the facilities for getting the coal out of the mine into the tipple, and from the tipple into the cars. A fixed per diem value is assigned to a man's labor, taking into consideration the character of the seam upon which the work is to be done; and the number of places in which a man can work is taken into account regardless of the number of men actually employed." [147]

The method of determining the commercial capacity was described by the Commission as follows:

"The commercial capacity, or the requirements of a mine for cars as tested by its actual shipments, is arrived at by taking the volume of the shipments made by a mine during a period of free-car supply, usually of four months and generally from April 1 to August 1, in each of the two preceding years. The three figures expressed in coal tons, namely, the physical capacity, the commercial capacity for the first year, and the commercial capacity for the second year, are added together and the sum is divided by three." [148]

[146] Secs. 8, 9 and 22 of the Act. Secs. 382, 383 and 443, *post*.

[147] Rail & River Coal Co. *v.* Baltimore & O. R. Co., 14 I. C. C. 86, 93, 94.

[148] Hillsdale Coal & Coke Co. *v.* Pennsylvania R. Co., 19 I. C. C. 356, 359, 360.

In the Hillsdale Coal & Coke Co. case, *supra,* speaking of the methods of rating by thus determining the physical and commercial capacity of the mines, the Commission said:

"After a careful consideration of the system as applied to interstate shipments, we are inclined to think * * * that a method of rating coal mines based upon a combination of their physical and commercial capacities more closely approximates their actual car requirements than a system based upon physical capacity only."

The Commission in the Hillsdale case, *supra,* in summing up the principles adopted in previous cases, said:

"The general status of the question before the Commission may be readily ascertained by an examination of our decisions in one or two formal proceedings since the passage of the so-called Hepburn Act. In Railroad Commission of Ohio *v.* H. V. Ry. Co., 12 I. C. C. Rep. 398, we held that while a carrier during periods of car shortage might not assign privately owned cars to operators other than their own owners, and might not assign foreign railway fuel cars to any mines except those to which they had been manifested by the foreign lines, it must nevertheless count all such cars against the distributive share of the respective mines to which the private cars belonged or to which the foreign railway fuel cars had been consigned; and in case the private cars or foreign railway fuel cars so delivered to a mine were not sufficient to fill out its distributive share of available coal cars, it should have in addition only so many of the system cars of the carrier as might be necessary, when added to the private or foreign railway fuel cars so received by it, to make up its full ratable proportion of the total available coal cars of all classes. We also held that all foreign railway fuel cars consigned to a particular operator, and all private cars owned by a particuar operator, must be delivered to that operator, even though their number might exceed the ratable proportion of the particular mine in the distribution of available cars."

These general principles were held by the Supreme Court to be such as the Commission might legally apply,[149] but that

[149] Int. Com. Com. *v.* Illinois C. R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. 155; Int. Com. Com. *v.* Chicago & A. R. Co., 215 U. S. 479, 54 L. Ed. 291, 30 Sup. Ct. 163. For cases of the Commission discussing the general question see; Richmond Elevator Co. *v.* Pere Marquette R. Co., 10 I. C. C. 629, 635, 637,

court in the Morrisdale Coal Co. case, *supra,* summed up the Commission's cases by saying:

"It was, however, recognized that there could be no hard and fast rule, and that circumstances might arise which would otherwise warrant a departure so as to enable the carrier to meet emergencies arising from a strike on its road, or embargoes by connecting lines."

The duty to furnish cars, a facility of transportation, without undue discrimination or unjust preference, applies, of course, to all kinds of traffic moved by the carriers.[150]

§ 176. **Freight Charges Must Be Collected Without Discrimination.**—One, if not the principal, purpose of the Act to Regulate Commerce being to prevent every form of discrimination, favoritism and inequality,[151] and it being the purpose of Congress "that all shippers should be treated alike," and the in-

Gallogly *v.* Cincinnati, H. & D. R. Co., 11 I. C. C. 1; Parks *v.* Cincinnati & M. V. R. Co., 10 I. C. C. 47; Thompson *v.* Pennsylvania R. Co., 10 I. C. C. 640; Hawkins *v.* Wheeling & L. E. R. Co., 9 I. C. C. 212; Glade Coal Co. *v.* Baltimore & O. R Co., 10 I. C. C. 226, and cases there cited and discussed; Powhatan Coal & Coke Co. *v.* Norfolk & W. Ry. Co., 13 I. C. C. 69; Traer *v.* Chicago & A. R. Co., 13 I. C. C. 451; Jacoby *v.* Pennsylvania R. Co., 19 I. C. C. 392; Bulah Coal Co. *v.* Pennsylvania R. Co., 20 I. C. C. 52; Re Coal Rates Stony Fork Branch, 26 I. C. C. 168. For other than Commission cases see: Logan Coal Co. *v.* Pennsylvania R. Co., 154 Fed. 497; United States ex rel. Coffman *v.* Norfolk & W. Ry. Co. (C. C.), 109 Fed. 831; United States ex rel. Kingwood Coal Co. *v.* West Virginia & N. R. R. Co. (C. C.) 125 Fed. 252; West Virginia & N. R. Co. *v.* United States ex rel. Kingwood Coal Co., 134 Fed. 198, 67 C. C. A. 220; United States ex rel. Greenbrier Coal & Coke Co. *v.* Norfolk & W. Ry. Co., 143 Fed. 266, 74 C. C. A. 404; State ex rel. *v.* Cincinnati, N. O. & T. P. Ry. Co., 47 Ohio St. 130, 23 N. E. 928; United States ex rel. Pitcairn Coal Co. *v.* Baltimore & O. R. Co., 154 Fed. 108; Illinois Cent. R. Co. *v.* Mulberry Hill Coal Co., 238 U. S. 275, 59 L. Ed. —, 35 Sup. Ct. 760; Vulcan Coal Mining Co. *v.* I. C. R. Co., 33 I. C. C., 52 and cases cited. In Pennsylvania Parafine Works *v.* P. R. Co., 34 I. C. C., 179; the question of furnishing cars was discussed at some length and many precedents cited. The orders in the Vulcan Coal case and in the Parafine case are being contested in the courts.

[150] Re Advance Rates on Potatoes, 25 I. C. C. 159, 169; Galveston Commercial Assn. *v.* Atchison, T. & S. F. Ry Co., 25 I. C. C. 216, 228.

[151] Louisville & N. R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 Sup Ct. 265.

tention of the Act being "to prohibit any and all means that might be resorted to to obtain or receive *concessions* and rebates from the fixed rates duly posted and published," [152] it would seem to be clear that a carrier should not extend to one shipper a credit and refuse another shipper in like situation the same extension. It would seem to be equally clear that whatever privilege was extended must be stated in the published tariffs.[153]

§ 177. **Right of Carrier to Route Shipments beyond Its Own Terminus.**—In the absence of a contract specifying the routing, the carrier may route freight passing beyond its own lines over any other reasonably convenient line. If there is a contract on the subject, or if the shipper gives instructions, the carrier must of course, comply therewith. In the absence of instructions, the carrier should route by the most direct and cheapest route.[154] There was nothing in the act to regulate commerce before the amendment of June 29, 1906, that would make illegal a contract by which an initial carrier reserved to itself, as a condition of guaranteeing the through rates, the right of routing the shipment beyond its own line as it might determine.[155] The Hepburn amendment, not prohibiting such right nor specifically granting the power to the commission to prohibit same, the carrier may yet exercise the right, provided, of course, no undue or unjust discrimination results to shippers thereby. The commission now has the power to establish through routes and joint rates.

§ 178. **Discrimination in Billing.**—An unjust discrimination may be committed by billing one commodity under a classification to which it does not belong by giving it a false weight or value, and by letting one commodity go at the net weight and denying that privilege to a like kind of traffic. This species of discrimination and other like devices and means are prohibited

[152] Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. 428.

[153] So held in United States *v.* Hocking Valley R. Co., 194 Fed. 234. See Gamble-Robinson Com. Co. *v.* Chicago & N. W. Ry. Co., 168 Fed. 161, 94 C. C. A. 217, 21 L. R. A. (N. S.) 982, 16 Ann. Cas. 613; United States *v.* Erie R. Co., 209 Fed. 283.

[154] Dewey Bros. Co. *v.* Baltimore & O. R. Co., 11 I. C. C. 481; Hennepin Paper Co. *v.* Northern Pac. R. Co., 12 I. C. C. 535.

[155] Southern Pac. Co. *v.* Int. Com. Com., 200 U. S. 536, 50 L. Ed. 585, 26 Sup. Ct. 330.

by section 10 of the act to regulate commerce (see post, § 384). The prohibition of the statute applies to the shipper as well as the carrier. The net weight practice was in effect a rebate,[156] as is the other practices mentioned, all of which are but devices violating the act, and subjecting those who are guilty to punishment. The offense is committed when the goods are billed.[157] A shipper who, by misrepresentation, obtains a lower classification and rate than he is entitled to, is liable to the carrier for the difference between the rate paid and the rate he should have paid under a proper billing.[158] One who in good faith by mistake incorrectly describes the goods is not subject to the penal provision of the act.[159]

§ 179. **Tariffs of Rates Must Be Printed, Posted and Maintained.**—No carrier can engage in interstate transportation of goods "unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published." The act requires not only the filing and publishing of such "rates, fares and charges," but demands that the published tariffs must be charged and collected. (See *post,* §§ 358, 364). No change in the tariff can be made without reasonable notice. No provisions of the act are more effective to prevent discrimination and promote equality than are these. The courts and the Commission have sustained and enforced these provisions. It has sometimes been contended that they are unjust when applied to import or export traffic. It is true that such provisions would be inapplicable to purely water traffic. It is little or no more expensive for a ship to carry her full, than it is to carry her minimum cargo. For this reason, as a ship's sailing day approaches and her cargo has not been obtained, she does and should be allowed to reduce her rates, thereby obtaining her full load. This principle, however, does not apply to that part of a through export or import movement that is had over rail carriers. Ships, as well as individuals, are entitled to know what the land movement will cost and to have this cost based upon equality of charge. There is nothing in the law that makes the

[156] Proctor & Gamble *v.* Cincinnati, H. & D. R. Co., 9 I. C. C. R. 440, 484.

[157] Davis *v.* United States, 104 Fed. 136, 43 C. C. A. 448.

[158] Missouri, K. & T. R. Co. *v.* Trinity Lumber Co., 1 Tex. Civ. App. 553, 21 S. W. 290.

[159] Atchison, T. & S. F. Ry. Co. *v.* Goetz, 51 Ill. Appl. 151; Davis *v.* Pere Marquette R. Co., 10 I. C. C. 405.

rail carrier transport its domestic freight at the same rate as its proportion of an import or export movement.[160] On this subject the Commission, in its twenty-second annual report, pp. 14 and 15, says:

"Effective April 15, 1908, and in exact harmony with the decision of the Commission in the case of Cosmopolitan Shipping Company *v.* Hamburg-American Packet Company et al., 13 I. C. C. Rep., 266, a regulation was promulgated by the Commission requiring that tariffs applying on traffic exported to or imported from foreign countries not adjacent to the United States must show the rates, fares, and charges of the inland carriers subject to the act for such transportation to the port and from the port in the United States, and that such rates, fares, and charges be so stated as to be available for all persons who desire to use them. It was provided that as a matter of convenience to the public such tariffs might show through rates to or from foreign points, but that if so prepared they should also show the inland rate or fare of the carrier subject to the act.

"Representations were made to the Commission that transcontinental rail carriers reaching our Pacific coast ports were, on account of the long rail haul, at a disadvantage in competition with other carriers serving Atlantic ports and transporting Asiatic traffic via the Suez Canal route. They therefore requested modification of the requirements as to notice of changes in rates, and were given permission to make changes in their rates applicable to such import and export traffic to or from our Pacific coast ports upon notice of three days of reduction in rates and of ten days as to advance in rates. Subsequently, by supplemental order, the same permission was extended to carriers subject to the act reaching Pacific coast ports in British Columbia.

"The rail carriers in the United States ordinarily known as the transcontinental lines withdrew, effective November 1, 1908, all their through import and export rates via the Pacific ports and applied to the inland carriage of export and import traffic through those ports the domestic rates applicable on traffic to and from the ports proper. The Canadian Pacific Railway, in connection with a large number of carriers in the United States with lines east of the Mississippi River, published and filed pro-

[160] Tex. & Pac. Ry. Co. *v.* Int. Com. Com., 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666.

portional class and commodity inland rates applicable to Vancouver, British Columbia, on traffic destined to oriental ports, the Phillipines, Australia, and New Zealand, which proportional rates are much lower than the domestic rates applying on traffic destined to Vancouver proper. These tariffs, as permitted by the Commission's rule and for the information of shippers, show through rates to foreign ports in connection with certain named steamship lines.

"The rule of the Commission was freely commented upon in the newspapers, but almost without exception from an entirely erroneous standpoint and a total misunderstanding or misconception as to what the rule required. No opinion was expressed by the Commission that the inland portion of export and import rates might not reasonably and properly be less than the domestic rates to the ports. The order simply required the carriers to conform to the plain requirements of the law and to publish, in the manner prescribed by law, whatever rates they saw fit to establish on this traffic."

§ 180. **Same Subject—Misquoting Rates.**—If a carrier makes a mistake and quotes the wrong rate, the shipper must nevertheless pay the correct tariff rate, even though he suffer severe loss thereby, and for this loss he has no remedy.[161] In Poor *v.* Chicago, B. & Q. R. Co., 12 I. C. C. 418, 421, 422, Mr. Commissioner Harlan gives the reason for this decision as follows:

"And of necessity no other conclusion was possible if the integrity of this regulative legislation is to be preserved. If a mistake in naming a rate between two given points is to be accepted as requiring the application of that rate by the carrier, the great principle of equality in rates, to secure which was the very purpose and object of the enactment of these several statutes, might as well be abandoned. If the act of a railroad clerk,

[161] Tex. & Pac. Ry. Co. *v.* Mugg, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. 628; Gulf C. & S. F. R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 Sup. Ct. 802; Poor Grain Co. *v.* Chicago, B. & Q. R. Co., 12 I. C. C. 418, 421, 422; Suffern, Hunt & Co. *v.* Indiana, D. & W. Ry. Co., 7 I. C. C. 255, 278; Houston & T. C. R. Co. *v.* Dumas, 43 S. W. 609; Chicago, R. I. & P. Ry. Co. *v.* Hubbell, 54 Kans. 232, 38 Pac. 266, 5 I. C. R. 241; Pond-Decker Lumber Co. *v.* Spencer, 86 Fed. 846, 30 C. C. A. 430; Mobile & O. R. Co. *v.* Dismukes, 94 Ala. 131, 10 So. 289, 4 I. C. R. 200; Atchison, T. & S. F. Ry. Co. *v.* Holmes, 18 Okla., 92, 90 Pac. 22.

whether through mistake or otherwise, in quoting a less than the lawful rate or in inserting a lower rate in a bill of lading is to be held to require or to justify and excuse the substitution of that rate, on a particular shipment, for the lawfully published rate, the effectiveness of such legislation is at an end and its whole purpose destroyed. For past experience shows that billing clerks and other agents of carriers might easily become experts in the making of errors and mistakes in the quotation of rates to favored shippers, while other shippers, less fortunate in their relations with carriers and whose traffic is less important, would be compelled to pay the higher published rates.

"Stability and equality of rates are more important to commercial interests than reduced rates. It was instability and inequality that were the special evils to be remedied; it was the possibility that one shipper, in one way or another, whether by mistake or otherwise, could, and actually did, get a lower rate than another shipper that led to the more stringent legislation. That evil the present amended statute meets in substantially the language of previous legislation."

While Mr. Commissioner Harlan was undoubtedly correct in his conclusion as the law then stood, the ruling was one that frequently worked serious injury to shippers. On this subject the commission, in its twenty-second annual report, pp. 16, 17, aptly says:

"The act to regulate commerce requires carriers to collect their published rates, under severe penalty, and the Supreme Court of the United States has held that this must be done even though the carrier has quoted to the shipper a different rate, in good faith, upon which the shipper has acted.

"The practical hardship of this rule is illustrated by the last case in which it was applied by that court. Texas and Pacific Railway Company *v.* Mugg, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. 628. Here the plaintiff applied for a rate on coal from a point in Arkansas to a point in Texas and was quoted a rate of $1.25 upon one kind and $1.50 upon another. Upon the strength of this quotation he made sale of three carloads for a delivered price at the Texas point. In fact, the published rate was $2.75 upon one kind and $2.85 upon the other, and the shipper was obliged to pay upon the arrival of the coal in Texas $140.18 more than would have been due under the rates quoted. This converted the transaction from a profit to a loss, and his

suit was to recover damages thus occasioned. The court, as has been said, held that no recovery could be had.

It is undoubtedly true that shippers ordinarily do not know and it would some times take an expert to find out what a particular rate is, and, therefore, reliance must be had on the information furnished by the agents of the carriers. The commission points out the evil but suggests no remedy. It would probably be an effective remedy to allow the commission to award reparation in such cases as it might find were based upon an honest mistake of the carrier. The commission would be able to prevent the evils that Mr. Commissioner Harlan points out; and, if necessary to prevent discrimination, the rate mistakenly given might be open to all who ship contemporaneously with the shipper who relied on the misquoted rate.

The Act of 1910 prescribing a penalty for misquoting a rate under certain prescribed conditions makes it illegal to misstate a rate. This provision taken in connection with Section 8 of the act, presents a situation different from that existing prior to this amendment and now when the amended provision is violated it is believed that a shipper may recover his damages.[162]

§ 181. **Different Rates over the Same Line in Opposite Directions.**—In the case of Duncan *v.* Atchison, T. & S. F. Ry. Co.,[163] the Commission said:

"The complainant was not discriminated against in being allowed on his shipments west, to Los Angeles, the lowest available rate, and there was no discrimination against him on his shipments east to Louisville, as he was charged the general rate exacted of all shippers. His complaint in reference to the disparity between the rates charged him on his east and west bound shipments, respectively, is not properly one of unjust discrimination under the third section of the act to regulate commerce, but rather calls in question the reasonableness of the higher rate. The claim is in substance, that the rate of $350 eastward is unreasonable in view of the fact that the rate over the same line and between the same points westward is only $263. This fact alone is relied upon to support the charge. The two rates have no necessary connection or relation, and the

[162] Secs. 368, and 382, *post*, and St. Louis S. W. Ry. Co. *v.* Lewellen Bros., 192 Fed. 540.

[163] Duncan *v.* Atchison, T. & S. F. R. Co., 6 I. C. C. 85, 4 I. C. R. 385.

fact that a rate over a road or line in one direction is materially higher than the rate on the same class of traffic over the same road or line and between the same points in the opposite direction does not, as in the case of hauls over the same line in the same direction, establish *prima facie* the unreasonableness of the higher rate. This would appear to be especially true where the hauls are of as great length as those now under consideration. It is moreover in evidence, as remarked above, that the 'west-bound movement of the traffic termed "emigrants' moveables" is double the east-bound movement,' and the goods shipped west as 'emigrants' moveables' are 'materially lower in value' than those shipped east. It may be conceded that the much greater volume of the traffic moved west than east is to some extend attributable to the lower rate west, but the tide of emigration is naturally from a comparatively old and thickly populated country like the east to a new and sparsely settled country like the west. No evidence as to the unreasonableness of this rate in itself has been offered."

This ruling has been repeated several times by the Commission. In the Duncan case, *supra,* the facts of the case showed a much heavier movement of the goods transported under the shipment there in controversy towards the west than towards the east. This fact is one of the causes that affects rates and may always be considered. The amount of traffic of a particular kind that moves in a particular direction may properly constitute a different circumstance and condition. The conclusion of the Commission was correct, but what was there stated should not be accepted as a general rule. If the movement both ways is practically equal and there are no other differentiating circumstances, the fact that a rate over a road or line in one direction is materially higher than the rate on the same class of traffic over the same road or line and between the same points in the opposite direction does, as in the case of hauls over the same line in the same direction, establish *prima facie* the unreasonableness of the higher rate.

The facts in the MacLoon case [164] while stated by the Commission to be practically the same as in the Duncan case, do not so clearly support the holding as did the facts in the last named case. There was no evidence as to the relative

[164] MacLoon *v.* Boston & M. R. Co., 9 I. C. C. 642, 645.

amount of traffic each way and the accommodations seemed to have been practically the same. The charge was greater going west than going east. This case would indicate a disposition on the part of the Commission to make it a general rule that there is no relation between traffic in opposite directions over the same route. In a later case [165] the MacLoon case is cited and followed. It will be conceded that circumstances may exist justifying a difference in rates over the same line in opposite directions; but in the absence of proof of such circumstances, such difference should be held *prima facie* evidence of unjust discrimination.[166]

It is clear that rates in opposite directions over the same line may be different; but such a rate relationship requires explanation.[167]

§ 182. **Discrimination by Granting Free Service.**—Free tickets, fares, passes, or free transportation for passengers are prohibited, with certain exceptions, by paragraph four of section one of the Act to Regulate Commerce as amended by the Act of April 13, 1908.[168] The provisions requiring the tariff rates to be charged and collected would prevent the free transportation of property, except such as may be had under section 22 of the Act, which section provides: "Nothing in this act shall be construed to prevent railroads from giving free carriage to their officials and employees."

The purpose and history of these provisions of the law are given by the Commission in an investigation of the subject of granting passes in Colorado and Montana. In the report of this investigation it was held that to grant an interstate shipper an intrastate pass violates the Act and prosecutions were recommended. It was also shown that a free pass dissipates revenues and when carriers seek rate advances this fact is proper to be considered.[169]

[165] Hewins *v.* New York, N. H. & H. R. Co., 10 I. C. C. 221, 224.

[166] Int. Com. Com. *v.* Louisville & N. R. Co., 118 Fed. 613, 623.

[167] Weil *v.* Pennsylvania R. Co., 11 I. C. C. 627, 629, 630; Phillips *v.* Grand Trunk W. R. Co., 11 I. C. C. 659, 664, 665; Pacific Coast Gypsum Co. *v.* O. W. R. Co., 30 I. C. C. 135.

[168] Sec. 342, *post.*

[169] Re Issuance and Use of Passes, 26 I. C. C. 491; Re Issuance and Use of Passes—Montana Situation—29 I. C. C. 411.

In the Motley Case,[170] the Supreme Court had for determination the validity of a contract for transportation made by Mottley in consideration of the settlement of his claim for damages. The contract, though made prior to the statute prohibiting free passes, was held void, the court saying:

"The passenger has no right to buy tickets with services, advertising, releases or property, nor can the railroad company buy services, advertising, releases or property with transportation. The statute manifestly means that the purchase of a transportation ticket by a passenger and its sale by the company shall be consummated only by the former paying cash and by the latter receiving cash of the amount specified in the published tariffs."

The court referred in the opinion to the ruling by the Interstate Commission, conference ruling 207, which ruling is as follows:

207. Payment for Transportation.—Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates or fares in effect at the time, precludes the acceptance of services, property, or other payment in lieu of the amount of money specified in the published schedules.

§ 183. **Basing Points, Group Rates and Zone Rates.**—In discussing the reasonableness of rates the questions of basing the rate of one locality on that of another, grouping territory and giving the whole group the same rate, and making rates to or from particular zones were discussed.[171] The description of these systems of rate making there given need not be here repeated. It was there seen that discrimination could result from such practices, and it is obvious that either of the systems may be so applied as unduly to discriminate for or against a particular locality. But it was shown that the systems were not necessarily illegal, the illegality, if existing, arising from the application of the system.

Generally speaking, competition may force a lower rate at one

[170] Louisville & N. R. Co. *v.* Mottley, 219 U. S. 467, 477, 55 L. Ed. 297, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671.

[171] Sec. 108, *supra*.

point than at another. What competition must be considered and the force that must be given thereto present questions having the difficulties which accompany the determination of all questions relating to making or judging rates. Definite water competition is a fact which carriers may consider, and water competition at one point which forces a low rate thereat may be met by a carrier without being compelled to accord the same low rate to another point where no such competition exists.[172] But, "every city is entitled to the advantage of its location and may not lawfully be subjected to high freight charges merely because carriers, for reasons of convenience or otherwise, include it with a number of other points in surrounding territory which latter points are not similarly situated."[173] Carriers can not of their own initiative, nor can they be compelled, "to equalize natural advantages."[174]

In speaking of group rates, the Commission said:

"When general rate adjustments in and between large territories, which contemplate substantial justice between all shippers generally, result in individual instances of disproportionate inequality, they fail in their purpose to that extent, and their strict observance in such cases upon no other ground than the arbitrary theory of their existence, should yield to the extent necessary to prevent gross injustice, just as many other general rules are necessarily subject to exceptions."[175]

The report of the Commission in the Carrollton Board of Trade case,[176] discusses the general subject and holds that distance is a fact requiring consideration.

[172] Int. Com. Com. *v.* Alabama M. Ry. Co., 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45; Int. Com. Com. *v.* Louisville & N. R. Co., 190 U. S. 273, 47 L. Ed. 1047, 23 Sup. Ct. 687; Int. Com. Com. *v.* Western & A. Ry. Co., 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512; Columbia Grocery Co. *v.* Louisville & N. R. Co., 18 I. C. C. 502.

[173] Corporation Com. of North Carolina *v.* Norfolk & W. Ry. Co., 19 I. C. C. 303, 307.

[174] Elk Cement & Lime Co. *v.* Baltimore & O. R. Co., 22 I. C. C. 84, 88.

[175] Alpha Portland Cement Co. *v.* Baltimore & O. R. Co., 22 I. C. C. 446, 449; Kaufman Commercial Club *v.* T. & N. O. R. Co., 31 I. C. C. 167; Coffeyville Commercial Club *v.* A. T. & S. F. R. Co., 33 I. C. C. 122, 34 I. C. C. 231.

[176] Board of Trade of Carrollton *v.* Central of Ga. Ry. Co., 28 I. C. C. 154.

§ 184. **How Far a Rate Made by a State Relieves a Carrier from the Duty to Serve Communities with Legal Equality.**—That discrimination which the statute prohibits, may result from the fact that state made rates applying within a particular state are lower than interstate rates applicable to interstate shipments which are made to compete with like shipments moving under intrastate rates. If Congress has no power to prohibit discrimination when one class of the discriminatory rates is made by a state, there could be the most injurious discrimination for which no remedy would exist. This and similar arguments influenced the Commission in the Shreveport case to direct the carriers there defendant to remove an unlawful discrimination resulting from rates prescribed by the Railroad Commission of Texas. Such an order the courts held was valid.[177]

§ 185. **Commutation, Mileage and Party Rate Tickets.**—Section 22 of the act provides: "Nothing in this act shall prevent * * * the issuance of mileage, excursion or commutation tickets." The right, however, to issue these special contracts for passenger travel is subject to the provisions of other sections of the act requiring that all in similar situation shall be accorded like treatment. Commutation tickets must not be accorded to some and denied to other similarly situated.[178]

A dictum of Mr. Justice Holmes supports the conclusion that commutation tickets might be limited in their use to school children, while the opinion of the Commission seems to favor the opposite view.[179] While the question is not free from doubt, the public purpose served, and the absence of damage to any one tends to justify a classification of school children for the purpose of conceding to them special commutation fares.

[177] Houston, E. & W. Ry. Co. *v.* United States-Shreveport case, 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833, affirming Texas & P. R. Co. *v.* United States, 205 Fed. 380, and the order of the Commission in Railroad Com. of La. *v.* St. L. S. W. Ry. Co., 23 I. C. C. 31. See also Sec. 44, *supra*

[178] Commutation Tickets to School Children, 17 I. C. C. 144; Re Restricted Rates, 20 I. C. C. 426; Commutation Rate Case, 21 I. C. C. 428; Bitzer *v.* W.-V. Ry. Co., 24 I. C. C. 225.

[179] Interstate Ry. Co. *v.* Massachusetts, 207 U. S. 79, 2 L. Ed. Ill. 28 Sup. Ct. 26; affirming Commonwealth *v.* Interstate Ry. Co., 187 Mass. 436, 73 N. E. 530; Commutation Tickets to School Children, 17 I. C. C. 144.

It is not an unjust discrimination to give lower rates for each individual when several travel on one ticket than is accorded each individual traveling alone.[180]

§ 186. **Rebates.**—A rebate within the meaning of the act to regulate commerce means the acceptance by a common carrier of a rate less than that provided for in its tariffs of charges. The most frequent method of rebating was for the carrier to exact the full tariff charge and afterwards "rebate" or pay to the shipper a portion thereof. This rebate was sometimes affected under the guise of a claim for damages by the shipper. In whatever form, whether openly or by the most ingenious and complicated device, all rebates are illegal and punishable under the Elkins law. The desire to obtain equality to shippers and to prevent favoritism was probably the strongest reason for the enactment of the act to regulate commerce. By the unjust and preferential payment of rebates the incomes of carriers were reduced and the unfortunate shipper who received no rebates had his business destroyed, while his more favored competitor thrived. The views of the Supreme Court, through Mr. Justice White, in New York, N. H. & H. R. Co. *v.* Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. Ed. 515, 521, 26 Sup. Ct. Rep. 272, 277,[181] are apposite here:

"It can not be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial, and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve * * * The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which

[180] Int. Com. Com. *v.* B. & O. R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844, 4 I. C. R. 92.

[181] New York, N. H. & H. R. Co. *v.* Interstate Com. Com., 200 U. S. 361, 391, 50 L. Ed. 515, 521, 26 Sup. Ct. Rep. 272, 277.

the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer."

Mr. Justice Day, after quoting the above remarks in the Armour Packing Co. case,[182] said:

"The Elkins act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service, under the same conditions, should be the one established, published, and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

Emphasis was given to these principles by the Supreme Court in holding that land can not be purchased and paid for by conceding to the grantor a rebate although the amount of the rebate is less than the value of the land. Said Mr. Justice Lamar in the opinion of the court: "The commerce act prohibits the payment of rebates, and its command can not be evaded by calling them differentials or concessions, nor by taking the money from the railroad itself or from a company that is proved to be the same as the railroad.[183]

The law applies to demurrage charges,[184] and each distinct shipment, transportation or transaction constitutes a separate offense.[185]

The venue of suits in prosecutions for granting rebates is in

[182] Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. 428.

[183] Fouche River Lumber Co. *v.* Bryant Lumber Co., 230 U. S. 816, 57 L. Ed. 1498, 33 Sup. Ct. 887, citing Louisville & N. R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 397, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671; United States *v.* Lehigh Valley R. Co., 220 U. S. 257, 55 L. Ed. 458, 31 Sup. Ct. 387; United States *v.* Union Stock Yards Co., 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83, and reversing Fouche Lumber Co. *v.* Bryant Lumber Co., 97 Ark. 623, 135 S. W. 796.

[184] Lehigh Valley R. Co. *v.* United States, 188 Fed. 879, affirming United States *v.* Philadelphia & R. Co., 184 Fed. 543, and United States *v.* Lehigh Valley R. Co., 184 Fed. 546.

[185] United States *v.* Standard Oil Co., 192 Fed. 438; New York C. & H. R. R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed. 613, 29 Sup. Ct. 304.

any federal district through which moves the transportation on which the rebate is paid.[186]

When no joint tariff is filed, the sum of the local rates is the valid through rate, and a carrier who issues a through bill of lading and collects less than such rate is guilty of rebating.[187]

§ 187. **Same Subject—Corporation Punishable.**—In New York C. & H. R. R. Co. *v.* United States,[188] it was contended that the law could not impute to a corporation the Commission of a crime and that the conviction of a corporate common carrier for rebating was illegal. This question is discussed at length, authorities cited and this conclusion arrived at:

"We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agent acts. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it can not shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation can not commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.

"There can be no question of the power of Congress to regulate interstate commerce, to prevent favoritism and to secure equal rights to all engaged in interstate trade. It would be a distinct step backward to hold that Congress can not control those who are conducting this interstate commerce by holding them responsible for the intent and purposes of the agents to whom they have delegated the power to act in the premises."

This section and the one preceding it are limited to the ques-

[186] See note 185, *supra*, this chapter.

[187] Chicago, B. & Q. R. Co. *v.* United States, 157 Fed. 830. Affirmed, 209 U. S. 90, 52 L. Ed. 698, 28 Sup. Ct. 439.

[188] New York C. & H. R. R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed. 613, 29 Sup. Ct. 304.

tion of discrimination as the result of rebates. The procedure for determining and punishing rebating will be more fully discussed in a subsequent chapter.[189]

§ 188. **Summary.**—Obviously many of the facts which must be considered in determining whether a particular rate is reasonable or unreasonable must also be considered in determining whether or not a particular rate is unjustly discriminatory or unduly preferential. Some, therefore, of the principles discussed in section 131 *supra* are applicable here.

A common carrier performs a public function; the Government permits the carrier to do what the Government itself could do. The charges exacted by the carrier are analogous to taxation. The Government taxes, that it may perform its governmental duties. The Government, it is true, exacts no profit for the service rendered, the common carrier using private capital is permitted to receive, in addition to the actual cost of the service it performs, a fair return on the capital necessarily used to enable it to perform such service. The Government itself would, were it to undertake to perform the service directly, have to obtain capital to supply the necessary facilities. The Government could furnish the service free to all, obtaining the cost thereof from general taxation, or it could as with the mails make all who use the service pay therefor.

This analogy between taxation and charges by common carriers is sufficient to require that the rule of uniformity applicable to taxation should be observed in fixing the charges which the common carrier may exact.

But uniformity does not mean that every charge must be the same. It means no more than that under the same or similar circumstances the charge exacted shall be guaged alike.

There are different kinds of taxes, but there must be uniformity in the tax on the same or a similar subject-matter.

To get just uniformity, either in taxation or in charges by public service corporations, there must be classification; classification as to the service rendered considering the cost and extent thereof, and classification as to the value the service is to him for whom it is performed.

It has been the aim of the author of this chapter to present the principles which have been applied in making this classifica-

[189] Sec. 371, *post*.

tion of commodities and of rates. That these principles must yield sometimes is true. That the known facts are not sufficiently comprehensive to justify definite generalizations and a fixed standard to be applied to the question, must be admitted. But the general rules which have been empirically deduced justify the statement of the Commission that "it is not fanciful to say that a schedule of rates may be made which will approach justice as between services."

CHAPTER V.

Enforcement by the Commission of the Act to Regulate Commerce.

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§ 189. **General Statement of the Functions of the Commission.**—In discussing the scope and validity of the act to regulate commerce *infra* chapter two, it was seen that the Interstate Commerce Commission was an administrative body, with no judicial power, that it is an agency of the legislative department of the Federal Government to which has been delegated the legislative power of prescribing rates for the future. In the performance of its administrative duties, it exercises certain functions in the exercise of which it adopts forms and procedure similar to those in use by courts when enforcing the judicial powers of the government. While in a loose way it is frequently said that the Commission exercises *quasi* judicial powers, it can not be said that any of the judicial powers conferred by the Constitution of the United States are, or can be, exercised by the Commission. Its duties under existing law naturally divide themselves into two distinct branches. The first of these are purely administrative in their nature. The second is the exercise of its delegated legislative power and consists of prescribing rules, regulations and rates for the future. Under the first head, upon complaint, the Commission, after hearing, may decide that the past practice of a carrier has not been in accord with the law, it may determine that by such practices the complainant has been damaged in an amount which the Commission fixes. Its findings awarding reparation may or may not, at the option of the carrier, be obeyed. If the order therefor is obeyed, it is not that the carrier can be compelled to do so by any order of the Commission, but because the carrier

recognizes the justice thereof or fears that the courts may do so. If obedience is refused, the Commission, or the parties in whose favor the order is granted, may ask the judicial department of the government to lend its aid to make effective the findings of the Commission. When the matter is brought to the attention of the proper court in such a way as to invoke its action, a hearing is had *de novo,* the findings of the Commission being, by a rule of evidence prescribed by the legislative department, *prima facie* true. Exercising its full and unlimited judicial power, the court may give weight to the findings of the Commission like it might to any other administrative body; but the power to enforce the order is wholly in the courts.

The Commission prescribes forms of accounting which the carriers must obey, prescribes the forms of tariffs and methods of publishing same, and makes conference rulings applicable to the general enforcement of the Act.

By the Amendment of March 1, 1913, the Commission is directed to investigate, ascertain and report the value of all the property owned or used by every common carrier subject to the provisions of the commerce acts.

§ 190. **Appointment and General Duties of the Commission.**—The Interstate Commerce Commission is composed of seven members, whose terms of office is seven years each, and each of whom receives an annual salary of ten thousand dollars. They are appointed by the president by and with the advice and consent of the Senate. Nor more than four of the commissioners may be of the same political party, and they may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. They shall not engage in any other business, vocation, or employment. The principal office of the Commission shall be in Washington, where its general sessions shall be held; but whenever the convenience of the public or the parties may be promoted, or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of the act. It shall inquire into the management of the business of all common carriers subject to the act, and is authorized and required to enforce such act. It has power to require, by subpœna, the

attendance of witnesses and the production of books and it may order testimony taken by depositions. Every order of the commission shall be forthwith served by mailing to any one of the principal officers or agents of the carrier at his usual place of business a copy thereof; and the registry mail receipt shall be *prima facie* evidence of the receipt of such order by the carrier. It may suspend or modify its orders and grant rehearings. It has power to require reports from carriers subject to the act and to prescribe forms for accounting by carriers. It must itself make annual reports to Congress.

§ 191. **Switch Connections—Duty of Carrier.**—It is the duty of any common carrier subject to the provisions of the Act to Regulate Commerce, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, to construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, and where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same, and to furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper.[1]

Under section one of the Act of March 4, 1887, as amended by the Act of June 29, 1906, the Supreme Court held that the Interstate Commerce Commission had power to compel switch connections with lateral branch roads only at the instance of shippers and that it had no power to compel switch connections on the application of a branch railroad.[2]

The amendment of June 18, 1910, however, gives the right to "any lateral, branch line of railroad," as well as to any shipper.

In construing the words "lateral branch line," the Supreme Court gave as examples of such lines, "those that are dependent upon and incident to the main line—feeders, such as may be built from mines or forests to bring coal, ore or lumber to the main line for shipment," and the court held that the question

[1] First part, last par. Sec. 1, of Act to Regulate Commerce, as amended by act June 18, 1910, Chap. 309, Sec. 7, 36 Stat. at Large 539, 547, Sec. 338, *post*.

[2] Interstate Com. Com. *v.* Delaware, L. & W. R. Co., 216 U. S. 531, 54 L. Ed. 605, 30 Sup. Ct. 415.

of whether or not a particular line comes within the meaning of the statutory language must be determined by what the line is, and not by what it may become.[3]

§ 192. **Switch Connections—Powers of the Commission.** —Should a carrier fail to perform the duty to make switch connections, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad, may make complaint, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and the justification and the reasonable compensation therefor, and the Commission may make an order directing the common carrier to comply with the provisions of the statute in accordance with such order.[4]

This provision is limited by section three of the Act to Regulate Commerce which provides that no railroad shall be required to give the use of its tracks or terminal facilities to another carrier engaged in like business.[5]

When there is an application for a switch connection made as provided by statute and the evidence shows an existing siding from which interstate freight is tendered, that there is sufficient business to justify the construction and maintenance of the switch and the connection is reasonably practicable and safe, the Commission will order a connection.[6]

There must, however, be an existing side track or lateral branch line of railroad with which the connection can be made,[7] and the Commission has no jurisdiction to enforce a contract for such connection.[8]

[3] United States *v.* Baltimore & O. R. Co., 226 U. S. 14, 57 L. Ed. 104, 33 Sup. Ct. 5, affirming Baltimore & O. R. Co. *v.* United States, 195 Fed. 962, Opinion Commerce Court No. 60, p. 431. For order of the Commission see, Cincinnati & Columbus Traction Co. *v.* Baltimore & O. R. Co., 20 I. C. C. 486. Following the Supreme Court see, St. Louis, S. & P. R. Co. *v.* Peoria & P. U. Ry. Co., 26 I. C. C. 226; Morris Iron Co. *v.* Baltimore & O. R. Co., 26 I. C. C. 240.

[4] Last part of last par. Sec. 1, note 1, *supra;* Sec. 338, *post.*

[5] Morris Iron Co. *v.* Baltimore & O. R. Co., 26 I. C. C. 240, 243, 244; Sec. 347, *post.*

[6] Ridgewood Coal Co. *v.* Lehigh Valley R. Co., 21 I. C. C. 183, 185.

[7] Winters Metallic Paint Co. *v.* Chicago, M. & St. P. Ry. Co., 16 I. C. C. 687.

[8] Ralston Townsite Co. *v.* Missouri Pac. Ry. Co., 22 I. C. C. 354.

The prohibition against requiring a carrier to give the use of its tracks, terminals and facilities to a competing carrier, does not prevent the Commission in a proper case from requiring a carrier to receive cars from a connection for transportation over its tracks and terminals. Such a requirement when the haul is "a substantial part of a continuous transportation routing" and necessary to such movement, is a proper regulation of the business of the carrier and not an appropriation of terminal facilities for the use and benefit of another road.[9] For the transportation over its tracks the carrier performing the service is entitled to a reasonable compensation.[10]

§ 193. **Industrial Switches and Railways.**—The jurisdiction of the Commission to require switch connections includes the power and imposes the duty to regulate such connections. Many industries own private switch tracks connecting with a carrier; some of the tracks privately owned have developed so far as to become incorporated as railways. That connections may in proper cases be required to be made by the carriers with these industrial tracks or industrial railways has been shown in the preceding section. When such connections are made, cars are delivered from the line of the carrier to the industrial track or railway, and sometimes the line carrier delivers incoming cars over and takes outgoing cars from the plant tracks. Obviously such delivery and receipt of cars is valuable to the industry and costs the carrier something. Carriers have made allowances from their rates to such industries or to their subsidiary railways in the form of rate divisions, per diem reclaims, remission of car demurrage, furnace allowances, and have performed services without additional charges over the line rate by placing cars at points on the tracks or railways of the industry.

These allowances and remissions were discussed by the Commission in the First Industrial Railways case,[11] and held to be illegal.

[9] Grand Trunk R. Co. *v.* Michigan Railroad Com., 231 U. S. 457, 58 L. Ed. 310, 34 Sup. Ct. 152; Michigan C. R. Co. *v.* Michigan Railroad Com., 236 U. S. 615, 59 L. Ed. —, 35 Sup. Ct. 422; Penn. Co. *v.* U. S., 236 U. S. 351, 59 L. Ed. —, 35 Sup. Ct. 370; Ill. Cent. R. Co. *v.* Railroad Com. of La., 236 U. S., 157, 59 L. Ed. —, 35 Sup. Ct. 275.

[10] So. Ry. Co. *v.* St. Louis Hay & Grain Co., 214 U. S. 297, 53 L. Ed. 1004, 29 Sup. Ct. 678.

[11] Industrial Railways Case, 29 I. C. C. 212.

"Spotting cars" in so far as the phrase has a definite meaning, is the service performed by a line carrier of placing or receiving cars for a plant beyond the point of interchange between the rails of the carrier and the tracks of the industry, and, as such practice is so defined, it was held illegal unless a reasonable charge was made for the service.[12]

The Commerce Court held invalid an order of the Commission requiring an interstate carrier to deliver freight to industrial tracks at the same rate as when the delivery was made to the team track of the carrier, a decision which appears sound and which was not appealed from.[13] There can be no doubt under the decisions of the Supreme Court, that tap line and industrial roads are entitled to a reasonable division or allowance from the road enjoining the line haul. The Commission may not deprive the short line of this right, but the Commission has jurisdiction to regulate the amount of the allowance or division as in cases of other charges by common carriers.[14]

§ 194. **Switch Connections with Carriers by Water.**— The Panama Canal Act gives jurisdiction to the Commission over interstate transportation "by rail and water through the Panama Canal or otherwise," and "of the carriers, both by rail and by water, which may or do engage in the same," and gives the Commission power to establish physical connections between the lines of the rail carrier and the dock of the water carrier

[12] Industrial Railways Case, 29 I. C. C. 212, 234. Spotting was defined in a tariff suspended by the Commission as "service beyond a reasonable convenient point of exchange." In a brief it was defined as "placing a car at a particular spot." See also Alan Wood Iron & Steel Co. *v.* Pennsylvania R. Co., 22 I. C. C. 540.

[13] Atchison, T. & S. F. Ry. Co. *v.* Interstate Com. Com., 188 Fed. 229 and 929, Opinion Commerce Court No. 2, p. 3, enjoining the order of the Commission in Associated Jobbers of Los Angeles *v.* Atchison, T. & S. F. Ry. Co., 18 I. C. C. 310. Commerce Court reversed, Interstate Com. Com. *v.* Atchison, T. & S. F. Ry. Co., 234 U. S. 294, 58 L. Ed. 1319, 34 Sup. Ct. 814.

[14] Secs. 170, 171, *supra*. Note 13, *supra*, this chapter. Tap Line Cases, 234 U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 741; Manufacturers' Railway Co. *v.* St. L. I. M. & S. Ry. Co., 32 I. C. C. 578; Industrial Railways Case, 32 I. C. C. 129; Car Ferry Allowance at Cheboygan, 32 I. C. C. 578; Trap or Ferry Car Service Charges, 34 I. C. C. 516; Second Industrial Railways Case, 34 I. C. C. 596; Car Spotting Charges, 34 I. C. C. 609.

when such "connection is reasonably practicable" and "can be made with safety to the public, and where the amount of business to be handled is sufficient to justify the outlay." [15]

It was argued before the Commission that the words "or otherwise" modified the phrase "by rail and water" and not the phrase "through the Panama Canal." This construction was not adopted and it was held that by reason of the words "or otherwise," the Commission had jurisdiction to establish through routes and joint rates between rail carriers and water carriers, those operating through the Canal and those operating on other waters. Not to adopt the construction given the statute by the Commission would leave the words "or otherwise" mere surplusage, to do which would violate the fundamental canons of statutory construction.[16]

§ 195. **Through Routes.**—It is made the duty of the carriers subject to the Act "to establish through routes."[17]

The Commission may, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of the Act, and the carriers complained to have refused or neglected voluntarily to establish such through routes and joint rates. This jurisdiction exists when one of the carriers is a water line.

The Panama Canal Act, as shown in the preceding section, extended the power of the Commission over transportation by water and also gave the Commission power to establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.[18]

[15] Act March 24, 1912, Sec. 377, *post.*

[16] Augusta & Savannah Steamboat Co. *v.* Ocean Steamship Co., 26 I. C. C. 380, 385; Federal Sugar Refining Co. *v.* Central R. Co. of New Jersey, 35 I. C. C. 488; Decatur Navigation Co. *v.* L. & N. R. Co., 31 I. C. C. 281; Bowling Green Bus. Men's Protective Asso. *v.* L. & N. R. Co., 31 I. C. C. 1; Pacific Nav. Co. *v.* S. P. Co., 31 I. C. C. 472; Port Huron & Duluth S. S. Co. *v.* P. R. Co., 35 I. C. C. 475.

[17] Sec. 1 of Act, Sec. 338, *post.*

[18] Act August 24, 1912, Secs. 376, 377, *post;* Augusta & Savannah Steamboat Co. *v.* Ocean Steamship Co., 26 I. C. C. 380; Truckers Transfer Co. *v.* Charleston & W. C. Ry. Co., 27 I. C. C. 275.

The Amendment of June 18, 1910, omitted from the statute the words, "provided no reasonable or satisfactory through route exists." Under the old law, the non-existence of a reasonable or satisfactory through route was jurisdictional, and where there was such through route the Commission had no power to order another.[19]

Under the old law it was said:

"It may be laid down as a general rule, admitting of no qualification, that a manufacturer or merchant who has traffic to move and is ready to pay a reasonable rate for the service, has a right to have it moved and to have reasonable rates established for the movement, regardless of the fact that the revenues of the carrier may be reduced by reason of its competition with other shippers in the same market; and he has the right also to have the benefit of through routes and reasonable joint rates to such distant markets if no reasonable or satisfactory through route already exists."[20]

A limitation as to the character of the through route was prescribed by the Amendment of 1910 by the provision that no company without its consent should be required to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroads operated in conjunction and under a common management or control therewith.[21]

While the limitation is stated positively, a carrier could not use it to discriminate in violation of other provisions of the Act,[22] nor is it a protection to the carrier when charging an unreasonable rate because the provision that between two given points

[19] Interstate Com. Com. *v.* Northern Pac. Ry. Co., 216 U. S. 538, 54 L. Ed. 608, 30 Sup. Ct. 417; Enterprise Transportation Co. *v.* Pennsylvania R. Co., 12 I. C. C. 326; Enterprise Transportation Co. *v.* Pennsylvania R. Co., 16 I. C. C. 219, 222; Southern California Sugar Co. *v.* San Pedro, L. A. & R. Co., 19 I. C. C. 6; Cedar Hill Coal & Coke Co. *v.* Colorado & S. Ry. Co., 17 I. C. C. 479; Spring Hill Coal Co. *v.* Erie R. Co., 18 I. C. C. 508; Pacific Coast Lumber Mnfg. Assn. *v.* Northern Pac. R. Co., 14 I. C. C. 51, 53.

[20] Cardiff Coal Co. *v.* Chicago, M. & St. P. Ry. Co., 13 I. C. C. 460. As sustaining the text see P. R. Co. *v.* United States, 236 U. S. 351, 59 L. Ed. —, 35 Sup. Ct. 370.

[21] Sec. 401, *post*, for full text of provision.

[22] Proposition urged but not decided, Hughes Creek Coal Co. *v.* Kanawha & M. Ry. Co., 29 I. C. C. 671, 679.

a carrier shall not be deprived of a haul which it is capable of providing by a reasonably direct route.[23] Other than this limitation under the law as it now exists, the Commission has discretionary power.[24]

The Commission refused to establish a through route with tugs and barges operated by the owner of practically the whole freight which would use the route if one were established;[25] but the mere fact that only one shipper may at the outset use the connection, does not prevent the connection from having a public purpose.[26]

The Commission having no jurisdiction of railroads and steamship lines located, owned and operated entirely in an adjacent foreign country, can not establish through routes therewith.[27]

Agreements between connecting railway and steamship carriers to establish through routes and joint rates and to refuse such an arrangement with other connecting carriers, resulting in high and discriminatory charges, with the intent and result of eliminating competition, violates the anti-trust laws of the United States. Whether or not the giving or refusing joint traffic arrangements is in violation of the commerce acts, is a question which the courts have no jurisdiction to determine in advance of action by the Interstate Commerce Commission.[28]

The broad purpose of this provision is well stated by the Commission as follows:

"The railroads of the country are called upon to so unite themselves that they will constitute one national system; they

[23] Meridian Fertz. Factory *v.* Texas & Pac. Ry. Co., 26 I. C. C. 351, 352.

[24] Truckers Transfer Co. *v.* Charleston & W. C. Ry. Co., 27 I. C. C. 275, 277, quoting the Commerce Court in Crane Iron Works *v.* United States, 209 Fed. 238, Commerce Court Opinion No. 55, p. 453, 461, not appealed. For report of the Commission in the same case see, Crane Iron Works *v.* Central R. Co. of New Jersey, 17 I. C. C. 514, and Crane R. Co. *v.* Philadelphia & R. Ry. Co., 15 I. C. C. 248.

[25] Gulf Coast Navigation Co. *v.* Kansas City Sou. Ry. Co., 19 I. C. C. 544.

[26] Union Lime Co. *v.* C. & N. W. Ry. Co., 233 U. S. 211, 58 L. Ed. 924, 34 Sup. Ct. 522; Federal Sugar Refining Co. *v.* C. of N. J. Ry. Co., 35 I. C. C. 488.

[27] Humbolt Steamship Co. *v.* White Pass & Yukon Route, 25 I. C. C. 136.

[28] United States *v.* Pacific & Arctic Ry. & Nav. Co., 228 U. S. 87, 57 L. Ed. 742, 33 Sup. Ct. 443.

must establish through routes, keep these routes open and in operation, furnish the necessary facilities for transportation, make reasonable and proper rules of practice as between themselves and the shippers, and as between each other."[29]

A carrier publishing a joint through rate is responsible therefor.[30] Electric railways are entitled to through routes and joint rates.[31]

§ 196. **Division of Joint Rate.**—When joint rates are established by order of the Commission, or otherwise, and carriers fail to agree among themselves upon the apportionment or division thereof, the Commission may, after hearing, prescribe the just and reasonable proportion of such joint rate to be received by each carrier party thereto.[32] Speaking of this power Mr. Commissioner Harlan, delivering the opinion of the Commission, said:[33]

"The phrase 'the just and reasonable proportion of such joint rate to be received by each carrier' necessarily implies that it is the duty of the commission in fixing divisions to take into consideration all the circumstances, conditions, and equities that are necessary to arrive at what is a fair and proper adjustment of the situation as between the two roads, and precludes the idea that joint rates must be divided between the participating carriers on a mileage or any other fixed basis."

[29] Missouri & Illinois Coal Co. *v.* Illinois Cent. R. Co., 22 I. C. C. 39, 45.

[30] Black Horse Tob. Co. *v.* Illinois Cent. R. Co., 17 I. C. C. 588; Texico Transfer Co. *v.* Louisville & N. R. Co., 20 I. C. C. 17.

[31] Louisville Board of Trade *v.* Indianapolis, C. & S. T. Co., 27 I. C. C. 499, and cases cited. That a through route could not be made with the Columbus Traction Co. was placed on the ground that such company was not a lateral branch road. United States *v.* Baltimore & O. R. Co., 226 U. S. 14, 57 L. Ed. 104, 33 Sup. Ct. 5.

[32] Secs. 397, and 400, *post.*

[33] Star Grain & Lumber Co. *v.* Atchison, T. & S. F. Ry. Co., 14 I. C. C. 364, 370. Without giving force to the words "or otherwise" in the statute the Commission expressed a doubt as to its power to prescribe divisions of rates not fixed by it. Re Wharfage Charges at Galveston, 23 I. C. C. 535, 546. Giving force to all the words of the statute there seems to be no room to doubt the jurisdiction of the Commission in all cases where there is a failure of the carriers to agree.

§ 197. **Allowances to Shippers for Services and Facilities.**—The statute reads:[34]

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and to fix the same by appropriate order."

This statute has received consideration in many cases. It is not open to question that when a shipper renders services connected with the *transportation* of his goods or furnishes any instrumentality used therein, a charge and allowance therefor is recognized by the law. This charge and allowance must be just and reasonable, that is, it must not be too high nor discriminate against another shipper rendering a like service or furnishing a like instrumentality.[35]

The Commission has held that this charge and allowance must be limited to the cost of the service.[36]

[34] Sec. 15 being added thereto by Act June 29, 1906, *post*, Sec. 404.

[35] Central Stock Yards Co. *v.* Louisville & N. R. Co., 192 U. S. 568, 48 L. Ed. 565, 24 Sup. Ct. 339; Railroad Com. of Kentucky *v.* Louisville & N. R. Co., 10 I. C. C. 173; Cattle Raisers Assn. *v.* Chicago, B. & Q. R. Co., 11 I. C. C. 277; Central Stock Yards Co. *v.* Louisville & N. R. Co., 118 Fed. 113, 55 C. C. A. 63, 63 L. R. A. 213, affirmed, 192 U. S. 568, 48 L. Ed. 565, 24 Sup. Ct. 339; Covington Stock Yards Co. *v.* Keith, 139 U. S. 128, 35 L. Ed. 73, 11 Sup. Ct. 461; Butchers, etc., Stock Yards Co. *v.* Louisville & N. R. Co., 67 Fed. 35, 14 C. C. A. 290; United States *v.* Delaware, L. & W. R. Co. (C. C.), 40 Fed. 101; Consolidated Fordg. Co. *v.* Southern Pac. Co., 9 I. C. C. 182; Excursion Car Co. *v.* Pennsylvania R. Co., 3 I. C. C. 577; In re Transportation of Fruit, 10 I. C. C. 360; Peavey Co. *v.* Union Pac. R. Co. (C. C.), 176 Fed. 409, affirmed 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22; Interstate Com. Com. *v.* Diffenbaugh, 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22; Fouche River Lumber Co. *v.* Bryant Lumber Co., 230 U. S. 816, 57 L. Ed. 1498, 33 Sup. Ct. 887; Mitchell Coal & Coke Co. *v.* Pennsylvania R. Co., 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916.

[36] Re Allowances to Elevators, 12 I. C. C. 85; Federal Sugar Refining Co. *v.* Baltimore & O. R. Co., 17 I. C. C. 40, 47.

The Commission in the Sugar Lighterage case[37] did not deny the validity or application of the statute, but held that the fact that one sugar refinery owned and operated a dock and terminals for the railroad did not justify an allowance thereto when such allowance was denied another refinery owning no such terminals but tendering sugar brought by boat to the same pier as that to which the first company brought its sugar. The issue of law in this case was therefore whether or not undue discrimination existed. This issue of law was determined by the Commerce Court differently from the Commission. The Commerce Court said:[38]

"We find Arbuckle Bros. owning the Jay Street terminal, used as a public terminal of petitioners within the lighterage limits. We find the Federal Sugar Refining Company, with its refinery at Yonkers, 10 miles north of the lighterage limits, owning and operating no public terminal for petitioners, and tendering petitioners no freight at any of their public terminals. So that we can not see how any violation of either section 2 or section 3 can be predicated of the facts stated in the record." The Supreme Court held there was no undue discrimination and affirmed the decision of the Commerce Court.[39]

The Supreme Court held allowances to grain elevators proper,[40] but that such allowances should be free from discrimination.[41]

The so-called tap line allowances or divisions to short roads owned or controlled by a shipper must be without discrimination, otherwise, said the Supreme Court, "it amounts to a rebate."[42]

What this allowance means was considered and discussed by the Commission in the tap line case.[43] The Supreme Court reversed the order of the Commission and held that tap line allowances were legal.[44]

[37] Federal Sugar Refining Co. *v.* Baltimore & O. R. Co., 20 I. C. C. 200.

[38] Baltimore & O. R. Co. *v.* United States, 200 Fed. 779, Opinion Commerce Court No. 38, p. 499.

[39] United States *v.* Baltimore & O. R. Co., 231 U. S. 274, 58 L. Ed. 218, 34 Sup. Ct. 75.

[40] Interstate Com. Com. *v.* Diffenbaugh, 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22.

[41] Union Pac. Ry. Co. *v.* Updike, 222 U. S. 215, 56 L. Ed. 171, 32 Sup. Ct. 39.

[42] Illinois Cent. R. Co. *v.* Interstate Com. Com., 206 U. S. 441, 444, 51 L. Ed. 1128, 27 Sup. Ct. 700.

[43] Tap Line Case, 23 I. C. C. 277 and 549.

[44] United States *v.* Louisiana & P. R. Co.—Tap Line Cases, 234 U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 741, 34 I. C. C. 116.

Industrial railways present similar questions. These have been discussed section 171 *supra*.

The meaning of the word "transportation" in this connection was defined by District Judge Rellstab in an opinion which as to this question seems to be comprehensive, clear and accurate. Under his definition, draying sugar from a refinery to a railroad was not transportation nor service in connection therewith within the legislative meaning, but was a drayage service falling normally upon the shipper.[45] The decision of Judge Rellstab was reversed, but the opinion on appeal is not inconsistent with the definition of the court below, but is explainable on the theory that the Circuit Court of Appeals held that a payment made to all in like condition was not a rebate, whether an allowance within the meaning of section 15 or not.[46]

§ 198. **Distribution of Cars.**—Transportation includes cars and other vehicles and all instrumentalities and facilities of shipment or carriage, and it is the duty of every carrier subject to the provisions of the Act to Regulate Commerce to provide and furnish transportation. The Commission is given jurisdiction to enforce this duty. Where carriers fail to furnish cars without discrimination this jurisdiction may be invoked that the governmental power of regulation may be used in compelling a just and equal distribution of cars and the prevention of an unjust and discriminating one.

In determining whether a particular car distribution is just and equal or unjust and discriminatory, the Commission may consider the producing capacity of the shippers and all cars used in the transportation whether they be private cars or cars used by the carrier for its own fuel, and the courts have no jurisdiction over the question until after action thereon by the Commission.[47]

[45] American Sugar Refining Co. *v.* Delaware, L. & W. Ry. Co., 200 Fed. 652. See also, Atchison, T. & S. F. Ry. Co. *v.* Interstate Com. Com., 188 Fed. 229 and 929, Opinion Commerce Court No. 2, p. 3, enjoining the order of the Commission in Associated Jobbers of Los Angeles *v.* Atchison, T. & S. F. Ry. Co., 18 I. C. C. 310. Commerce Court reversed, Interstate Com. Com. *v.* Atchison, T. & S. F. Ry. Co., 234 U. S. 294, 58 L. Ed. 1319, 34 Sup. Ct. 814.

[46] American Sugar Refining Co. *v.* Delaware, L. & W. Ry. Co., 207 Fed. 733, 125 C. C. A. 251.

[47] Interstate Com. Com. *v.* Illinois Cent. R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. 155; Interstate Com. Com. *v.* Chicago

Where, however, the question involved is not the administrative question of what is a reasonable rule, but the judicial question of whether or not the rule in force has been complied with, the courts have jurisdiction without prior action by the Commission.[48]

§ 199. **Long and Short Haul Provisions, History of.**— Section four of the original Act to Regulate Commerce[49] prohibited "under substantially similar circumstances and conditions" a greater charge for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. The proviso to this section gave power to the Commission to relieve carriers from the requirements thereof.

Judge Cooley in construing this section and provision announced principles which may be quoted, as such principles finally became the settled construction of the law. He said:[50]

"That which the act does not declare unlawful must remain lawful if it was so before; and that which it fails to forbid the carrier is left at liberty to do without permission of any one. The charging or receiving the greater compensation for the shorter than the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since if the circumstances and conditions of the two hauls are dissimilar the statute is not violated.

"Should an interested party dispute that the action of the

& A. R. Co., 215 U. S. 479, 54 L. Ed. 291, 30 Sup. Ct. 163; Baltimore & O. R. Co. *v.* United States ex rel. Pitcairn Coal Co., 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164; Vulcan Coal Mining Co. *v.* I. C. R. Co., 33 I. C. C. 52.

[48] Morrisdale Coal Co. *v.* Penn. R. Co., 230 U. S. 304, 57 L. Ed. 1474, 33 Sup. Ct. 938; Penn. R. Co. *v.* Puritan Coal Co., 237 U. S. 121, 59 L. Ed. —, 35 Sup. Ct. 484; Ill. C. R. Co. *v.* Mulberry Hill Coal Co., 238 U. S. 275, 59 L. Ed. —, 35 Sup. Ct. 760; Penn. R. Co. *v.* Clark Bros. Coal Mining Co., 238 U. S. 456, 59 L. Ed. —, 35 Sup. Ct. 896.

[49] Act February 4, 1887, Chap. 104, 24 Stat. L. 379, U. S. Comp. Stat. 1901, p. 3154, 3 Fed. State. Ann. 809, et seq. See *post.*

[50] Re Petition Louisville & N. R. Co. and Southern Pacific Ry. & Steamship Co., 1 I. C. C. 31, 57, 1 I. C. R. 278.

carrier was warranted, an issue would be presented for adjudication, and the risks of that adjudication the carrier would necessarily assume. The later clause in the same section, which empowers the Commission to make orders for relief in its discretion, does not in doing so restrict it to a finding of circumstances and conditions strictly dissimilar, but seems intended to give a discretionary authority for cases that could not well be indicated in advance by general designation, while the cases which upon their facts should be acted upon as clearly exceptional would be left for adjudication when the action of the carrier was challenged. The statute becomes on this construction practical, and this section may be enforced without serious embarrassment."

In a later case the Commission refused to follow the opinion of Judge Cooley,[51] but subsequently the Supreme Court adopted the Cooley rule,[52] with Mr. Justice Harlan vigorously dissenting. It was held that the burden of proof to show dissimilarity of circumstances was on the carrier, and that "line" used in the statute meant a physical line and not a mere business arrangement.

§ 200. **Relationship of Intermediate and Through Rates.** —The amended fourth section also makes it unlawful "to charge any greater compensation as a through route than the aggregate

[51] Railroad Com. of Georgia, Trammell et al. *v.* Clyde S. S. Co., 5 I. C. C. 324, 4 I. C. R. 120, 150.

[52] The history of the judicial construction appears from the following cases: Int. Com. Com. *v.* Alabama M. R. C., 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45; Int. Com. Com. *v.* Cincinnati, N. O. & T. P. Ry. Co., 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700; Parsons *v.* Chicago & N. W. Ry. Co., 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. 887; Int. Com. Com. *v.* Detroit, G. H. & M. Ry. Co., 167 U. S. 633, 42 L. Ed. 306, 17 Sup. Ct. 986; Louisville & N. R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209; East Tenn., Va. & Ga. Ry. Co. *v.* Int. Com. Com., 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516. See also Int. Com. Com. *v.* Clyde S. S. Co., 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512; Int. Com. Com. *v.* Louisville & N. R. Co., 190 U. S. 273, 47 L. Ed. 1047, 23 Sup. Ct. 687; Brewer *v.* Central of Ga. R. Co., 84 Fed. 258; Int. Com. Com. *v.* Western & A. R. Co., 88 Fed. 186; Spartansburg Board of Trade *v.* Richmond & D. R. Co., 2 I. C. C. 304, 2 I. C. R. 193; Boston & A. R. Co. *v.* Boston & L. R. Co., 1 I. C. C. 158, 1 I. C. R. 500, 571; Daniels *v.* Chicago R. I. & P. R. Co., 6 I. C. C. 458, 476. See sections 152 to 155, *supra*.

of intermediate rates subject to the provisions" of the Act to Regulate Commerce.

This rule but makes statutory what was a general principle applied by the Commission.

§ 201. **Water Competition.**—The last paragraph of section four of the amended Act provides:

"Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

§ 202. **Power of the Commission under the Fourth Section.**—The fourth section prohibits three things, (a) a greater charge for a shorter than a longer haul under the circumstances named, (b) a greater charge for a through route than the aggregate of the intermediate rates subject to the Act, (c) an increase of rates which had been lowered in competition with water routes.

These provisions, leave carriers no discretion. They must be obeyed unless the Commission orders otherwise. The exceptions to this absolute provision must be such as the Commission may prescribe. This is the fundamental difference between the old section as construed and the present law.

The power is given the Commission upon application, after investigation, to authorize the carrier "to charge less for longer than for shorter distances," and to "prescribe the extent to which such designated common carrier may be relieved from the operation of the section."

The provision giving the right to prescribe the extent of relief which may be granted, might with reason be construed as being limited by the language giving authority to "charge less for longer than for shorter distances;" although the practice of the Commission has been to relieve from the provision relating to through routes and aggregate intermediate rates as well as limiting the relation of charges in the long and short haul clause.

Rates lawfully in existence when the amended law was passed were not required to be changed prior to the expiration of six months after such time, nor then, when application for relief

was filed, "until a determination of such application by the Commission."

The Commission also has power to permit an increase of rates lowered to meet water competition "upon changed conditions other than the elimination of water competition."

In determining its power under this statute the Commission held the law constitutional, that the provision for exceptions to the general clause did not give the Commission arbitrary or absolute power, that the burden was on the carrier to show facts authorizing an exception to the general rule, and that the object of the law was to make "a rule of well nigh universal application," deviation from which could only be authorized "to meet transportation circumstances which are beyond the carrier's control," and then only to the extent necessary to meet such conditions.[53] The orders of the Commission in the cases in which these principles were announced were by the Commerce Court set aside.[54] Upon appeal the Supreme Court reversed the Commerce Court and sustained the jurisdiction of the Commission.[55]

§ 203. **Ownership of Water Carriers by Railroads.**—The Panama Canal Act makes it unlawful after July 1, 1914, for "any railroad company or other common carrier subject to the act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense."

Jurisdiction was given the Commission after hearing "to de-

[53] Railroad Com. of Nevada *v.* Southern Pac. Co., 21 I. C. C. 329, 341; Spokane, City of, *v.* Northern Pac. R. Co., 21 I. C. C. 400.

[54] Atchison, T. & S. F. Ry. Co. *v.* United States, 191 Fed. 856, Opinion Commerce Court Nos. 50, 51, p. 229.

[55] United States *v.* Atchison, T. & S. F. Ry. Co., Intermountain Cases, 234 U. S. 476, 58 L. Ed. 1408, 34 Sup. Ct. 986; Sec. 154, ante.

termine questions of fact as to the competition or possibility of competition." This determination was authorized to be made on the application of the carrier, or shipper, or on the initiative of the Commission itself, and in all cases the Commission's order was made by the law final.[56]

If an "existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people," and if "such extension will neither exclude, prevent, nor reduce competition on the route by water," the Commission may extend the time beyond July 1, 1914, under the conditions prescribed in the statute.[57]

The principles upon which the Commission has acted in determining applications under this statute were stated in Application of Southern Pacific Co. in re Operation of Steamship Company.[58]

§ 204. **The Commission's Duty with Reference to Schedule of Rates.**—It is the duty of all common carriers subject to the Act to Regulate Commerce to file with the Commission, print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation both on their own line and over other lines, pipe lines and water connections with which they have established a through route and joint rates. Changes in these schedules can not be made without thirty days' notice; but the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein provided, or modify the requirements of this section in respect to publishing, posting, and filing tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions. The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be found expedient.

Under the power given with respect to the schedules of rates

[56] Act August 24, 1912; Secs. 353, 354, *post*.

[57] Act August 24, 1912; Sec. 355, *post*.

[58] Sec. 355, and see Application S. P. Co. re Operation S. S. Co., 32 I. C. C. 692. S. P. Co. Ownership of Oil Steamers, 34 I. C. C. 377; Steamer Lines on Chesapeake Bay, 35 I. C. C. 692.

to be charged by common carriers it issues administrative orders from time to time.

Carriers are prohibited from engaging or participating in interstate transportation "unless the rates, fares, and charges * * * have been filed and published" as provided by the statute.

The Commission has power to reject tariffs under certain conditions.[59]

Tariff provisions relating to interchangeable milage tickets must likewise be published.[60]

Discrimination was one of the evils most complained of prior to the original Act to Regulate Commerce and since, and that Act and the supplemental and amendatory Acts have been framed to afford an effective means for reducing the wrongs resulting from unjust discrimination and undue preference. One of the means of effectuating this purpose, is that of placing upon all carriers the positive duty of establishing, filing and publishing schedules of reasonable rates with a uniform application and of a definite meaning, and of maintaining and collecting such rates so long as they remain unaltered in the manner provided by law.[61]

Where the tariff shows no joint through rate, carriers parties to a through bill of lading must collect the sum of the local rates shown by the local tariffs.[62]

Where an agent of a carrier gives a shipper a rate less than that prescribed in the legally filed tariff, the shipper must nevertheless pay the full tariff rate,[63] and a rate in a bill of lading less

[59] Sec. 6 of Act; Sec. 364, and 366, *post*.

[60] Sec. 22 of Act; Sec. 444, *post*.

[61] Texas & Pac. Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350; Cincinnati, N. O. & T. P. Ry. Co. *v.* Interstate Com. Com., 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700, 5 I. C. R. 391, 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896.

[62] United States *v.* New York C. & H. R. R. Co., 212 U. S. 509, 53 L. Ed. 629, 29 Sup. Ct. 313.

[63] Texas & Pac. Ry. Co. *v.* Mugg, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. 628; Illinois C. R. Co. *v.* Henderson Elevator Co., 226 U. S. 441, 57 L. Ed. 290, 33 Sup. Ct. 176; Kansas City Sou. Ry. Co. *v.* Albers Com. Co., 223 U. S. 573, 56 L. Ed. 556, 32 Sup. Ct. 316; New York C. & H. R. R. Co. *v.* United States, 212 U. S. 500, 53 L. Ed. 624, 29 Sup. Ct. 309; but the Act of 1910 provides a penalty for misquoting a rate, Sec. 180, *ante*, Secs. 205, 212, and 368, *post*.

than the tariff rate will not relieve a shipper from paying the tariff rate the shipment being interstate, although the statute of the state in which the bill of lading was issued made it illegal to collect a higher rate than was on the bill of lading specified.[64] That a schedule of rates has been duly filed will not prevent the Commission from declaring such rates unreasonable and awarding reparation for the amount charged and collected in excess of what was a reasonable rate.[65]

§ 205. **Damages.**—In addition to the public penalties prescribed by the act, a carrier is liable to any person or persons injured by its violation of the act for the full amount of damages sustained in consequence of such violation, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery. The only damages recoverable under this act by application to the Commission are damages for a violation of the provisions thereof, consequently the Commission has no jurisdiction to award damages for breach of contract by a carrier. The Commission has no jurisdiction to award damages against a shipper, nor can a carrier set off a claim for undercharges or other damage against the claim of a shipper for reparation.[66]

The language of the statute is broad and makes the carrier liable for damages sustained in any case where such carrier does or causes to be done any act, matter, or thing, prohibited or declared unlawful by the statute. Such liability exists when there is a failure to do any act, matter, or thing, required by the law.[67]

The foregoing right stated in section 8 of the Act in so far as it permits a recovery of damages for an unlawful charge was not created by the section, although some uncertainty as to the full extent of the right was removed by the statute. In England it had been held that a shipper paying a reasonable rate could not recover damages because of a discriminatory rate favoring an-

[64] Gulf C. & S. F. Ry. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 Sup. Ct. 802; Spratlin *v.* St. L. & S. W. Ry. Co., 76 Ark. 82, 88 S. W. 836; St. L. & S. W. Ry. Co. *v.* Carden, 34 S. W. (Tex.) 145.

[65] Nicola, Stone & Myers Co. *v.* Louisville & N. R. Co., 14 I. C. C. R. 199, 204.

[66] Laning-Harris C. & G. Co. *v.* St. Louis & S. F. R. Co., 15 I. C. C. R. 37, 38; Falls & Co. *v.* Chicago, Rock Island & P. Ry. Co., 15 I. C. C. R. 269, 273.

[67] Sec. 8, of the Act; Sec. 382, *post.*

other,[68] but in this country the weight of authority was the other way. The statute removed any doubt which might have existed on the subject.[69] The amount of recovery is stated in the statute to be the "full amount of damages sustained," which is not different from the common law measure of damages in cases where damages are recoverable. "The right to recover," as said by the Supreme Court, "is limited to the pecuniary loss suffered and proved."[70]

§ 206. **Damages—Power of the Commission to Make Award of.**—Any person or persons claiming to be damaged by any common carrier subject to the provisions of the Act to Regulate Commerce may make complaint to the Commission,[71] by petition which shall briefly state the facts. After service and hearing of which,[72] it shall be the duty of the Commission to make a report in writing in respect thereto, which shall state the conclusions of the Commission together with its decision, order or requirement in the premises, and such report shall, when there is an award of damages, include the findings of fact on which the award is made.[73]

When the Commission shall determine that any party complainant is entitled to an award of damages, it shall make an order directing the carrier to pay the complainant the sum to which he is entitled on or before a day named. These findings of fact and the order based thereon are *prima facie* evidence of the facts therein stated.[74]

Prior to the Amendment of March 2, 1889, the Commission held that a claim for damages "presents a case at common law in which the defendants are entitled to a jury trial," and under the then law awards for damages were not made.[75] Since the

[68] Great Western R. Co. *v.* Sutton L. R., 4 H. L. 238, 38 L. J. Exch. N. S. 177, 22 L. T. N. S. 43, 18 Week. Ref. 92.

[69] Parsons *v.* Chicago & N. W. R. Co., 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. 887; Pennsylvania R. Co. *v.* International Coal Mining Co., 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893.

[70] Cases note *supra* and, Knudsen-Ferguson Fruit Co. *v.* Michigan Cent. R. Co., 149 Fed. 973, 79 C. C. A. 483; St. Louis, S. W. R. Co. *v.* Lewellen, 192 Fed. 540.

[71] Sec. 9 of Act; Sec. 383, *post.*

[72] Sec. 13 of Act; Sec. 392, *post.*

[73] Sec. 14 of Act Sec. 394, *post.*

[74] Sec. 16 of Act; Sec. 407, *post.*

[75] Heck *v.* East Tennessee, Va. & Ga. Ry. Co., 1 I. C. C. 495, 1 I. C. R. 775; Riddle *v.* New York, L. E. & W. R. Co., 1 I. C. C. 594, 1 I. C. R. 787; Lehigh Valley R. Co. *v.* Clark, 207 Fed. 717, 720, 125 C. C. A. 235; Note 77 below.

amendment to section 16, awards may be made.[76]

Of these provisions for award of damages, it has been said: "As to the provisions covering reparation cases, Congress is no longer dealing with those matters which concern the practical management and conduct of the business of carriers and the regulation thereof *in futoro,* in the interests of the public generally, but is conferring a private right of action upon those who have suffered actual damage, by reason of such carriers' violation of some requirement of the Act. The conferring of such right of action, though incident to its power to regulate commerce, is not a regulation thereof. It makes redress of a private injury actually suffered, possible. It concerns the past and not the future conduct of the carrier, and, though this right of action for damages is qualified by making it dependent in certain cases upon the precedent award of reparation by the Commission, such award is not of the nature of the administrative functions conferred on that body."[77] In reversing the Circuit Court of Appeals the Supreme Court without discussing the principles quoted found that the report of the Commission conformed to the Statute.

General damages not caused by a violation of the Act can not be awarded by the Commission.[78] Misrouting violates the laws and damage suffered may be awarded by the Commission.[79]

§ 207. **Awards of Damages for Charging an Unjust and Unreasonable Rate.**—The statute provides that charges subject

[76] Rawson *v.* Newport N. & M. V. R. Co., 3 I. C. C. 266, 2 I. C. R. 626; MacLoon *v.* Chicago & N. W. R. Co., 5 I. C. C. 84, 3 I. C. R. 711, and practice of the Commission since.

[77] Lehigh Valley R. Co. *v.* Clark, 207 Fed. 717, 723, 125 C. C. A. 235, District Court affirmed except as to a portion of the attorney's fees, and Circuit Court of Appeals reversed, Mills *v.* Lehigh V. R. Co., 238 U. S. 473, 59 L. Ed. —, 35 Sup. Ct. 888.

[78] Duncan *v.* Atchison, T. & S. F. Ry. Co., 6 I. C. C. 85, 4 I. C. R. 385; Carstens Packing Co. *v.* Oregon R. & N. Co., 17 I. C. C. 125; Blume & Co. *v.* Wells-Fargo & Co., 15 I. C. C. 53; damage caused by delay; Shiel & Co. *v.* Illinois Cent. R. Co., 12 I. C. C. 210, breach of contract; LaSalle & B. Co. *v.* Chicago & N. W. R. Co., 13 I. C. C. 610; General Electric Co. *v.* New York C. & H. R. R. Co., 14 I. C. C. 237, breach of contract.

[79] McCaull-Dinsmore Co. *v.* Chicago G. W. Ry. Co., 14 I. C. C. 527; Gus Momsen & Co. *v.* Gila Valley, G. & N. Ry. Co., 14 I. C. C. 614; Goodman Mfg. Co. *v.* Pennsylvania R. Co., 26 I. C. C. 423; Newman Lumber Co. *v.* Mississippi C. R. Co., 26 I. C. C. 97; Sec. 15 of Act; Sec. 402, *post.*

to the Act must be "just and reasonable."[80] When this law is violated the Commission may make an "award of damages." The Circuit Court of Appeals held that before such an award can be made there must be a finding that the rate charged was unreasonable and the Commission must prescribe "a reasonable maximum rate to be observed by all," and "an order of reparation without such establishment of a reasonable maximum rate is beyond the power of the Commission and void."[81] This decision was reversed by the Supreme Court in an opinion written by Mr. Justice Lamar who said:[82]

"But however desirable it may have been to deal with the entire matter at one time, the joinder of the two subjects was not jurisdictional. There was no such necessary connection between the two as to make the order of reparation void because of the absence of a concurrent provision establishing a rate for the future."

When a rate is advanced and the increased rate is condemned the shipper, having the legal right to have transportation at a reasonable rate, is clearly entitled to an award of damages by way of reparation measured by the amount paid in excess of the rate found to be unreasonable.[83] Where, however, complaint is made of a rate already in existence and such rate is declared unreasonable at the date of the order of the Commission, a different question is presented. At what exact time did the rate become unreasonable? Discussing this question in the Anadarko Cotton Oil Co. case,[84] the Commission stated some principle to which it has since adhered. In

[80] Sec. 1 of Act; Sec. 339, *post.*

[81] Denver & R. G. R. Co. *v.* Baer Bros. Mer. Co., 187 Fed. 485, 109 C. C. A. 337; Commercial Club of Omaha *v.* A. & S. Ry. Co., 27 I. C. C. 302, 314.

[82] Baer Bros. Mer. Co. *v.* Denver & R. G. R. Co., 233 U. S. 479, 58 L. Ed. 1055, 34 Sup. Ct. 641.

[83] Tift *v.* Southern Ry. Co., 10 I. C. C. 548; Tift *v.* Southern Ry. Co., 138 Fed. 753; Southern Ry. Co. *v.* Tift, 148 Fed. 1021; Southern Ry. Co. *v.* Tift, 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. 709; Nicola, Stone & Myers Co. *v.* Louisville & N. R. Co., 14 I. C. C. 199; Central Yellow Pine Assn. *v.* Illinois Cent. R. Co., 10 I. C. C. 505; Illinois Cent. R. Co. *v.* Interstate Com. Com., 206 U. S. 441, 51 L. Ed. 1128, 27 Sup. Ct. 700; Russe & Burges *v.* Interstate Com. Com., 193 Fed. 678, Op. Com. Ct. No. 18, p. 311; Chicago, B. & Q. R. Co. *v.* Feintuch, 191 Fed. 482, 112 C. C. A. 126.

[84] Anadarko Cotton Oil Co. *v.* Atchison, T. & S. F. Ry. Co., 20 I. C. C. 43, 49, 50, 51.

this opinion it was said: "The Commission is not justified in awarding damages in any case except on a basis as certain and definite in law and in fact as is essential to the support of a final judgment or decree requiring the payment of a definite sum of money. * * * The test of reasonableness can be applied only by reference to and upon consideration of all pertinent facts, circumstances, and conditions affecting the rate in effect at any particular time. * * * A rate reasonable in view of the circumstances and conditions when it is established may in course of time become unreasonable by virtue of changed circumstances and conditions. It is manifestly impractical for the carriers or the Commission in such a case to determine at what exact time in the gradual process of changes the rate becomes unreasonable."

In the Burnham-Hanna-Munger case,[85] no reparation was awarded for shipments moving prior to the date of the order, but awards were made for shipments moving after that date and during the time the order was enjoined. After two years from the date of the order therein advances were made some of which were held to increase rates to a point where they were unreasonable. In determining the question arising in an investigation of these increases the Commission said: "We are now prescribing what may well be considered a new rate adjustment," and under such conditions reparation was denied.[86]

The Commission having found a rate unreasonable from the date of that order, reparation should be allowed, the Commission saying: "In every case like this the Commission must fix the point of time at which the rate becomes unreasonable, must determine when shippers were entitled, and when carriers ought to have established the rate found reasonable. Manifestly each case must depend upon its own facts, and the complainant must assume the burden of showing that the rates paid have been unreasonable."[87]

[85] Burnham-Hanna-Munger Dry Goods Co. *v.* Chicago, R. I. & P. Ry. Co., 14 I. C. C. 299, order enjoined in Chicago, R. I. & P. Ry. Co. *v.* Interstate Com. Com., 171 Fed. 680, and the Commission sustained in Interstate Com. Com. *v.* Chicago, R. I. & P. Ry. Co., 218 U. S. 88, 54 L. Ed. 946, 30 Sup. Ct. 651.

[86] Re Advances in Rates between Mississippi and Missouri Rivers, 21 I. C. C. 546.

[87] Re Wool, Hides and Pelts, 25 I. C. C. 675, 678; National Wool Growers Assn. *v.* Oregon S. L. R. Co., 23 I. C. C. 151.

And reparation may be ordered for an unreasonable charge although no tariff is provided therefor.[88]

Damages may be awarded "where a carrier collects a greater sum on an intermediate shipment than is fixed by its published tariffs.[89]

"Damages" and "Reparation" have been used interchangeably in the reports of the Commission, although in the later volumes the word damages is generally adopted.

§ 208. **Awards of Damages for Unlawful Discrimination.** —Sections two[90] and three[91] of the Act prohibit unjust discrimination and undue or unreasonable preference. When these sections are violated "the transgressing carrier is liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation."[92]

The jurisdiction of the Commission to make on award of damages in discriminating cases was at one time denied in an opinion by a bare majority of the commissioners,[93] but the courts having decided otherwise, the Commission now exercises jurisdiction over claims for such awards.[94] That such jurisdiction exists can not now be doubted.[95]

[88] Laning-Harris Coal & Grain Co. *v.* St. Louis & S. F. R. Co., 15 I. C. C. 37; Wheeler Lumber, Bridge & Supply Co. *v.* Astoria & C. R. Co., 20 I. C. C. 10.

[89] Memphis Freight Bureau *v.* Kansas C. S. Ry. Co., 17 I. C. C. 90; Hampton Mnfg. Co. *v.* Old Dominion Steamship Co., 27 I. C. C. 666, 668.

[90] *Post,* Sec. 345.

[91] *Post,* Sec. 346.

[92] Sec. 8 of Act; Sec. 382, *post.*

[93] Joynes *v.* Pennsylvania R. Co., 17 I. C. C. 361.

[94] Hillsdale Coal & Coke Co. *v.* Pennsylvania R. Co., 23 I. C. C. 186.

[95] Dissenting Opinion of Commissioner Lane in Joynes *v.* Pennsylvania R. Co., 17 I. C. C. 361, *et seq.;* Morrisdale Coal Co. *v.* Pennsylvania R. Co., 176 Fed. 748; Morrisdale Coal Co. *v.* Pennsylvania R. Co., 183 Fed. 929, 106 C. C. A. 269, affirmed, same styled case, 230 U. S. 304, 57 L. Ed. 1474, 33 Sup. Ct. 938; Baltimore & O. R. Co. *v.* United States (Pitcairn Case), 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164; Robinson *v.* Baltimore & O. R. Co., 222 U. S. 506, 56 L. Ed. 288, 32 Sup. Ct. 114, affirming same styled case, 64 W. Va. 406, 63 S. E. 323. Mr. Justice Pitney in his dissenting opinion in Pennsylvania R. Co. *v.* International Coal Mining Co., 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893, 914, 915, appends a list of cases where the Commission had granted reparation for unlawful charges "because discriminatory, irrespective of whether they were otherwise extortionate," because "in excess of rate afterward voluntarily established by the carrier" "because

In the Coal Car Supply cases shippers were damaged by being prevented from selling coal as a result of discrimination against them in furnishing cars. This discrimination was found illegal and the carriers ordered to desist therefrom.[96] Subsequently, and after the courts had held that the Commission had jurisdiction so to do, the Commission heard evidence, determined the amount of damages suffered and entered an award therefor in favor of the shippers.[97]

The jurisdiction is settled, but the difficult question is one of proof. What must be shown to establish the fact of damage? In the International Coal Mining case,[98] damage was claimed because the defendant carrier had rebated part of the published rate to a competitor of the plaintiff. The discrimination resulting from a less charge than that prescribed in a legally filed tariff, no prior action by the Commission was necessary to give the courts jurisdiction. In the Supreme Court, the shipper contended that it was unnecessary to allege or prove that it had suffered any injury, for the reason that, as a matter of law, it was entitled to recover as damages the same rate per ton on all its shipments as had been rebated to any other person, on any of his tonnage shipped at the same time over the same route. There was "neither allegation nor proof that it (plaintiff) suffered any injury." What plaintiff there claimed was its right to receive the same rebate which had been paid its competitor. The pleadings, the evidence and this contention must not be lost sight of in considering the opinion of a majority of the court in denying such contention. Delivering the opinion of the court, Mr. Justice Lamar said:

of error in routing," because "rates held unreasonable per se," "unreasonable because higher than obtainable by another route," and "because of exceeding the sum of the locals," see pages 242 and 243 of opinion.

[96] Hillsdale Coal & Coke Co. *v.* Pennsylvania R. Co., 19 I. C. C. 356; Jacoby *v.* Pennsylvania R. Co., 19 I. C. C. 392; Bulah Coal Co. *v.* Pennsylvania R. Co., 20 I. C. C. 52, order sustained, Pennsylvania R. Co. *v.* Interstate Com. Com., 193 Fed. 81; Opinion Com. Ct. No. 31, p. 275.

[97] Hillsdale Coal & Coke Co. *v.* Pennsylvania R. Co., 23 I. C. C. 186. See also, Hillsdale Coal & Coke Co. *v.* Pennsylvania R. Co., 229 Pa. 61, 78 Atl. 28.

[98] Pennsylvania R. Co. *v.* International Coal Mining Co., 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893, reversing Pennsylvania R. Co. *v.* International Coal Mining Co., 173 Fed. 1, 97, C. C. A. 383.

"Making an illegal undercharge to one shipper did not license the carrier to make a similiar undercharge to other shippers. * * * The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. These damages might be the same as the rebate or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered."

The case was remanded for a new trial, and all that the opinion holds is that a plaintiff's rights are not measured by the benefits another shipper receives, but are measured by the actual damages he suffers, proof of which damages must be made as in other suits therefor.

The Commission held that rates on tobacco for export were discriminatory in violation of the Act, and entered an order requiring the carriers to desist from such discrimination, but made no finding that the rate was unreasonable in violation of section one.[99] On a supplemental hearing, complainants sought to recover an award of damages. On such hearing it appeared that the complainants shipped to foreign ports other than those to which the shippers in whose favor the discrimination existed shipped, and no evidence of damages was offered. It was contended that an award should be made of the difference between the rate paid by complainants and that paid by other shippers shipping to points to which complainants made no shipments. The Commission denied reparation, but its opinion should be construed as limited by the facts of the case.[100] In a later case involving the same principle, the Commission stated the rule as follows:

"Reparation may properly be awarded when a discriminatory freight rate has been exacted, but it does not necessarily follow that because a rate is found to be unjustly discriminatory and unduly prejudicial, that the complaining parties are the ones who have been damaged through its exaction."[101]

That it may be difficult to prove damages is no reason for de-

[99] New Orleans Board of Trade *v.* Illinois Cent. R. Co., 23 I. C. C. 465.

[100] New Orleans Board of Trade *v.* Illinois Cent. R. Co., 29 I. C. C. 32.

[101] Curry & Whyte Co. *v.* Duluth & I. R. R. Co., 30 I. C. C. 1, 14. See also Becker *v.* Pere Marquette R. Co., 28 I. C. C. 645, 657.

nying the right thereto if the damages are reasonably certain and can be proved with reasonable exactitude.[102]

In awarding general damages, the courts meet with the same difficulty and the rules for fixing other kinds of damages should apply when a shipper is damaged by a rate illegally discriminatory against him. The meeker case[103] is decisive only of the question of the *prima facie* effect of an order of the Commission. In that case the Commission had awarded damages both for a violation of section one and of section three of the act. The carrier being sued presented no testimony but relied on the claim that the report of the Commission showed that the amount of the award corresponded in one instance to the amount of the rebate and in the other to the amount of the overcharge, and that therefore the Commission had applied an erroneous and inadmissible measure of damages. To this contention the Supreme Court replied: "The Commission was authorized and required by section 8 of the act to regulate commerce to award the full amount of damages sustained, and that, of course, was to be determined from the evidence. If it showed that the damage corresponded to the rebate in one instance and to the overcharge in the other, the claimant was entitled to an award upon that basis. The case of Pennsylvania R. Co. *v.* International Coal Min. Co., 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. Rep. 893, is cited as holding otherwise, but it does not do so. There a shipper, without proving that he sustained any damage, sought to recover from a carrier for giving a rebate to another shipper, and this court, referring to section 8, said (p. 203): 'The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than

[102] Weinman *v.* De Palma, 232 U. S. 571, 58 L. Ed. 733, 34 Sup. Ct. 370.

[103] Meeker *v.* Lehigh Valley R. Co., 21 I. C. C. 129, 23 I. C. C. 480, 211 Fed. 785, 128 C. C. A. 311, 236 U. S. 412, 434, 59 L. Ed. ———, 35 Sup. Ct. 328, 337. See also Mills *v.* Lehigh V. R. Co., 238 U. S. 473, 59 L. Ed. ———, 35 Sup. Ct. 888; So. Pac. Co. *v.* Goldfield Consol. Milling & Transportation Co., 220 Fed. 14; Darnell-Taenzer Lumber Co. *v.* So. Pac. Co., 221 Fed. 890, —— C. C. A. ——, reversing 190 Fed. 659. As misconstruing the International Coal Case *supra*, see Lehigh V. R. Co. *v.* Clark, 207 Fed. 717, 125 C. C. A. 235, reversed in Mills Case *supra;* Lehigh V. R. Co. *v.* American Hay Co., 219 Fed. 539, —— C. C. A. ——.

the rebate; but unless they were proved, they could not be recovered. Whatever they were they could be recovered.' There is nothing in either report of the Commission which is in conflict with what was said in that case. On the contrary, the plain import of the findings is that the amount awarded represent the claimant's actual pecuniary loss; and, in view of the recital that the findings were based upon the evidence adduced, it must be presumed, there being no showing to the contrary, that they were justified by it."

In the case of Mills *v.* Lehigh Valley R. Co., note *supra,* the Commission found that the complainant was entitled to a stated amount "as reparation."[104] It was contended that such a finding was not equivalent to a finding that he was damaged. Of this contention the Court said: "What the Commission decided was that the shippers were entitled to reparation; that is, to be made whole,—to be compensated for a loss because of an illegal and unreasonable exaction; and the amount which they stated as the sum to be paid 'as reparation' on the specified shipments was the amount which they found necessary to accomplish the reparation,—to afford the compensation. The statute was not concerned with mere forms of expression, and in view of the decision that a finding of the ultimate fact of the amount of damage is enough to give the order of the Commission effect as *prima facie* evidence, we think that the trial court did not err in its ruling. The statutory provision merely established a rule of evidence. It leaves every opportunity to the defendant to contest the claim. But when the Commission has found that there was damage to a specified extent, *prima facie* the damage is shown; and, according to the fair import of its decision, the Commission did find the amount of damage in this case."

§ 209. **Damages under the Fourth Section.**—Under section four of the Act, as has been shown,[105] relief may be granted from the long and short haul provision, and the Commission has granted relief from the provision requiring that the rate for the through routes shall not exceed the aggregate of the intermediate rates.

Under these circumstances, where the carrier has followed the

[104] Naylor & Co. *v.* Lehigh V. R. Co., 15 I. C. C. 9, 18 I. C. C. 624.

[105] *Ante* Secs. 154, 155; *post.* Section 349.

statute and applied for relief, the existing rate is the legal rate until adjudged otherwise by the Commission after hearing. Until such adjudication the carrier has not "done any act, matter or thing * * * prohibited or declared to be unlawful," nor has there been an omission to "do any act, matter or thing" required to be done. Speaking to the question and of the applications filed for relief under the section, the Commission said:

"Under this provision over 5,000 applications were filed before the date fixed, and these two applications were among that number. Now, we think that it plainly appears, from the action of Congress in providing that no carrier should be proceeded against for a violation of the fourth section until its application had been acted upon, that it was the intent of Congress to say that matters should be left *in statu quo* until that time. It would be inconsistent to grant reparation for a disregard of the rule of the fourth section during that period within which the law-making authority had expressly sanctioned existence of such disregard.

"Without undertaking, therefore, to lay down any rule as to the granting of reparation for violations of the fourth section, we hold that no damages can be given up to the time when the Commission passes upon these fourth section applications, unless, possibly, a case is made out under the third section, which might carry with it an award of damages, or unless under the first section the rate to the intermediate point has been found unreasonable." [106]

§ 210. **Damages for Misrouting.**—Where two through routes exist the shipper "subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said

[106] Appalachian Lumber Co. *v.* Louisville & N. R. Co., 25 I. C. C. 193, 197, followed in Jonesville Clothing Co. *v.* Chicago & N. W. Ry. Co., 26 I. C. C. 628, 630.

property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* that the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported." [107]

Under the authority granted by the statute, the Commission has passed certain conference rulings in which it is stated that it has exclusive jurisdiction over claims for damages arising from the misrouting of freight.[108] Carriers must not disregard instructions of shippers as to intermediate routing, except when the tariff of the initial line reserves the right to the carrier to dictate intermediate routing. When such reservation is made in the tariff: (1) where all-rail rates and rail-and-water rates are available the agent of the carrier must have the shipper designate which of the two he wishes to use; and (2) the agent must not route shipment via a route which will be more expensive to the shipper than the one desired by him, or which does not furnish substantially as good and expeditious service.

In the absence of specific routing which the carrier is willing to observe, the routing must be via the cheapest reasonable route of the class designated by the shipper. The initial carrier must protect the routing.[109]

When a bill of lading is presented by a shipper showing both routing and rate, and the rate is not available by the prescribed routing, a routing applicable to the rate must be adopted.[110]

When a carrier routes by a higher interstate rate and there is available a lower reasonable intrastate rate, damages for the difference between the lower and higher rate may be allowed, unless the route over the interstate line is prescribed by the shipper.[111]

[107] Sec. 15 of Act; Sec. 402, *post.*

[108] Conf. Ruling 286.

[109] Conf. Rulings 214, 91, 93, 140, 190, 192, 198, 205, 214d, 286, 316.

[110] Con. Ruling 286f.

[111] Lathrop Lumber Co. *v.* Alabama G. S. R. Co., 27 I. C. C. 250; Conf. Ruling 140. See also: McCaull-Dinsmore Co. *v.* Chicago G. W. Ry. Co., 14 I. C. C. 527; Gus Momsen & Co. *v.* Gila Valley G. & N. Ry. Co., 14 I. C. C. 614; Goodman Mnfg. Co. *v.* Pennsylvania R. Co., 26 I. C. C. 423; Newman Lumber Co. *v.* Mississippi C. R. Co., 26 I. C. C. 97; Sec. 15 of Act; Sec. 402, *post.*

§ 211. **Damages—General Statement.**—Carriers may voluntarily make rates lower than they could be compelled to make them, but the Commission will not award reparation on the basis of a rate lower than that which it would prescribe, even though the shipper and carrier may agree thereto.[112]

Where complainant operates an industrial road which is a plant facility, originating shipments and receiving an allowance from the carrier therefor or participating in the joint rate under which shipments moved, reparation has been denied by the Commission.[113] If, however, the industrial railroad was legally entitled to an allowance, and some may be, and,[114] if the allowance did not exceed a reasonable compensation, it would seem that where the rate, other than the portion allowed the industrial railroad, is unreasonable, that reparation should be awarded.

§ 212. **Damages for Misquoting a Rate.**—Prior to the Amendment of 1910 it was held that should a carrier's agent make a mistake and quote a wrong rate, the shipper receiving such quotation of a rate must nevertheless pay the correct tariff rate even though he suffer severe loss thereby.[115] Nor does the fact that there was no rate on file change the rule.[116] Discuss-

[112] Pacific Elevator Co. *v.* Chicago, M. & St. P. R. Co., 17 I. C. C. 373, 374.

[113] Kaul Lumber Co. *v.* Central of Ga. Ry. Co., 20 I. C. C. 450; Tap Line Case, 23 I. C. C. 277, 549; Commercial Club of Omaha *v.* Anderson & Saline River Ry. Co., 27 I. C. C. 302, 324. The Kaul Case is hardly sustained by the Tap Line Cases; United States *v.* Louisiana & Pac. Ry. Co., 234 U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 741.

[114] Sec. 171, *ante.*

[115] Poor *v.* Chicago, B. & Q. R. Co., 12 I. C. C. 418, 421, 422; Tex. & Pac. Ry. Co. *v.* Mugg, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. 628; Gulf C. & S. F. R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 Sup. Ct. 802; Suffern, Hunt & Co. *v.* Indiana, D. & W. Ry. Co., 7 I. C. C. 255, 278; Houston & T. C. R. Co. *v.* Dumas, 43 S. W. 609; Chicago, R. I. & P. Ry. Co. *v.* Hubbell, 54 Kans. 232, 38 Pac. 266, 5 I. C. R. 241; Pond-Decker Lumber Co. *v.* Spencer, 86 Fed. 846, 30 C. C. A. 430; Mobile & O. R. Co. *v.* Dismukes, 94 Ala. 131, 10 So. 289, 4 I. C. R. 200; Atchison, T. & S. F. Ry. Co. *v.* Holmes, 18 Okla. 92, 90 Pac. 22. New York C. & H. R. R. Co. *v.* United States, 212 U. S. 500, 53 L. Ed. 624, 29 Sup. Ct. 309; Illinois Cent. R. Co. *v.* Henderson Elevator Co., 226 U. S. 441, 57 L. Ed. 290, 33 Sup. Ct. 176, reversing same styled case, 138 Ky. 220, 127 S. W. 779.

[116] Kansas City S. R. Co. *v.* Albers Com. Co., 223 U. S. 573, 56 L. Ed. 556, 32 Sup. Ct. 316, reversing same styled case, 79 Kan. 59, 99 Pac. 819.

ing this subject, the Commission, in its twenty-second Annual Report, pp. 16, 17, showed the hardship of the rule and said:

"The Commission feels that to require the shipper to ascertain for himself at his peril the rate imposes upon him an undue burden. The railway should know what its established charges are, and may be fairly required to state in writing, when a written request is made by the shipper, the rate which it has published and maintains in force. We call special attention to this matter as one of immediate and general concern, which discloses the need of an appropriate remedy, and urgently request that a suitable measure be promptly enacted."

In the first edition hereof, referring to the quotation above, it was said:

It is undoubtedly true that shippers ordinarily do not know, and it would sometimes take an expert to find out, what a particular rate is, and, therefore, reliance must be had on the information furnished by the agents of the carriers. The Commission points out the evil but suggests no remedy. It would probably be an effective remedy to allow the Commission to award reparation in such cases as it might find were based upon an honest mistake of the carrier. The Commission would be able to prevent the evils which Mr. Commissioner Harlan points out in the Poor case *supra;* and, if necessary to prevent discrimination, the rate mistakenly given might be open to all who ship contemporaneously with the shipper who relied on the misquoted rate.

By the Amendment of 1910,[117] it was made the duty of the carrier "after written request" to give a statement of the correct rate, and should there be a refusal to comply with a request properly made, or should there be given a wrong rate, and "if the person or company making such request suffers damage in consequence of such refusal or omission, or in consequence of the misstatement of the rate," the carrier is made liable by the statute to pay a penalty of two hundred and fifty dollars, which penalty shall accrue to the United States. As such refusal, omission or misstatement would come within the provisions of section eight of the Act, the shipper could recover and the Commission or a court could award "the full amount of damages sustained in consequence of any such violations."

This statement is not in conflict with the decisions of the Su-

[117] Act June 18, 1910; Sec. 368, *post.*

preme Court in the Albers Commission case and the Henderson Elevator case, cited note *supra*. In the Albers Commission Co. case the court was careful to limit its opinion to the law in effect prior to 1910, and at page 598 of the opinion it was said: "To avoid any misapprehension in respect to the character of the liability sought to be enforced in this case, we deem it well to repeat that there was no claim of any right to reparation or damages under the Interstate Commerce Act, * * * but only an attempt to enforce a supposed liability for a breach of the special agreement." A like limitation could be stated as to the Henderson Elevator case. The Commission in a case decided in 1913, refused reparation, but in that case there was no application made and refused and no misstatement under the amended law.[118]

§ 213. **Damages, to Whom Paid.**—Reparation is paid to him who pays the illegal advance or exaction. For the wrong of being required to pay that which is unlawful under the Act, he who makes such payment has suffered legal damage to the extent of the amount paid in excess of the unlawful rate or to the extent that he is damaged by an unlawful preference to another.

It is the person who sustains damages who is given the right to an award by way of reparation, and that the injured owner may add to the price of his commodity the amount of his damages can not relieve the carrier causing the damage and keeping the unlawful exaction of an excessive rate. For, as said by Mr. Commissioner Prouty:[119]

"If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them. Certainly these defendants are not entitled to this money which they have taken from the complainants, and they ought not to be heard to say that they should not be required to refund this amount because the complainants themselves may have obtained some por-

[118] Franke Grain Co. *v.* Illinois Cent. R. Co., 27 I. C. C. 625. As supporting the principle announced in the text. See St. Louis S. W. Ry. Co. *v.* Lewellen, 192 Fed. 540.

[119] Burgess *v.* Transcontinental Freight Bureau, 13 I. C. C. 668, 679, 680.

tion of this sum from the consumer of the commodity transported."

This statement of the Commission applies with more force to cases where the rate is unreasonable than to discrimination cases where there must be proof of damages by the shipper who suffers the loss.[120]

The manufacturer who sells his produce f. o. b. his plant pays no freight thereon, although the value of his product may be affected by the rate of carriage from his plant to the market. His damage, if any, however, is not subject of ascertainment. When he sells free on board cars at his place of business, the title passes upon delivery of the commodity to the carrier. The purchaser then owns the commodity and must pay the transportation charges thereon to whatever place he may direct shipment. Should there be loss or injury, the manufacturer would not suffer, but such loss or injury must be adjusted between the owner and the carrier. It may be that the higher rate affects the selling price at the point of manufacture, but to what extent can not be definitely ascertained. Besides, the manufacturer does not fix his selling price according to the final destination of the commodity. He frequently does not know where the purchaser will send the goods when the purchase is made. The purchaser may decide to use the commodity at the point of manufacture, or ship to some place where the illegal rate does not apply. These and other considerations make it manifest that the legal injury is suffered by the person who pays for the carriage. This does not mean the man who actually hands the money or check to the carrier. It means the one who owns the commodity while in transit and who has undertaken to deliver it at a point requiring its shipment over the lines of the carrier who collects the unlawful charge. Frequently a manufacturer will sell his goods delivered at a particular point, but allow the consignee to pay the freight thereto, deducting the amount thereof from the purchase price of the goods. In such a case, the manufacturer has paid the freight and is entitled to recover the overcharge. The manufacturer may add the freight charges to the manufacturing cost, the jobber and the retailer may add not only such charges but a profit thereon when they sell, and in the end the consumer "pays the freight," but it would be impracticable to trace an

[120] Sec. 208, *supra*.

overcharge to the consumer who never could make proof entitling him to a recovery. The law will not attempt to follow these speculations, but will let the carrier repay to the man, who pays for the transportation of his property, all charges above what such shipper is legally bound to pay.[121]

The Commission declined to award reparation before a complainant had paid the lawful rate.[122]

The right to recover damages under the Act may be assigned,[123] but by conference ruling 362 the Commission said: "In awarding reparation the Commission will recognize an assignment by a consignor to a consignee or by a consignee to a consignor, but will not recognize an assignment to a stranger to the transportation records."

§ 214. **Damages, by Whom Paid.**—Where the illegal rate is a joint rate over a through route consisting of several carriers, the question arises as to what carrier or carriers must pay the reparation, and as to whether the liability is joint or several; that is, is each carrier jointly and severally liable for all the illegal rate, or is each carrier liable for only the proportion of the illegal charge received by it? The charging of an illegal rate is a tort and all participants in such illegal act are joint tort feasors, and as such, each carrier is jointly and severally liable. Where, as was found to be a fact in the Tift case, *supra*, an illegal advance was made by a combination of carriers by concerted and concurrent action in violation of the Sherman Anti-Trust law, it would seem that each and all carriers who participated in the action by which the advance was made would be joint tort feasors and liable to any one who suffered damages

[121] Commercial Club of Omaha *v.* Anderson & S. R. R. Co., 27 I. C. C. 302, 323; Nicola, Stone & Meyers Co. *v.* Louisville & N. R. Co., 14 I. C. C. 199, 208; Sunnyside Coal Mining Co. *v.* Denver & R. G. R. Co., 19 I. C. C. 20; Mountain Ice Co. *v.* Delaware, L. & W. R. Co., 21 I. C. C. 596; Baker Mnfg. Co. *v.* Chicago & N. W. R. Co., 21 I. C. C. 605; Carolina Portland Cement Co. *v.* Chesapeake & O. Ry. Co., 21 I. C. C. 533; Lamb, McGregor & Co. *v.* Chicago & N. W. Ry. Co., 22 I. C. C. 346; Deming Lumber Co. *v.* Southern Pac. Co., 24 I. C. C. 598; Sondheimer *v.* Illinois Cent. R. Co., 20 I. C. C. 606.

[122] Rosenblatt *v.* Chicago & N. W. Ry. Co., 18 I. C. C. 261.

[123] Edmunds *v.* Illinois Cent. R. Co., 80 Fed. 78; Jubitz, Assignee, *v.* Southern Pac. Co., 27 I. C. C. 44. The Commission declined to express an opinion on this point, O'Brien Com. Co. *v.* Chicago & N. W. Ry. Co., 20 I. C. C. 68.

by such illegal advance. The Commission does not fully agree with this proposition, and in the Nicola, Stone and Myers case, announced the rule as follows:

"The complainants contend that the defendant carriers who concurred in establishing the unlawful advance in the rates under consideration are jointly and severally liable for all the damages resulting therefrom, whether or not participating in the particular rate from which the individual overcharge resulted. We can not concur in so broad a view of the liability of the defendants. We do not think those carriers who received no part of the charges and who did not participate in the movement of the commodity should be liable to refund the whole or any part of the rate for the movement of a shipment in which they did not participate. We think that the liability is restricted to those carriers who participated in the transportation of the lumber via their respective routes over which the several shipments moved, and who shared in the transportation charges therefor, and that such carriers are jointly and severally liable to the persons found to be entitled to the refund." [124]

§ 215. **Damage—Protest Unnecessary.**—It is not necessary that a rate be paid under protest in order to enable a shipper paying it to recover the excessive and unlawful portion thereof. This is true because the law requires no useless thing, and in no case where a rate is fixed in the schedules filed according to law, would protest avail anything. The carrier could not, if it wished, yield to the protest and charge less than the tariff rates. This question has been before the Commission and has been decided in harmony with the principles stated.[125]

The holding of the Commission is not in conflict with the deci-

[124] Osborne *v.* Chicago & N. W. Ry. Co., 48 Fed. 49; Interstate Com. Com. *v.* Louisville & N. R. Co., 118 Fed. 613; Nicola, Stone & Meyers Co. *v.* Louisville & N. R. Co., 14 I. C. C. 199; Blackhorse Tobacco Co. *v.* Illinois Cent. R. Co., 17 I. C. C. 588. Nor is it necessary that all the parties liable should be defendants, Independent Refiners Assn. *v.* Western N. Y. & P. R. Co., 6 I. C. C. 378; Webster Grocery Co. *v.* Chicago & N. W. Ry. Co., 21 I. C. C. 20.

[125] Southern Pine Lumber Co. *v.* Southern Ry. Co., 14 I. C. C. R. 195; Baer Bros. *v.* Mo. Pac. Ry. Co., 13 I. C. C. R. 329; National Refining Co. *v.* Atchison, T. & S. F. Ry. Co., 18 I. C. C. 389; Pennsylvania R. Co. *v.* International Coal Co., 173 Fed. 1, 97 C. C. A. 383. While this case was reversed by the Supreme Court, same styled case, 230 U. S. 184, 57 L.

sion of the courts. It may be admitted that ordinarily where a payment is voluntarily made it can not be recovered, but where a payment must be made by force of law and where the law prescribes a particular method by which it may be determined whether or not the payment is legal, protest is neither necessary nor effective. The case of Knudsen-Ferguson Fruit Co. *v.* Chicago, St. P., M. & O. Ry. Co.[126] illustrates the distinction between charges collected under the force of a tariff and charges paid voluntarily. In that case, an icing charge of $45.00 was made under a tariff treating icing as a separate charge from transportation, the schedules stating "that the published charge for transportation did not include the cost of icing in transit, but that the carrier would impose an additional charge for such service." Such a tariff would not comply with the present law as to filing tariffs, but it is clear that no icing charges were specified in the tariff and a payment of such charges was not made under the force of law. Therefore, when ten days after having received his goods, the shipper voluntarily paid the icing charges the court correctly held, in a suit brought a year thereafter, that he could not recover. While it is true that protest is not necessary, a shipper, when an illegal advance is made, should not continue paying it, without objection or protest until a large claim has accumulated against the carrier.

§ 216. **Damages—Interest and Attorneys Fees.**—It is the practice of the Commission to allow interest at six per cent on

Ed. 1446, 33 Sup. Ct. 893, that court did not discuss this question and remanded the case, which would have been useless if protest had been necessary; Mitchell Coal & Coke Co. *v.* Pennsylvania R. Co., 181 Fed. 403. The subsequent history of this case, though not affecting this question, is: Dismissed, same styled case, 183 Fed. 908, appeal dismissed, same styled case, 192 Fed. 475, 112 C. C. A. 637, writ of certiorari denied, 223 U. S. 733, 56 L. Ed. 635, 32 Sup. Ct. 528. On appeal affirmed in part and reversed in part, 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916. The statement in Denver & R. G. R. Co. *v.* Baer Bros. Mercantile Co., 209 Fed. 577, 580, 126 C. C. A. 399, was directed to the subject of interest and cannot be claimed as a precedent against the principles stated in the text. See Baer Bros. Mercantile Co. *v.* D. & R. G. R. Co., 233 U. S. 479, 58 L. Ed. 1055, 34 Sup. Ct. 641.

[126] Knudson-Ferguson Fruit Co. *v.* Chicago, St. P., M. & O. Ry. Co., 149 Fed. 973, 79 C. C. A. 483, 204 U. S. 670, 51 L. Ed. 672. Petition for writ of certiorari denied.

awards of damages. The statute makes no provision for interest, but the loss of the money is an injury and to give "the full amount of damages" must include interest. That the Commission has this power, has been asserted when a protest was made,[127] though it would seem from the authorities discussed in the next preceding section that a protest is immaterial.

Attorneys fees are provided for by the statute and may be fixed by the court when the award of the Commission is sued on and recovery is had. The statute is a valid law.[128]

The Commission has no authority and does not assume to award attorney's fees,[129] nor can attorney's fees be allowed by the courts for the services of an attorney before the Commission. The attorney's fees are allowed only for services in the courts.[130]

§ 217. **Award of Damages an Inadequate Remedy.**—Prior to the Amendment of 1910, when a carrier advanced a rate the only remedy the Commission could enforce was to investigate upon complaint filed and, after hearing, award damages for the illegal exaction, if the rate increased was held unlawful. The Commission recognized this and stated the fact as follows:

"While it is certainly true that the remedy by way of damages is utterly inadequate and inconsistent, it is apparently the remedy prescribed by the act to regulate commerce and the only remedy which the shipper has against the exaction of an unreasonable interstate rate." [131]

Some of the federal courts held that an injunction could issue preventing an advance or at least staying the advance until the Commission could determine whether or not the increased rate was illegal, [132] but there was uncertainty about the remedy.

[127] Denver & R. G. R. Co. *v.* Baer Bros. Merc. Co., 209 Fed. 577, 580, 126 C. C. A. 399.

[128] Chicago, B. & Q. R. Co. *v.* Feintuch, 191 Fed. 482, 488, 489, 112 C. C. A. 126; Denver & R. G. R. Co. *v.* Baer Bros. Mercantile Co., 209 Fed. 577, 581, and cases there cited, 126 C. C. A. 399. No Attorney's fees in suit in state court for excess rate, Kansas City S. Ry. Co. *v.* Tonn, 102 Ark. 20, 143 S. W. 577.

[129] Councill *v.* Western & A. R. Co., 1 I. C. C. 339, 1 I. C. R. 638; Washer Grain Co. *v.* Missouri Pac. Ry. Co., 15 I. C. C. 147, 152, 154, 155.

[130] Meeker *v.* Lehigh V. R. Co., 236 U. S. 412, 59 L. Ed. —, 35 Sup. Ct. 328; Mills *v.* Lehigh V. R. Co., 238 U. S. 473, 59 L. Ed. —, 35 Sup. Ct. 888.

[131] McGrew *v.* Missouri Pac. Ry. Co., 8 I. C. C. 630.

[132] Secs. 304 and 305, *post.*

To meet this evil, the Amendment of 1910 was enacted, giving the Commission power to suspend an advance.[133]

§ 218. **Damages, Limitation on Complaint for.**—Section sixteen of the Act to Regulate Commerce as amended by the Hepburn law fixed a limitation on the right of action for damages in the following language: "All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after."[134] Prior to this amendment there was no limitation in the statute and the limitation laws of the state in which a suit was filed controlled.[135] No limitation ran prior to the effective date of the Hepburn Amendment which date was held to be August 28, 1906, although the Act was approved June 29, 1906.[136]

A complaint filed by an association demanding reparation under general averments, which does not name the members on whose behalf it is filed and which does not with reasonable particularity specify and describe the shipments as to which the complaint is made, will not operate to stop the running of the period of limitation fixed by law.[137]

When, however, an individual files a complaint for reparation in his own behalf, an informal complaint will stop the running of the statute.[138]

[133] Secs. 398, *post*.

[134] Sec. 408, *post*.

[135] Ratican *v.* Terminal R. Asso., 114 Fed. 666. Contra holding R. S. U. S. § 1047 applied. Carter *v.* New Orleans & N. E. R. Co., 143 Fed. 99, 74 C. C. A. 293; Cattle Raisers' Asso. *v.* Chicago, B. & Q. R. Co., 10 I. C. C. 83.

[136] Nicola, Stone & Myers Co. *v.* Louisville & N. R. Co., 14 I. C. C. 199, 206. See also Kile, Morgan & Co. *v.* Deepwater Ry. Co., 15 I. C. C. 235; Nollenberger *v.* Mo. Pac. Ry. Co., 15 I. C. C. 595; Re When a Cause of Action Accrues, 15 I. C. C. 201, 204.

[137] Missouri & Kan. Shippers Asso. *v.* Atchison, T. & S. F. Ry. Co., 13 I. C. C. 411.

[138] Venus *v.* St. Louis, I. M. & S. Ry. C ., 15 I. C. C. 136, 137; Woodward & D. *v.* Louisville & N. R. Co., 15 I. C. C. 170; Beekman Lumber Co. *v.* St. Louis, I. M. & S. Ry. Co., 15 I. C. C. 274, 276; Hartman Furn. & Carpet Co. *v.* Wisconsin Cent. Ry. Co., 15 I. C. C. 530, 531; Duluth Log Co. *v.* Minnesota & Int. Ry. Co., 15 I. C. C. 627; Nicola, Stone & Myers Co. *v.* Louisville & N. R. Co., 14 I. C. C. 199, 206; Louisville & N. R. Co. *v.* Dickerson, 191 Fed. 705, 112 C. C. A.

The cause of action accrues when the shipment terminates and the complainant becomes liable for the freight and not when the money is actually paid.[139]

The Commission has no jurisdiction unless the claim is filed in time and can not relieve from the operation of the statute.[140]

§ 219. **General Investigations by the Commission.**—The Interstate Commerce Commission is authorized and empowered to enforce the provisions of the act to regulate commerce. To accomplish which it has authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created, and it may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made. It also has "power to require, by *subpœna,* the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation. Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a *subpœna* the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section."[141]

In the Brimson case,[142] an informal complaint having been

295; but the informal complaint must refer to the particular rate involved, Acme Cement Plaster Co. *v.* St. Louis & S. F. R. Co., 18 I. C. C. 376.

[139] Arkansas Fertilizer Co. *v.* United States, 193 Fed. 667, Com. Court Opinion No. 43, p. 283; Blinn Lumber Co. *v.* Southern Pac. Co., 18 I. C. C. 430; Meeker *v.* Lehigh V. R. Co., 236 U. S. 412, 59 L. Ed. —, 35 Sup. Ct. 328.

[140] Werner Saw Mill Co. *v.* Illinois Cent. R. Co., 17 I. C. C. 388; Morrisdale Coal Co. *v.* Pennsylvania R. Co., 230 U. S. 304, 57 L. Ed. 1474, 3 Sup. Ct. 938.

[141] Sec. 12 of Act; Sec. 390, *post.*

[142] Int. Com. Com. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 Sup. Ct. 1125.

made of the facilities of certain carriers, the Commission of its own motion decided to investigate the matters set forth in such complaint; and thereupon it made an order reciting the facts of the informal complaint and requiring each of certain named carriers "to make and file, in its office at Washington, a full, complete, perfect and specific verified answer setting forth all facts in regard to the matters complained of and responding to" certain questions relating to the methods of operation of the carriers and especially as to the relation of such carriers to the Illinois Steel Company. To these questions each carrier filed a denial and each averred that it had, in all respects, complied with the obligations imposed by the laws of the United States. Notwithstanding these denials, the Commission continued the investigation by the examination of witnesses and books and documents. It *subpœnaed* W. G. Brimson, who was president and manager of five carriers incorporated under the laws of Illinois, which carriers were among those under investigation. This witness refused to answer the question as to the ownership of his companies by the Illinois Steel Company. Other witnesses refused to answer the same question. The Commission thereupon filed its petition in the circuit court praying that the witnesses be required to answer the questions. The circuit court refused the order, holding that the proceeding did not constitute a controversy to which the judicial power of the United States could be extended. Section twelve of the act was held valid in the Supreme Court, the circuit court reversed and the cause remanded, with directions to proceed in conformity with the opinion of the Supreme Court. The very able opinion of Mr. Justice Harlan concluded as follows:

"We are of the opinion that a judgment of the circuit court of the United States determining the issues presented by the petition of the Interstate Commerce Commission and by the answers of appellees, will be a legitimate exertion of judicial authority in a case or controversy to which, by the Constitution, the judicial power of the United States extends. And a final order by that court dismissing the petition of the Commission, or requiring the appellees to answer the questions propounded to them, and to produce the books, papers, etc., called for, will be a determination of questions upon which a court of the United States is capable of acting and which may be enforced by judicial process."

In the Baird case,[143] which was also an application of the Commission to the court to compel the testimony of witnesses, the defendant urged that though a complaint was filed, the complainant "did not show any real interest in the case brought." The witnesses were required to answer.

In the Harriman case,[144] the investigation was upon the motion of the Commission, not upon complaint. The relations between the Union Pacific Railroad Company and other connecting roads, whether parallel or not, were inquired about and certain questions asked were, under advice of counsel, not answered by the witnesses.

The gist of the opinion is contained in a short paragraph, which is here reproduced:

"We are of opinion on the contrary that the purposes of the act for which the Commission may exact evidence embrace only complaints for violation of the act, and investigations by the Commission upon matters that might have been made the object of complaint. As we have already implied the main purpose of the act was to regulate the interstate business of carriers, and the secondary purpose, that for which the Commission was established, was to enforce the regulations enacted. These in our opinion are the purposes referred to; in other words the power to require testimony is limited, as it usually is in English-speaking countries at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law."

In its twenty-second Annual Report (1908) the Commission pointed out the difficulties of administering the law with the limitations stated in the Harriman case.

§ 220. **Same Subject—Amendment of 1910.**—Section 13 of the Act in force at the date of the decision in the Harriman case *supra*, after providing for hearings on complaint, in addition to the power conferred by section 12 *supra*, gave power to the Commission to "institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made." The same section as amended by the Act of 1910[145] materially enlarges the powers of the Commission in this respect,

[143] Int. Com. Com. *v.* Baird, 194 U. S. 25, 48 L. Ed. 860, 867, 24 Sup. Ct. 563.

[144] Harriman *v.* Int. Com. Com., 211 U. S. 407, 419, 420, 53 L. Ed. 253, 29 Sup. Ct. 115.

[145] Sec. 393, *post*.

giving it full authority and power "on its own motion in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complainant on petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money."

In the Harriman case this *quaere* was propounded: "Whether Congress has unlimited power to compel testimony in regard to subjects which do not concern direct breaches of the law, and whether, and to what extent, it can delegate such power." It need not be said that Congress has *unlimited* power in this respect but it would seem that the power granted to the Commission as stated herein was a proper and constitutional delegation because necessary to the performance of the duties of the Commission under the Act to Regulate Commerce. The Goodrich Transit Co. case, while not directly in point, supports this statement.[146]

The provisions of the act giving the Commission power to prescribe methods of accounting and to require reports from the carriers subject to its jurisdiction, are complementary to the power to make general investigations, and these powers relating to the accounts which such carriers must keep are valid.[147] In making investigations into the "accounts, records and memoranda" kept by the carriers, the Commission has no power to investigate general correspondence and original documents not required to be entered on their books.[148] The rather extraordinary avowal

[146] Interstate Com. Com. *v.* Goodrich Transit Co., 224 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436, reversing Commerce Ct. in Goodrich Transit Co. *v.* Interstate Com. Com., 190 Fed. 943, Commerce Court Opinion Nos. 21-24, p. 95.

[147] Kansas City S. Ry. Co. *v.* U. S., 231 U. S. 423, 58 L. Ed. 296, 34 Sup. Ct. 125.

[148] United States *v.* L. & N. R. Co., 212 Fed. 486; affirmed United States *v.* L. & N. R. Co., 236 U. S. 318, 59 L. Ed. —, 35 Sup. Ct. 363; United States *v.* N. C. & St. L. Ry., 217 Fed. 254.

by counsel asking the questions that they were asked as the beginning of "an attempt to go into the whole business of the Armour car lines—a fishing expedition into the affairs of a stranger for the chance that something discreditable might turn up," resulted in the Ellis case[149] in a refusal by the witness to answer the questions. After making the statement in the quotation above, the Supreme Court held that the Commission had no power to demand answers to such questions.

§ 221. **Commission May Ask the Aid of Courts to Enforce the Law.**—We have seen that the Commission may apply to courts to aid it in obtaining testimony in investigations relating to violations of the Act to Regulate Commerce. Upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of the Act to Regulate Commerce and for the punishment of all violations thereof.

At the request of the Commission suit was filed and an injunction granted enjoining a carrier from engaging in interstate commerce without filing tariffs and making reports as required by law and also enjoining discriminatory practices.[150]

§ 222. **Commission Has Power to Prescribe Rates for the Future.**—When the act to regulate commerce was originally passed the Commission appointed thereunder, believing the law so authorized, exercised the power to prescribe rates for the future. That this power was not delegated to the Commission prior to the Hepburn amendment was definitely decided by the Supreme Court in Interstate Commerce Commission *v.* Cincinnati, N. O. & T. P. R. Co.,[151] where the question was elaborately discussed and the conclusion stated "that under the interstate commerce act the Commission has no power to prescribe the tariff of rates which shall control in the future." Under the old

[149] Ellis *v.* Interstate Com. Com., 237 U. S. 434, 59 L. Ed. —, 35 Sup. Ct. 645.

[150] United States *v.* Union Stock Yard & Transit Co., 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83, same styled case in Commerce Court, 192 Fed. 330, Opinion Com. Ct. No. 15, p. 189.

[151] Interstate Com. Com. *v.* Cincinnati, N. O. & T. P. R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896.

law the Commission had and exercised the power to declare a particular advance in rates illegal. The exercise of this power practically meant prescribing the old rate as the rate for the future. This is clearly shown in the Tift Case. There an advance was made by the carriers, this advance, on hearing, was declared illegal, and the whole advance was held to be the measure of reparation allowed shippers.[152]

The Amendments of 1906 and of 1910, give the Commission power, after full hearing upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative either in extension of a pending complaint or without any complaint whatever, when it shall be of opinion that the rates or practices constitute a violation of any of the provisions of the Act, to prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed as the maximum to be charged, and what individual or joint classification, regulation or practice is just, fair, and reasonable to be thereafter followed.[153]

When a rate, regulation or practice of a common carrier is within the jurisdiction conferred on the Commission it may prescribe what shall be such rate, regulation or practice for the future, and when the Commission acts on substantial evidence in accordance with law, its orders in respect to the questions within its jurisdiction will not be set aside by the courts.[154] "But," said Mr. Justice Lamar, delivering the opinion of the Supreme Court, "the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, be 'set aside by a court of competent jurisdiction.'"[155]

[152] Southern Ry. Co. *v.* Tift, 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. 709; Southern Pine Lumber Co. *v.* Southern Ry. Co., 14 I. C. C. 195; Nicola, Stone & Myers Co. *v.* Louisville & N. R. Co., 14 I. C. C. 199.

[153] Sec. 16 of Act; Sec. 406, *post.*

[154] Interstate Com. Com. *v.* Illinois Cent. R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. 155; Interstate Com. Com. *v.* Chicago & A. R. Co., 215 U. S. 479, 54 L. Ed. 291, 30 Sup. Ct. 163; Interstate Com. Com. *v.* Chicago, R. I. & P. Ry. Co., 218 U. S. 88, 54 L. Ed. 946, 30 Sup. Ct. 651; Interstate Com. Com. *v.* Delaware, L. & W. R. Co., 220 U. S. 235, 55 L. Ed. 448, 31 Sup. Ct. 392.

[155] Interstate Com. Com. *v.* Louisville & N. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct.

The "opinion" of the Commission upon which it may act must be based upon a full hearing at which evidence is received, of which the carrier is apprised and given an opportunity to meet.[156]

The Commission has entered many orders under the authority granted by this provision. Illustrative of these are: distribution of cars,[157] prescribing rates,[158] division of rates,[159] terminal charges,[160] ordinary switch connections, [161] prohibiting discrim-

185, reversing Louisville & N. R. Co. *v.* Interstate Com. Com., 195 Fed. 541, Opinion Com. Ct. No. 4, p. 325, 375.

[156] Atlantic C. L. R. Co. *v.* Interstate Com. Com., 194 Fed. 449, Opinion Com. Ct. No. 3, p. 255.

[157] Traer *v.* Chicago & A. R. Co., 13 I. C. C. 451; Chicago & A. R. Co., and Illinois Cent. R. Co. *v.* Interstate Com. Com., 173 Fed. 930; Interstate Com. Com. *v.* Illinois Cent. R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. 155; Interstate Com. Com. *v.* Chicago & A. R. Co., 215 U. S. 479, 54 L. Ed. 280, 30 Sup. Ct. 163; Hillsdale Coal & Coke Co. *v.* Pennsylvania R. Co., 19 I. C. C. 356, sustained, Pennsylvania R. Co. *v.* Interstate Com. Com., 193 Fed. 81, Opinion Com. St. No. 31, p. 275.

[158] Burnham-Hanna-Munger Dry Goods Co. *v.* Chicago, R. I. & P. Ry. Co., 14 I. C. C. 299, order enjoined, Chicago, R. I. & P. Ry. Co. *v.* Interstate Com. Com., 171 Fed. 680, Commission sustained, Interstate Com. Com. *v.* Chicago, R. I. & P. Ry. Co., 218 U. S. 88, 96, 54 L. Ed. 946, 30 Sup. Ct. 651, holding that the power extends to the regulation of old or new rates, notwithstanding changes in business may be necessary.

[159] Eichenberg *v.* Southern Pac. Co., 14 I. C. C. 250, injunction denied, Southern Pac. Terminal Co. *v.* Interstate Com. Com., 166 Fed. 134, Commission sustained, Southern Pac. Terminal Co. *v.* Interstate Com. Com. 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279.

[160] Cincinnati & C. Traction Co. *v.* Baltimore & O. S. W. R. Co., 20 I. C. C. 486, enjoined, Baltimore & O. S. W. R. Co. *v.* United States, 195 Fed. 962, Opinion Com. Ct. No. 60, p. 431, order voided, United States *v.* Baltimore & O. S. W. R. Co., 226 U. S. 14, 57 L. Ed. 104, 33 Sup. Ct. 5.

[161] Corp. Com. of North Carolina *v.* Norfolk & W. Ry. Co., 19 I. C. C. 303, order sustained, Norfolk & W. Ry. Co. *v.* United States, 195 Fed. 953, Opinion Com. Ct. No. 40, p. 413; New Orleans Board of Trade *v.* Louisville & N. R. Co., 17 I. C. C. 231, order set aside, Louisville & N. R. Co. *v.* Interstate Com. Com., 195 Fed. 541, Opinion Com. Ct. No. 4, pp. 325, 375, Commerce Ct. reversed Interstate Com. Com. *v.* Louisville & N. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185; Chamber of Commerce of Newport News *v.* Southern Ry. Co., 23 I. C. C. 345, sustained, Southern Ry. Co. *v.* United States, 204 Fed. 465, Opinion Com. Ct. No.

ination,[162] icing charges and freecooling.[163]

The Commission, however, has no jurisdiction to fix rates based upon estoppel of the carrier.[164] When relief is denied to the shipper, the order can not be set aside by a court.[165]

§ 223. **Suspension of Rates, Regulations and Practices.** —The Act of 1910 gives the Commission authority, with or without complaint or other formal pleadings, but upon reasonable notice, temporarily to suspend and, after hearing, to make such orders in reference to fares, charges, classifications, regulations, and practices, as would be proper in a proceeding after such fares, etc., became effective. The burden of proof is on the carrier at all hearings involving a rate increased after January 1, 1910, or of a rate sought to be increased after the passage of the Amendment of June 18, 1910.[166] When a new rule, regulation or practice results in an increased rate, it would be a rate increased to justify which the burden would be on the carrier prescribing such rule, regulation or practice.

The Commission has held many investigations under this section, the most conspicuous of which are the Advances in Rates—Eastern case,[167] Advances in Rates—Western case,[168] Five Per-

82, p. 603; Railroad Com. of La. *v.* St. Louis & S. W. Ry. Co., 23 I. C. C. 31, sustained, Texas & Pac. Ry. Co. *v.* United States, 205 Fed. 380, Opinion Com. Ct. No. 68, p. 655, (Shreveport Case); Houston, E. & W. T. Ry. Co. *v.* United States, 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833.

[162] Atchison, T. & S. F. Ry. Co. *v.* United States, 203 Fed. 56, 59, Opinion Com. Ct. No. 61, p. 537. For history of case, see Arlington Heights Fruit Co. *v.* Southern Pac. Co., 22 I. C. C. 149, Atchison, T. & S. F. Ry. Co. *v.* Interstate Commerce Com., 190 Fed. 591, Opinion Com. Ct. No. 7, p. 83.

[163] Arlington Heights Fruit Co. *v.* Southern Pac. Co., 20 I. C. C. 106; Re Precooling and Preicing, 23 I. C. C. 267, order sustained, Atchison, T. & S. F. Ry. Co. *v.* United States, 204 Fed. 647, Opinion Com. Ct. No. 41, p. 627, affirmed, Atchison, T. & S. F. Ry. Co. *v.* United States, 232 U. S. 199, 58 L. Ed. 568, 34 Sup. Ct. 291.

[164] Southern Pac. Co. *v.* Interstate Com. Com., 219 U. S. 433, 55 L. Ed. 283, 31 Sup. Ct. 288, reversing Southern Pac. Co. *v.* Interstate Com. Com., 177 Fed. 963, and the Commission in Western Oregon Lumber Mnfg. Assn. *v.* Southern Pac. Co., 14 I. C. C. 61.

[165] Proctor & Gamble *v.* United States, 225 U. S. 282, 56 L. Ed. 1091, 32 Sup. Ct. 761; Louisville & N. R. Co. *v.* United States, 207 Fed. 591, Opinion Com. Ct. No. 86, p. 699.

[166] Re Rates on Crushed Stone, 29 I. C. C. 136.

[167] Advances in Rates, Eastern Case, 20 I. C. C. 243.

[168] Advances in Rates, Western Case, 20 I. C. C. 307.

cent Advance,[169] and in the Western Advance Rate case 1915.[170] In the Eastern advance case the question of the burden of proof was discussed, and it was there held that the Amendment of 1910 was unlike the English Act on a similar subject. Said the Commission:

"Nor should our statute receive exactly the same interpretation which has been put upon the English act. That act provides that the carrier shall justify the 'increase of the rate.' Our act provides that the burden of proof shall be upon the carrier to show that the 'increased rate' is just and reasonable. The English act creates a presumption that the rates in effect on December 31, 1892, were reasonable rates, and the justice of any increase must be tried by that standard. Our act does not intend to enact that all rates in effect on January 1, 1910, are just and reasonable. Upon the contrary, it is open to any shipper or to this Commission to attack such a rate as unjust and unreasonable. The only effect of our statute is to cast, in certain cases, the burden of proof upon the carrier."

It was also then held that rates otherwise reasonable would not be permitted to be advanced "for the purpose of bolstering up the credit of our railroads," and that "no general advance in rates should * * * be permitted until carriers have exhausted every reasonable effort toward economy in their business."[171]

§ 224. **Through Routes and Joint Rates.**—The Commission has, after hearing, on a complaint or upon its own initiative, the right to establish joint rates and prescribe the divisions thereof, and the terms and conditions under which through routes shall be operated. Under what circumstances a through route and joint rate shall be prescribed has been discussed herein, section 195 *supra*, and need not be repeated. It is sufficient to say that when the carriers over whose lines the through route is to be established are subject to the jurisdiction of the Commission, the Commission has a discretion as to whether or not it will establish the through route and joint rate.[172]

§ 225. **Allowances for Services or Instrumentalities.**—The Amendment of 1906 provides:

[169] Five per Cent Case, 31 I. C. C. 351, 32 I. C. C. 325.

[170] Western Rate Advance Case 1915, 35 I. C. C. 497.

[171] Pp. 253, 254, 255, 279 of opinion Eastern Case, *supra*.

[172] Truckers Transfer Co. *v.* Charleston & W. C. Ry. Co., 27 I. C. C. 275, 277.

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order." This authority of the Commission was discussed in the chapter on Equality of Rates.

§ 226. **Powers Enumerated, Not Exclude Others.**—By the Amendment of 1906, concluding section 15 of the Act, it was provided, "the foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act." Obviously this provision is not a grant of power; it merely evidences a legislative intention not to limit any general grant by specific provisions relating to particular powers, an intention that the Act should be construed as remedial. The general purposes of the Act were to prevent unjust rates, to require fair play between shippers, and to make rates certain in order that such fair play might exist, and Congress has emphasized the intention that these general purposes were not to be unduly limited. The courts have given a broad construction to the Act in determining whether or not power exists to effectuate these general purposes.[173] This principle was well stated by the Commerce Court as follows:

"A statute of the scope of the interstate commerce act, designed to regulate the vast interstate transportation business of the country, is not to be narrowly interpreted in accordance with the economical or physical conditions prevailing at the time of its enactment."[174]

[173] Interstate Com. Com. *v.* Goodrich Transit Co., 224 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436, reversing Goodrich Transit Co. *v.* Interstate Com. Com., 190 Fed. 943, Opinion Com. Ct. Nos. 21-24, p. 95; Kansas City S. Ry. Co. *v.* United States, 231 U. S. 423, 58 L. Ed. 296, 34 Sup. Ct. 125, affirming same styled case, 204 Fed. 641, and sustaining accounting orders of the Commission.

[174] Omaha & C. B. Street Ry. Co. *v.* Interstate Com. Com., 191 Fed. 40, Opinion Com. Ct. No.

The outlook of the Commission must be as comprehensive as the whole country and as to all subjects within its prescribed authority it has power to make such orders as are necessary to enforce the great remedial purpose of the Act.[175]

§ 227. **Effect of Commission's Orders.**—When an award of damages is made "the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated." Where orders other than an award of damages are made they are binding "unless * * * suspended or set aside by a court of competent jurisdiction." In what cases and for what causes the courts may set aside these orders will be discussed in a subsequent chapter.

§ 228. **Commission's Control over Its Orders.**—The Commission is authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper, and it may grant rehearings. These powers will be discussed in the chapter on procedure of the Commission.

Until such orders are suspended or modified, it is the duty of every common carrier, its agents and employees, to observe and comply therewith.

§ 229. **Commission May Employ Attorneys.**—"The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work or for proper representation of the public interest in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for and represent the Commission in any case pending in the Commerce Court; and the expenses of such employment shall be paid out of the appropriation for the Commission."

This power the Commission exercises, its attorneys appearing in investigations before the Commission or in advance rate cases and other investigations of general interest, and cases where orders of the Commission are involved.

25, p. 147. This case was reversed but the principle quoted not referred to, Omaha & C. B. Street Ry. Co. *v.* Interstate Com. Com., 230 U. S. 324, 57 L. Ed. 1501, 33 Sup. Ct. 890.

[175] Interstate Com. Com. *v.* Chicago, R. I. & P. Ry. Co., 218 U. S. 88, 54 L. Ed. 946, 30 Sup. Ct. 651; Interstate Com. Com. *v.* Chicago, B. & Q. R. Co., 218 U. S. 113, 54 L. Ed. 959, 30 Sup. Ct. 660.

The Commission, the United States by the Attorney-General, as well as parties to the orders made by the Commission, may apply to the United States District Courts for the enforcement of such orders.

§ 230. **Records of Commission.**—Copies of schedules and classifications and tariffs of rates, fares and charges filed with the Commission, and the statistics, tables and figures contained in the reports of carriers made to the Commission as required by law, are public records and shall be received as *prima facie* evidence of what they purport to be in investigations by the Commission and in all judicial proceedings, and certified copies shall be received in evidence with like effect as the originals.

Section 14 of the Act makes the authorized publication of the reports and decisions of the Commission competent evidence. The Supreme Court held this not to mean that courts should take judicial notice of these reports and decisions, but that they were admissible without obtaining certified copies; otherwise, the rules of evidence were not changed.[176]

§ 231. **Valuation of Railroad Property.**—In the Eastern Advance Rate case,[177] Mr. Commissioner Prouty delivering the opinion of the Commission, speaking of the facts which must be considered in determining the question as to what net earnings the carriers are entitled, stated the well known principle: "Both the value of the property and what is a fair return upon that value must be considered," and then said: "Some states have authorized and even instructed their railway commissions to put a value upon the property of railways operating within their borders. In some instances the elements to be considered in determining that value have been prescribed by statute, and the effect of the valuation when made is indicated. This commission has no such authority. We can not in this case fix in terms the value of any one of these railroads, nor would that value, if determined in this case, be binding in subsequent proceedings; but, manifestly, in order to decide the issue presented we must have a general notion of the value of the properties of these defendants and must form an idea of the elements which should properly enter into the determination of that value."

[176] Robinson *v.* Baltimore & O. R. Co., 222 U. S. 506, 508, 56 L. Ed. 288, 32 Sup. Ct. 114, affirming same styled case, 64 W. Va. 406, 63 S. E. 323.

[177] Advances in rates, Eastern Case, 20 I. C. C. 243, 256 to 277.

The opinion then proceeds to state and discuss the rules established in the Smyth-Ames case,[178] and to point out the benefit a knowledge of the value of the property "devoted to the public service" would be to the Commission.

Congress, by Act approved March 1, 1913, amending the Act to Regulate Commerce,[179] provided that the "Commission shall * * * investigate, ascertain and report the value of all the property owned or used by every common carrier subject to the provisions of this (the) Act. * * * The Commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this (the) Act in detail, and show the value thereof * * *, and shall classify the physical properties, as nearly as practicable, in conformity with the classifications of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission."

§ 232. **Valuation, How Made.**—The valuation provided by the Amendment shall include in detail, (1) the original cost of all property to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods used and the reasons for their differences if any; (2) the original cost of all lands, rights of way and terminals and the present value of the same; (3) the same information as to property held for purposes other than those of a common carrier; (4) information relating to the issuance of stocks, bonds or other securities and other financial arrangements; and (5) information as to the value of gifts and grants. Except as provided by the statute, the Commission is given power to prescribe the method of procedure to be followed in the conduct of the investigation. The carriers are required to aid in the investigation by furnishing information and access to the sources thereof.

After such valuation is made, the Commission shall in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property of such common carriers, revising its valuations from time to time to fit such changes.

Application may be made to the District Courts of the United States to compel a performance by the carriers of the duties placed on them by the Amendment.

[178] Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418.

[179] Sec. 19a of Act; Sec. 420, *post.*

§ 233. **Finality and Effect of Valuation.**—Provision is made for notice of the completion of the tentative valuation of the property before such valuation shall become final; protest may be filed thereto and hearings had.

After hearing, the Commission shall issue an order making a final valuation, which valuation shall be published, and when published it is prima facie evidence of the value of the property in all proceedings under the Act to Regulate Commerce. The valuation so fixed is subject to modification by the Commission.

§ 234. **Office of Commission.**—The principal office of the Commission is in the city of Washington, where its general sessions are held. One or more commissioners may, and sometimes do, hold sessions in different parts of the United States. Its inquiries may be, and frequently are, prosecuted by one or more commissioners.

The testimony in cases is usually taken at some place most convenient to the parties interested; this is written out, and the Commission at Washington determines what order shall be entered.

§ 235. **Annual Reports from Carriers.**—The Commission is authorized to require annual reports from all common carriers subject to the provisions of the Act and from the owners of all railroads engaged in interstate commerce. The statute provides what these reports shall contain and gives the Commission authority to prescribe the manner in which such reports shall be made. The time for filing these reports may be extended by the Commission, which also has authority "by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce." Penalties and forfeitures are provided for a failure to comply with the orders of the Commission in this respect. Forms of accounting may also be prescribed, for violation of which prescribed forms penalties are provided.

The Commission may employ examiners to inspect accounts. False entries in, or willful destruction, mutilation or alteration, of accounts are prohibited.

The Commission may prescribe a time after which books, papers and documents may be destroyed. The Supreme Court

held this provision constitutional and applicable to water carriers engaged in interstate commerce.[180]

In the Kansas City Southern case,[181] in sustaining an order of the Commission made under authority of the section, the Supreme Court said: "In order that accounts may be standardized, it is necessary that the accounts of the several carriers shall be arranged under like headings or titles. * * * So far as such uniformity requirements control or tend to control the conduct of the carrier in its capacity as a public servant engaged in interstate commerce, they are within the authority constitutionally conferred by Congress upon the Commission." It was there held that a requirement of the Commission that when existing shops and terminal facilities were abandoned and new ones erected, that there should be charged to operating expenses "the cost of replacing the abandoned property in kind, plus the cost of removal, but less the value of salvage," was not such an order as would be set aside by a court where the Commission had proceeded "with deliberation and after proper inquiry." And this was true although the apportionment of profits to preferred stockholders, would, as a result of such method, be less than they would otherwise be entitled to.

§ 236. **Examiners.**—The Commission may employ special examiners "to inspect and examine any and all accounts, records and memoranda" kept by carriers subject to the interstate Commerce Acts. Any examiner who divulges any fact or information which may come to his knowledge during the course of examinations made by him, except in so far as he may be directed by the Commission or by a court or Judge thereof, is guilty of a crime and subject to a fine of not more than five thousand dollars, or imprisonment for a term not exceeding two years, or both.

And to carry out and give effect to the provisions of the Acts Regulating Interstate Commerce or any of them, the Commission may employ special agents or examiners "who shall have

[180] Interstate Com. Com. *v.* Goodrich Transit Co., 244 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436, reversing Goodrich Transit Co. *v.* Interstate Com. Com., 190 Fed. 943, Opinion Com. St. Nos. 21-24, p. 95.

[181] Kansas City S. Ry. Co. *v.* United States, 231 U. S. 423, 58 L. Ed. 296, 34 Sup. Ct. 125, affirming same styled case, 204 Fed. 641. Opinion Com. Ct. No. 56, p. 641.

power to administer oaths, examine witnesses, and receive evidence."

Under these provisions, accountants are appointed as special examiners to examine the accounts and records of the carriers for the purpose of obtaining information to enable the Commission to perform its duties in the enforcement of the statute, and to aid in valuing the property owned or used by carriers subject to the Act.

There are examiners who hear the evidence and submit reports to the Commission in general investigations made by the Commission and where complaints are brought before the Commission. These act somewhat as masters in chancery and of these there are the special examiners and the attorney-examiners, the latter hearing evidence in the more important cases.

§ 237. **Reports of the Commission.**—In addition to reports of investigations made by it, "the Commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission."

§ 238. **Lake Erie and Ohio River Ship Canal.**—Section 17 of the Act to incorporate the Lake Erie and Ohio River ship canal provides that canals constructed thereunder shall be open to the use and navigation of all suitable and proper vessels or other water craft upon fair and equal terms, conditions, rates, tolls and charges; but all charges, rates, and tolls, must be equal to all persons, vessels and goods under "classifications" to be established by the company and approved by the Interstate Commerce Commission. Rebates, drawbacks and discriminations, whether effected directly or indirectly, are prohibited and tariffs must be published, and not changed except after thirty days public notice; but the Commission may in its discretion and for good cause shown permit changes on less notice and may modify the requirements in respect to publishing and posting schedules.

§ 239. **Parcel Post.**—The statute approved August 24, 1912, authorized the Postmaster-General to reform "subject to the consent of the Interstate Commerce Commission after investigation" the classification of articles mailable as well as the weight limit, the rates of postage, zone or zones, and other conditions of mailability of articles under the law creating the parcel post.

§ 240. **Government Aided Railroads and Telegraph Companies.**—By Act August 7, 1888, all railroad and telegraph companies to which the United States has granted aid are required to construct, maintain and operate a railroad or telegraph line as may be prescribed by the act of incorporation, and furnish facilities without discrimination.

Complaint may be made to the Commission, or the Commission may act without complaint, to obtain a performance of these duties.

Penalties are prescribed for a failure to perform the duties required, and the "party aggrieved" by such failure may recover damages.

Reports are required as of other carriers subject to the Act.

Information may be given the Attorney-General by the Interstate Commerce Commission, upon which the Attorney-General must proceed judicially to enforce the forfeitures provided in the Act. Congress reserved the right to alter, amend or repeal the law.

§ 241. **Common Law Remedies, Continued.**—Nothing in the Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of the Act are in addition to such remedies.

The above provision was in the original Act of 1887, and has not been repealed by any amendment thereof or act supplemental thereto.

This provision must be construed conformably to the well established canons of statutory construction, and being construed with the whole law as required by such canons, it must be held to mean that where a common-law right can not, consistently with the general purposes of the statute, be enforced, the injured party must obtain redress under and in accordance with the statute. Any other construction would destroy the general scheme intended to be effected by the enactment. No right is taken away, but where a method for determining the right is

open under the statute, that method must be pursued to the exclusion of other methods. When the statute furnishes no remedy for a wrong, or where preliminary administrative action is unnecessary to determine the right, the common law remedies may be sought.[182]

[182] Mitchell Coal & Coke Co. *v.* Pennsylvania R. Co., 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916; Texas & Pac. Ry. Co. *v.* Cisco Oil Mill, 204 U. S. 449, 51 L. Ed. 562, 27 Sup. Ct. 358; Texas & Pac. Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 444, 51 L. Ed. 553, 27 Sup. Ct. 350; Southern Ry. Co. *v.* Tift, 206 U. S. 428, 437, 51 L. Ed. 1124, 27 Sup. Ct. 709; United States *v.* Pacific & Arctic R. Co., 228 U. S. 87, 57 L. Ed. 742, 33 Sup. Ct. 443; St. Louis S. W. R. Co. *v.* Lewellen, 192 Fed. 540. See also Secs. 294, 297, *post*.

CHAPTER VI.

Procedure of the Interstate Commerce Commission.

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§ 242. **Scope of Chapter.**—In the next preceding chapter there is a discussion of the powers and duties of the Interstate Commerce Commission. From this statement of these powers and duties it was seen that the jurisdiction of the Commission divides itself into those investigations, (a) which have to do with the general execution of the Commerce Acts in which parties are not directly involved and in which the whole public is interested, and (b) into investigations which, while affecting the whole public, more directly affect individuals who are parties to the proceeding.

It is the purpose of this chapter to discuss the procedural statutes and rules adopted and used in each of these kinds of investigations.

The Interstate Commerce Commission is not a court, and while it hears testimony from which it reaches conclusions and while some of its forms of procedure are analogous to those of a court, it is not and should not be embarrassed by purely technical rules.

§ 243. **Switch Connections.**—To invoke the authority of the Commission with reference to the installation and operation of switch connections, there must exist a failure by the carrier to perform its duty in this respect, an application in writing by a shipper tendering interstate traffic for transportation, or by an owner of a lateral branch line of railroad making complaint as provided in section 13 of the Act. Upon which complaint the Commission shall hear and investigate and determine as to the safety, practicability and justification of such connections and the reasonable compensation therefor. After which the Commission may make an order directing a compliance with the law

requiring such connection.[1] The Commission can not, however, order a carrier to make such connection when to do so it must acquire a right of way across the property of another carrier.[2]

In requiring connections between rail lines and the dock of a water carrier the Commission has full authority to determine the terms and conditions upon which the connecting tracks, when constructed, shall be operated; and, in the construction or operation of such tracks it may determine what sum shall be paid to or by each carrier.[3]

§ 244. **Relief under Fourth Section.**—The fourth section of the Act prescribes a relation between long and short hauls and between through rates and aggregates of the intermediate rates. The section gives the Commission authority to grant relief from the absolute provisions of the statute. There must be an application to the Commission by the carrier showing a "special case," some special reason for the relief, upon which, after investigation, the carrier may be authorized "to charge less for longer than for shorter distances;" and the Commission may from time to time provide the extent to which the carrier may be relieved from the operation of the section. The first statement of authority to grant relief applies to that part of the section referring to the long and short haul; the second statement is general and applies to the "operation of the section." The making of the application stays the effect of the prohibition "until a determination of such application by the Commission."[4]

The carriers filed over five thousand two hundred applications with the Commission pursuant to the statute.

There is nothing in the "Act prescribing the form, contents or breadth" of applications filed thereunder, and the Commission held that blanket applications covering many deviations from the statute might be filed.[5]

The statute does not give arbitrary power to the Commission to permit or refuse exceptions, but its action "must be limited and conditioned upon the presence in special cases of condi-

[1] Sec. 1 of Act; Sec. 344, *post.*

[2] Consolidated Pump Co. *v.* Lake Shore & M. S. Ry. Co., 27 I. C. C. 519.

[3] Sec. 6 of Act; Sec. 376, *post;* Re Wharf Facilities at Pensacola, Fla., 27 I. C. C. 252, 260.

[4] Sec. 4 of Act; Sec. 350, *post.*

[5] Southern Furniture Mnfg. Assn. *v.* Southern Ry. Co., 25 I. C. C. 379, 381. See Rule 18 of the Rules of Practice of the Commission; Sec. 285, *post.*

tions and circumstances which would make such exceptions legal and proper and in no wise antagonistic to the other provisions of the Act." [6]

That Congress could make an absolute prohibition of a greater charge for a longer haul than for the shorter, was stated by the Commission discussing the procedure under the section, and it was said that the burden of proof was on the carrier seeking relief from the statutory general rule, a burden that required proof not only of the cause of the lower rate at the longer distance point "but of the reasonableness of the rates applied to intermediate points." [7] It has already been shown that the reasonableness of the rate to the intermediate point must be considered, and in addition to that factor the Commission considers water [8] and market competition [9] and the fact, if a fact, that the road reaching the longer distance point is a circuitous route.[10] Mere railway competition was said to be ineffective to meet the burden on the carriers. The Commission, speaking of such competition and the resulting violation of the Act, said:

[6] Railroad Com. of Nevada *v.* Southern Pac. Co., 21 I. C. C. 329, 341; Bluefield Shippers Assn. *v.* Norfolk & W. Ry. Co., 22 I. C. C. 519, 530; Inter Mountain Rate Cases, 234 U. S. 476, 58 L. Ed. 1408, 34 Sup. Ct. 986.

[7] Re Application Southern Pac. Co., Long and Short Haul Docket 1243, 22 I. C. C. 366, 374. See also as to burden of proof: Bluefield Shippers Association *v.* Norfolk & W. Ry. Co., 22 I. C. C. 519, 530; Janesville Clothing Co. *v.* Chicago & N. W. Ry. Co., 26 I. C. C. 628; Commercial Club of Duluth *v.* Baltimore & O. R. Co., 27 I. C. C. 639, 660.

[8] Re Transportation of Wood, Hides and Pelts, Railroad Com. of Oregon *v.* Oregon R. & N. Co., 23 I. C. C. 151, 179; Bowling Green Business Men's Protective Assn. *v.* Louisville & N. R. Co., 24 I. C. C. 228, 240; Re Lumber Rates to Ohio River Crossings, 25 I. C. C. 50.

[9] Kellogg Toasted Corn Flakes Co. *v.* Michigan Cent. R. Co., 24 I. C. C. 604; Re Lumber Rates to Ohio River Crossings, 25 I. C. C. 50, 59. In each of these cases the effectiveness of market competition was considered and decided.

[10] Wright Wire Co. *v.* Pittsburg & L. E. Ry. Co., 21 I. C. C. 64, quoting Judge Cooley's opinion first construing the original Fourth Section; Gile & Co. *v.* Southern Pac. Co., 22 I. C. C. 298, 302; Re Rates on Salt, 24 I. C. C. 192, 195; Edwards & Bradford Lumber Co. *v.* Chicago, B. & Q. R. Co., 25 I. C. C. 93, 95, holding that a route exceeding the short line by 15 per cent was a circuitous route. See also Fourth Section Application in the Southeast, 30 I. C. C. 153, 32 I. C. C. 61.

"So far as the facts before us disclose, this condition has been brought about entirely by competition between different railways serving New Orleans. If no other element enters into the situation this would probably be wrong."[11]

§ 245. **Water Competition.**—The last paragraph of section 4 which prohibits carriers from increasing rates which have been lowered to meet water competition "unless after hearing * * * it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition," not only puts the burden on the carriers, but limits the reasons which are valid explanations of the increase by excluding as one of such "the elimination of water competition."

In order to make such increase the Commission must consent after hearing.

Suspension of lake navigation during the winter months is not an elimination of water competition, and during these months higher rail rates may be justified,[12] although the explanation seems unsatisfactory.

Whether or not the paragraph puts the burden of justifying increases of rates that were lowered prior to the Amendment enacting it, effective June 18, 1910, is immaterial, as that burden exists to all rates advanced since January 1, 1910, by virtue of section 15.[13]

§ 246. **Railroad Owned Steamships.**—A rail carrier may not own or control a water carrier in competition therewith,[14] but jurisdiction is conferred upon the Commission to "determine questions of fact as to the competition or possibility of competition" upon application of a railroad company or other company praying for an order permitting the continuance of such ownership or control of vessels already in operation or permitting the installation of new service.

The Commission may on its own motion make such investigation and enter an order thereon. There must be a hearing and the order of the Commission is made final. On such hearing, if the Commission shall be of the opinion that any such existing service by water "other than through the Panama Canal is

[11] Re Transportation Lime, 24 I. C. C. 170, 172.

[12] American Insulated Wire & Cable Co. *v.* Chicago & N. W. Ry. Co., 26 I. C. C. 415, 416.

[13] Re Pig Iron Rates from Virginia, 27 I. C. C. 343, 345.

[14] Sec. 5 of Act; Sec. 203 *ante;* Sec. 353, *post.*

being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude nor reduce competition," it may extend the time during which such carrier controlled water vessels may be so operated. The water carriers must in that event file tariffs of their rates, schedules and practices. Such applications must be made before July 1, 1914, but may be considered and disposed of thereafter.[15]

§ 247. **Changes in Tariffs.**—Changes in rates, fares and charges or joint rates, fares and charges, may not be made except after thirty days notice to the Commission and to the public, but the Commission is granted a discretion "for good cause shown" to allow changes on less notice, and may modify the requirements in respect to publishing, posting and filing tariffs. This may be done in particular instances or by general order.[16]

Speaking of this provision the Commission said: "It is believed that this authority should be exercised only in instances where special or peculiar circumstances or conditions fully justify it. Confusion and complication must follow indiscriminate exercise of this authority." Clerical or typographical errors constitute good cause.[17]

General orders permit the reduction of a through rate to the aggregate of the intermediate locals and the filing of tariffs by new roads in less than thirty days.[18]

§ 248. **Forms of Tariffs.**—The power granted the Commission to determine and prescribe the form of tariff schedules and to change that form when expedient has been exercised by prescribing rules in Tariff Circular No. 18-A and supplements thereto. The purpose of these rules is to make definite and ascertainable the rules which are in force.

§ 249. **Through Routes.**—After full hearing, on complaint, or upon its own initiative without complaint, the Commission may establish through routes and maximum joint rates between rail and water lines.[19]

Where a rail carrier enters into arrangements with any water

[15] Sec. 5 of Act; Sec. 355, *post.* Sec. 203, *ante.*

[16] Sec. 6 of Act; Sec. 360, *post.*

[17] Tariff Circular 18a, Rule 58, also prescribing a form of application to exercise the authority.

[18] Tariff Circular 18a, Rules 56 and 57.

[19] Sec. 377, *post.*

carrier operating from a port of the United States through the Panama Canal or otherwise for the handling of through business between interior points in the United States and such foreign country, similar arrangements may be required with any or all other lines of steamships operating from the same port to the same foreign country.[20]

Orders with reference to action authorized as herein stated shall be served and enforced as orders under section 15 of the Act[21] and may "be conditioned for the payment of any sum or the giving of security for the payment of any sum or the discharge of any obligation which may be required by the terms of" the order.[22]

Power is also given the Commission, after hearing, with or without complaint, to establish through routes and joint classifications and joint rates and the divisions thereof, when there is a failure of the carriers so to do. This does not apply to connection between street electric passenger railways not engaged in the general business of transporting freight and railroads of a different character. In establishing such through route reference must be had to the entire line of a carrier.[23]

Subject to the limitation stated in the statute the Commission has a discretion as to when it will order through routes.[24] The complainant asking for a through route should show himself "capable financially and physically" of assuming the obligations such routes would impose.[25]

In fixing the divisions between the carriers the Commission must "take into consideration all the circumstances, conditions, and equities."[26]

§ 250. **Complaints for Damages.**—In claims for damages a complaint must be filed with the Commission. This complaint

[20] Sec. 6 of Panama Canal Act, par. (b); Sec. 377, *post.*

[21] Sec. 6 of Act, par. (d); Sec. 379, *post.*

[22] Last par. Sec. 6; Sec. 380, *post.*

[23] Sec. 15 of Act; Sec. 195, *ante;* Sec. 401, *post.*

[24] Crane Iron Works *v.* United States, 209 Fed. 238, Com. Ct. Opinion No. 55, p. 453, 461, cited, Truckers Transfer Co. *v.* Charleston & W. C. R. Co., 27 I. C. C. 275.

[25] Truckers Transfer Co. *v.* Charleston & W. C. R. Co., 27 I. C. C. 275; Enterprise Transportation Co. *v.* Pennsylvania R. Co., 12 I. C. C. 326.

[26] Star Grain & Lumber Co. *v.* Atchison, T. & S. F. Ry. Co., 14 I. C. C. 364, 370. See also Sec. 196, *ante.*

frequently seeks to have a particular rate or practice declared illegal, and in the same complaint asks for an order fixing the Commission's finding as to the amount of damages the complainant is entitled to recover. It is not proper to divide up a complaint by first asking a finding that the rate or practice is illegal, and thereafter, by supplemental complaint, seek damages.[27]

Many informal complaints for damages are filed and allowed. These are in cases where the carriers concede that an award should be made.[28] Informal complaints are sufficient to give the Commission jurisdiction.[29] The general principles applicable to the question are stated by the Commission to be the intent of Congress to provide a method of obtaining an award of damages without resort to the expensive and tedious processes of the law, and that the Act should be construed with that view.[30]

Conference ruling 206 prescribes rules which have been formulated by the Commission and to which it adheres. The importance of the question and the fact that these rulings are not always available justify copying that part of ruling 206 applicable to this question:

(*c*) Reparation will not ordinarily be awarded in a formal case attacking a rate as unreasonable or otherwise in violation of law unless intent to claim reparation is specifically disclosed therein, or in an amendment thereto, filed before the submission of said case. The Commission may, however, in the exercise of its discretion, upon good cause shown, and under unusual circumstances, deal specially with a particular claim for reparation.

(*d*) Claims for reparation based upon a decision of the Commission filed by complainants not parties to the case in which such decision was rendered will not ordinarily be allowed unless reparation was claimed in the complaint upon which such deci-

[27] Dallas Freight Bureau *v.* Gulf, C. & S. F. Ry. Co., 12 I. C. C. 223, 228.

[28] Conference Ruling 396, Feb. 10, 1913.

[29] Marian Coal Co. *v.* Delaware, L. & W. Ry. Co., 27 I. C. C. 441; Mountain Ice Co. *v.* Delaware, L. & W. Ry. Co., 21 I. C. C. 45.

[30] Michigan Hardwood Mnfrs. Assn. *v.* Transcontinental Freight Bureau, 27 I. C. C. 32, 37.

sion of the Commission was based, or was awarded by the Commission. The Commission may, however, in the exercise of its discretion, upon good cause shown, and under unusual circumstances, specially consider a particular claim for reparation of this class.

(*e*) Complaints for reparation must disclose as nearly as possible all the claims of complainant or complainants covered by or involved in the complainant, except that when a general rate adjustment or a rate under which many shipments have been made to many destinations, or from many points of origin by many shippers, is involved, complainant may contain specific prayer for reparation on all shipments, and the proving up as to shipments and amounts of reparation due thereon be left until the questions of the reasonableness of the rate or rates and whether or not reparation will be awarded, have been decided. And each claimant for reparation under a decision that has been rendered must include all his shipments and claims in one complaint or statement.

For rules as to formal complaints see post, section 270.

§ 251. **Same Subject—Order of Commission.**—Until the act complained of is found to be violative of the law no award of damages can be made. In the procedure before the Commission evidence is heard as to the illegality of the rate, regulation or practice under investigation and as to the *fact* of damages. If, after the hearing, it is found that complainant or one in whose behalf the complaint is filed has suffered injury by a violation of the law and the fact of legal damage is established, the Commission directs how proof of the *amount* of damages shall be made, and when such amount is ascertained an order therefor is made. What must be shown to fix this amount is stated by the Commission as follows:

"The complainants will be expected to prepare statements showing as to each shipment upon which reparation is claimed the date of movement, the point of origin, the point of destination, the route, the weight, the car number and initials, the rate applied, the charges collected, and the amount of reparation claimed. These statements, with the freight bills covering the shipments, should be submitted to the defendants for verification by them. Upon the receipt of statements so prepared by the complainants and verified by the defendants, the Commis-

sion will take the matter up with a view to the issuance of an order of reparation."[31]

In case damages are awarded the Commission must make a report and state the findings of fact on which the award is made,[32] and on a trial in court to recover on such award the findings of fact set forth in such report shall be prima facie evidence of the matters therein stated.[33]

§ 252. **General Investigation.**—In the exercise of its power to obtain complete information necessary to enable it to perform the duties and carry out the objects for which it was created, the Commission makes investigations into the management of the business of the carriers subject to the provisions of the Commerce Acts. This authority extends to any matter or thing concerning which a complaint is authorized to be made or about which any question may arise or which relates to the enforcement of any provisions of the Act.[34]

No particular form of procedure is prescribed for these investigations, but in a similar kind of investigation, that fixing accounting regulations, the Supreme Court stated as a material fact that the investigation proceeded "with due deliberation and after proper inquiry."[35] The Bills of Lading and Industrial Railways Cases are illustrative of investigations without formal complaint.[36]

§ 253. **Procedure in Formal Cases—Complaint.**—The rules relating to formal complaints and the form thereof are stated in subsequent sections of this chapter.[37] By conference ruling the Commission has provided that complaints involving the same or substantially the same principle, subject or state of facts should be included in one complaint; that where the principle involved or the state of facts is substantially the same, two or more complainants may join against two or more carriers in

[31] Standard Mirror Co. *v.* Pennsylvania R. Co., 27 I. C. C. 200, 209.

[32] Sec. 14 of Act; Sec. 394, *post.*

[33] Sec. 16 of Act; Sec. 406, *post;* Lehigh Valley R. Co. *v.* Clark, 207 Fed. 717, 125 C. C. A. 233; Mills *v.* Lehigh Valley R. Co., 238 U. S. 473, 59 L. Ed. —, 35 Sup. Ct. 888.

[34] *Ante,* Secs. 219, 220.

[35] Kansas City S. Ry. Co. *v.* United States, 231 U. S. 423, 58 L. Ed. 296, 34 Sup. Ct. 125.

[36] Re Bills of Lading, 14 I. C. C. 346; Re Bills of Lading, 29 I. C. C. 417; Industrial Railways Case, 29 I. C. C. 212; Second Industrial Railways Case, 34 I. C. C. 596.

[37] Secs. 268, *et seq.*

one complaint, and where in such cases two or more complaints have been filed they may be consolidated and heard together.[38] Amendments are freely allowed, even to the extent of claiming reparation when there is no claim therefor in the original complaint.[39]

While the Commission's practice is in no degree technical, issues not clearly raised in the pleadings can not be determined by it.[40] Good faith both on the part of the complainants and defendants demands that the formal pleadings shall be sufficiently full to disclose the claim or the answer thereto. For a defendant in its answer to say that it neither admits nor denies an allegation the truth or falsity of which could be determined from its records, is not to deal frankly with Commission or complainant, and the complaint should be sufficiently definite to inform the defendant what rate, rule or practice is complained against and upon what is based the claim of illegality.

§ 254. **Notice before Hearing.**—To constitute that full hearing required by the statute notice must be given to the carrier directly affected. Where a complaint is filed a statement thereof must be forwarded to the carrier complained against, "who shall be called upon to satisfy the complaint, or to answer the same in writing."[41]

In hearings without formal complaint where an order against or affecting a particular carrier or carriers, as in suspension and similar cases, is contemplated, notice must be given.

Most rate situations have their influence on other rates and, having this fact in mind, objection was made to an order of the Commission because all carriers thus affected were not served with notice. Replying to the contention, the court said:

"It is obvious that the purpose was to require that notice should be given to the party immediately interested, and not to those remotely concerned. It is a novel and unreasonable proposition that, when rates in a given locality are drawn in con-

[38] Conference Ruling 206.

[39] Virginia-Carolina Chemical Co. *v.* St. Louis, I. M. & S. R. Co., 18 I. C. C. 1; Virginia-Carolina Chemical Co. *v.* Chicago, R. I. & P. Ry. Co., 18 I. C. C. 3.

[40] Commercial Club of Omaha *v.* Chicago, R. I. & P. Ry. Co., 6 I. C. C. 647; Sinclair & Co. *v.* Chicago, M. & St. P. Ry. Co., 21 I. C. C. 490; Board of Trade of Chicago *v.* Atchison, T. & S. F. Ry. Co., 29 I. C. C. 438, 444.

[41] Sec. 13 of Act; Sec. 392, *post;* Fels & Co. *v.* Pennsylvania R. Co., 23 I. C. C. 483, 486.

troversy, notice must be given to every carrier who may be in the succession of all or any interstate transportation which includes that in question. The procedure prescribed is analogous to that in all legal controversies, and must be deemed sufficient. The objections must be overruled.

"If such an order as is here contested were to be held to be beyond the power of the commission, and that precedent were to be followed, its functions would be frittered away, piecemeal, and the result must be that the power to regulate rates through the means provided by the statute would be so absurdly inadequate as to furnish no reason for its existence."[42]

Speaking of the same question the Commission said:

"The fact that all of the carriers operating in the Mesaba district and all of the carriers and parties interested in the ore rates are not made parties to this proceeding is immaterial in its bearing upon the legality of this complaint. A complainant can not be expected to search public and private records with the view of discovering all parties that may be interested in a certain proceeding. Full publicity attends every step of all proceedings before the Commission, and it must be assumed that parties interested will take notice of what is going on. Other parties interested may intervene in the present proceeding if they so desire."[43]

§ 255. **Formal Complaints—Answer.**—The statute requires the defendant to answer the complaint in writing, but neither the statute nor the rule of the Commission hereinafter given states the substance of what the answer shall contain. The word itself connotes the idea of stating what the facts are with reference to the allegations of the complaint. This answer is due "within a reasonable time," to be specified by the Commission, the time being specified in the rule of the Commission as thirty days after service by defendants whose general offices are west of El Paso,

[42] Louisville & N. R. Co. *v.* Int. Com. Com., 184 Fed. 118, 127, 128. For further history of the case see, Louisville & N. R. Co. *v.* Int. Com. Com., 195 Fed. 541, Opinion Com. Ct. No. 4, p. 235, 375; Int. Com. Com. *v.* Louisville & N. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185.

[43] Lum *v.* Great Northern R. Co., 21 I. C. C. 558, 561, 562. And see, Whiteland Canning Co. *v.* Pittsburg, C. C. & St. L. Ry. Co., 23 I. C. C. 92, 93. But a participating carrier to a tariff attacked is a necessary party, Reno Grocery Co. *v.* Southern Pac., 23 I. C. C. 400.

Texas, Salt Lake, Utah, or Spokane, Washington, and twenty days by all other defendants.[44]

No technical demurrer is necessary but the legal sufficiency of the complaint may be determined on a motion to dismiss, the practice being analogous to Federal Equity Rule 29.

The statute provides that, "no complaint shall at any time be dismissed because of the absence of direct damage to the complainant," so a motion to dismiss the complaint of one not then a shipper, but professing an intention to become such, was denied; nor does the complainant have to come before the Commission with clean hands as in a court of equity.[45]

§ 256. **Hearings by the Commission.**—When complaint is filed and served, the Commission is given discretion "to investigate the matters complained of in such manner and by such means as it shall deem proper."[46] On all hearings the Commission has "power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements and documents relating to any matter under investigation. Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. The claim that testimony may incriminate the witness is no excuse for not testifying, but the witness's testimony shall not be used against him on the trial of any criminal proceeding.[47] Testimony may be taken by depositions at the instance of any party, or by order of the Commission.[48] Witnesses summoned before the Commission are entitled to the same fees and mileage as are paid witnesses in the courts of the United States.[49]

The Commission is very liberal in its practice with reference to admitting testimony, "and," said Mr. Justice Lamar, speaking the opinion of the Supreme Court, "is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits by private parties." In the same case it was said: "But the statute gave the right to a full hearing, and that conferred the

[44] See Rules of Commission, Secs. 268, *et seq.* This chapter; Sec. 13 of Act; Secs. 392, *post.*

[45] Lum *v.* Great Northern R. Co., 21 I. C. C. 558.

[46] Sec. 13 of Act; Sec. 393, *post.*

[47] Sec. 12 of Act; Sec. 390, *post;* Sec. 3 of Elkins Act; Sec. *post,* 457; Compulsory Testimony Act, *post,* 480; Immunity of Witnesses Act, Sec. 479, *post.*

[48] Sec. 12 of Act; Sec. 390, *post.*

[49] Sec. 18 of Act; Sec. 418, *post.*

privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. * * * All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal."[50]

The same principles were applied by the Supreme Court in another case, in which it was indicated that parties were not bound by findings based upon specific investigation made in a case without notice to them.[51]

Any party may appear before the Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public at the request of either party. Any one of the members of the Commission may administer oaths and affirmations and sign subpœnas.[52]

§ 257. **Orders Relating to Rates and Practices.**—By formal complaint as hereinbefore stated, or on its own initiative in extension of a complaint, or without any complaint whatever, *after full hearing,* the Commission when "of opinion" that any individual or joint rates or charges whatsoever demanded, charged or collected, or that any individual or joint classifications, regulations or practices are unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise violative of the Commerce Act, may prescribe joint and lawful rates, rules and charges for the future as maximum rates and may likewise prescribe just and reasonable regulations. And the Commission, the carriers failing to agree, may prescribe the division of joint rates.[53] To do this there must be a full hearing and the "opinion" of the Commission must be based upon evidence as in formal complaints.[54] All orders of the Commission under this authority shall take effect in some reasonable time, to be prescribed by the Commission, not less than thirty days.

[50] Int. Com. Com. *v.* Louisville & N. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185, and cases cited.

[51] United States *v.* Baltimore & O. R. Co., 226 U. S. 14, 57 L. Ed. 104, 33 Sup. Ct. 5.

[52] Sec. 17 of Act; Sec. 417, *post.*

[53] Sec. 15 of Act; Secs. 395, and 397, *post.*

[54] Sec. 256, *supra.*

§ 258. **Suspension of Rates.**—A new individual or joint rate, fare, or charge, or a new joint classification, joint regulation or practice affecting any rate, fare, or charge, may, upon complaint, or on the initiative of the Commission without complaint, and without answer or other formal pleadings, be suspended by the Commission, and when the suspension is had the Commission must enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation or practice. When the suspension is ordered, a statement in writing of the Commission's reasons therefor must be filed with the schedule involved and delivered to the carrier or carriers affected thereby.

The first suspension can not be for a longer time than one hundred and twenty days, although where the hearing can not be completed in that time, the time may be further extended for not exceeding six months. The hearing and decision in suspension cases must be given preference over all other questions pending before the Commission and must be decided as speedily as possible.

"At any hearing involving a rate increased after January 1, 1910, * * * the burden to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible." [55]

Any new practice which results in increasing the rate is within the provision fixing the burden of proof on the carrier, although it would seem that a new tariff provision not affecting the rate while subject to suspension would not be within the burden of proof clause.[56]

Ordinary cases are given in practice a Docket number. Suspen-

[55] Sec. 15 of Act as amended by Act of June 18, 1910; Secs. 398, 399, *post*. The Commission in Tariff Circular 18-A, p. 21, prescribed as a rule for carriers: That when a rate is suspended, the carrier must *immediately* file with the Commission a statement stating that fact. Where only a part of a tariff is suspended, the carrier must file with the schedule suspended a copy of the suspending order. When a suspension is vacated, a statement of that fact must likewise be filed by the carrier.

[56] Re Advances in Rates on Soft Coal, 23 I. C. C. 518, 519; Re Advances on Lumber and Forest Products, 21 I. C. C. 455, 456. See also Sec. 223, *ante*.

sion cases are distinguished as Investigation and Suspension Docket, and given consecutive numbers.

§ 259. **Practice in Suspension Cases Where There Exist Intrastate Rates Lower than Proposed Increased Interstate Rates.**—When it is made to appear that proposed increased rates, although shown to be just and reasonable under section one of the act, will, if they become effective, be higher than intrastate rates for related and competitive hauls, what should be the order of the Commission? In some states maximum intrastate rates are prescribed by legislative act, and the maximum fixed cannot be exceeded until legislative authority is obtained. In other states rates are fixed by a commission, in some of which proposed increases may be suspended by the Commission under a practice similar to that obtaining with the Interstate Commerce Commission, in others of such states permission must be obtained from the state commission before publishing the increased rates. Obviously it is not always legally possible for carriers simultaneously to advance interstate and intrastate rates. If increases are denied in one class of rates because not effective in the other class, no increase can ever be made, and the state authority by refusing advances in the state rates could fix the limit of interstate rates. This may not legally be done.[57] The answer to the foregoing question was made by the Commission as follows:[58] "The protestants contend that, should the proposed change of rating become effective, the increased rates would result in unjust discrimination against interstate shipments of live poultry to St. Paul and Minneapolis, Minn., because of existing lower intrastate rates in Minnesota. The respondents answer that in the event proposed rates are permitted to become effective it is their purpose to bring about substantially similar increases in their intrastate rates. If the protestants or other shippers of live poultry should feel aggrieved by discriminations which may result from rates established because of our finding in this case, the way will be open by formal complaint to the Commission, as in other cases, to obtain relief from such discriminations as may be found to be unlawful." The rule just stated was applied in the Five Per Cent case,[59] where it ap-

[57] Houston, Tex. Ry. Co. *v.* U. S., 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833.

[58] Rates on Poultry in Western Trunk Line Territory, 32 I. C. C. 380.

[59] Five Per Cent Case, 31 I. C. C. 351.

peared that very low intrastate rates were not increased, notwithstanding which increases in interstate rates were permitted.

In another case [60] an interstate rate of 5¾ cents was found to have been justified, although the state rate for a similar haul in the same territory was but 3½ cents. The Commission refused to reduce an interstate rate where the claim for such reduction was based upon the fact of the existence of lower intrastate rates, and declined to pass upon the question of discrimination because that question was not the specific issue presented. There it was said: [61] "If any rate for transportation wholly within a state may be made the measure of the rate when that transportation moves from one state through or into another, the interstate rate so resulting would not be regulation of interstate commerce by the authority prescribed by the Constitution, but by the state. If the function of this Commission be to compute the sum of intrastate rates and prescribe the result as the measure of interstate rates, actual and direct regulation of interstate commerce by the states would be the result. That in the regulation of interstate commerce by the general government and of intrastate commerce by the state governments there result inconveniences and anomalies, such as is contended to exist here, might be conceded; but such facts, if they exist, neither deprive us of the power nor relieve us from the duty of performing the obligations imposed upon us by laws of Congress authorized by the Constitution of the United States. Were we at liberty and inclined to abdicate the authority and abandon the duty imposed upon us by accepting the sum of state rates as a measure of interstate rates, the difficulty would not be removed."

Where the claim was made that interstate rates could be increased upon proof that intrastate rates were higher than the interstate rates proposed to be advanced, the Commission said: [62] "Unquestionably the law of Minnesota presents a situation to the carriers which makes it necessary for them either to adjust some interstate rates to the mileage rates prescribed by that law, to leave their intrastate and interstate rates out of line, or to suffer material reductions below the intrastate rates fixed thereunder. While

[60] Hans Rees' Sons *v.* S. Ry. Co., 30 I. C. C. 585.

[61] Corporation Com. of Okla. *v.* A., T. & S. F. Ry. Co., 31 I. C. C. 532, 540, 541.

[62] Rates on Beer and Other Malt Products, 31 I. C. C. 544.

we may consider this fact, 'Congress does not directly or indirectly interfere with local rates by adopting their sum as the interstate rate,' *L. & N. R. R. Co. v. Eubank*, 184 U. S. 27, 42, and we cannot say that merely because a higher intrastate rate exists that an increase of an interstate rate to meet the state-made rate is justified, even though the transportation conditions as to distance and territory are similar. Nor do the facts here presented require that we consider the application of the decision of the Supreme Court in the *Shreveport Case, H. E. & W. T. Ry. Co. v. United States*, 234 U. S. 342."

The cases discussed show the rule, which until the decisions now to be referred to were rendered, was followed by the Commission. Where a gateway was sought to be closed for interstate traffic although left open for intrastate traffic, the Commission held that the tariff proposing the change should be canceled. While some of the language used in the opinion is apparently not consistent with prior decisions of the Commission, the order can be justified on the ground that the proposed tariff was unlawful under section one of the act.[63]

In discussing live stock rates the Commission without reference to any of the cases cited above, said:[64] "The incongruity between the proposed interstate rates and intrastate rates is a circumstance which goes vitally to the propriety of the rates under suspension. To dispose of this issue it is necessary to have before us the facts and circumstances surrounding the establishment of these intrastate rates." In the 1915 Western Advance Rate case[65] the majority of the Commission, Mr. Commissioner Harlan and Mr. Commissioner Daniels dissenting, applied the rule that lower intrastate rates may justify denying increases in interstate rates in the proposed increases in the rates on live stock and packing house products, but not to the proposed increases in the rates on coal and the increased car load minimum on grain products. The principles stated in the quotations above cannot, when taken from their setting, be harmonized. The Commission does not apply the rule *stare decisis* and considering what was done in the several cases rather than what was

[63] Class Rules between Stations in Louisiana, 33 I. C. C. 302.

[64] Live Stock Rates from Colorado, 35 I. C. C. 682, dissenting opinion, pp. 689-691.

[65] Western Rate Advance Case 1915, 35 I. C. C. 497. For the discussion in the dissenting opinion, see pp. 654, *et seq.*

said, it may be stated that when a carrier seeks to justify increases in its rates and the claim is made or the fact appears that there exist lower intrastate rates on the same commodity in the same general territory, the safe course is to make full proof showing the reasons for the existence of the lower rates and explaining why they have not been increased. In all cases where this relationship of interstate rates higher than intrastate rates exists, the protesting shippers should present the fact supported by such proof as is available. When the proof is made, the Commission upon a consideration of "all the facts and circumstances," will exercise its "flexible limit of judgment," permitting or denying the increases, as may seem just and proper in each case. Perhaps a definite and uniform rule like that stated in the Live Poultry case, *supra*, would be advisable, but it cannot be said that there is now any such rule.

§ 260. **The Weak and the Strong Roads.**—Rates between the same points must, as a practical matter, be the same over all lines connecting the points, otherwise the line maintaining the lowest rates would receive all the business. When rates in a general and related territory are increased the increases must, to be of any benefit to the carriers, apply to all carriers serving the territory. It not infrequently occurs that in the general territory there are carriers whose need for additional revenue is indubitable; other carriers may be earning a fair return on their investments while as to others the need for additional revenue is uncertain. To consider the weak roads or the strong roads only would manifestly be unfair either to the public or to the investor in railroad property. Under such circumstances it has been the rule of the Commission to measure the need for additional revenue by the condition of a road which is fairly representative of the general situation. This is manifestly proper, as each road, the weak and the strong, is necessary to the public service, and to destroy the weak road because there may be a road in the same territory which needs less revenue, benefits a few but injures the many. Perhaps it might be proper that there should be regulation limiting the construction of a road where the territory is already sufficiently served by existing transportation facilities; but so long as the law permits the construction of roads and denies the right to pool freights, justice will permit the needs of the roads so constructed to be considered in prescribing rates for a related

section. In the general rate advance cases heretofore heard by the Commission, these principles have been announced, and in the Western Advance Rate case of 1915, 35 I. C. C. 497, 560, 561, the authorities are collated.

§ 261. **Other Orders.**—The procedure in prescribing through routes and joint rates may be on complaint or without complaint,[66] and so with the procedure to determine the maximum to be paid a shipper for services rendered or facilities furnished in connection with transportation.[67] In each case there must be a hearing.

§ 262. **Service of Orders of the Commission.**—Every order of the Commission shall be forthwith served upon the designated agent of the carrier.[68]

Every carrier must designate in writing an agent in the city of Washington, District of Columbia, upon whom service of all notices and processes may be made and file such designation with the Secretary of the Commission, and, in default of such designation, service of any notice or other process in any proceeding before the Commission may be made by posting such notice or process in the office of the Secretary of the Commission.[69]

The Commission has an official seal, which the law prescribes shall be judicially noticed.[70]

§ 263. **Rehearing by the Commission.**—The Commission has authority to suspend or modify its orders upon notice, the manner of acting and the kind of notice being left to its discretion. Section 16-a gives the Commission power to grant rehearings under such general rules as it may prescribe, but unless specially permitted otherwise, the order must be obeyed pending such rehearing. This section was added by the amendment of June 29, 1906, but the power has been exercised by the Commission since its organization.

In re Petition of Produce Exchange,[71] a rehearing was denied the petitioner, who was not a party on the original hearing. In Myers *v.* Penn. Co.[72] the rehearing was denied, the petition not showing that any material testimony had been overlooked or mis-

[66] Sec. 15 of Act; Sec. 400, *post.*

[67] Sec. 15 of Act; Sec. 404, *post.*

[68] Sec. 16 of Act; Sec. 410, *post.*

[69] Sec. 6, par. 2 of Act June 18, 1910; Sec. 450, *post.*

[70] Sec. 17 of Act; Sec. 417, *post.*

[71] Re Petition of Produce Exchange, 2 I. C. C. 588, 2 I. C. R. 412.

[72] Myers *v.* Pennsylvania R. Co., 2 I. C. C. 573, 2 I. C. R. 403, 544.

apprehended and no error of law being disclosed. In overruling the first motion for rehearing filed with the Commission, Judge Cooley, its then chairman, announced this rule in relation thereto:[73]

"(a) The Commission will promptly and carefully examine an application for a rehearing with a view to the immediate correction of any error of law or fact found to exist, but will not direct a rehearing involving the expense to parties of appearing before the Commission for a reargument, unless satisfied that such reargument might have the effect of changing the result of what the Commission has already done.

"(b) The statute is construed as dealing with the substance of things, and as contemplating, as far as that is possible, methods of procedure that are speedy and which come at once to the very right of questions arising in the transportation of persons and freight."

On a petition asking a rehearing in a case decided before the Hepburn amendment, so that an order could be made under section 15, as amended, the Commission held that a case closed prior to the effective date of the Amendment of June 29, 1916, could not be reopened to enter an order authorized by the amended law.[74]

§ 264. **Valuation of Property.**—The power given the Commission by Act March 1, 1913, to classify, inventory and value the property of carriers subject to the Act has been stated.[75] The statute gives the Commission power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results shall be submitted, and the classification of the elements that constitute the ascertained value.

§ 265. **Oral Argument.**—By rule 14 of the rules of practice it is provided: "Oral argument will be had only as ordered by the Commission."

In speaking of oral argument the Commission said:

"The act provides for the taking of testimony in these investigations by a single commissioner or by an examiner. It is probable that the Commission might, in its discretion, require the submission of a case upon the testimony so taken and written briefs.

[73] Riddle, Dean & Co. *v.* Pittsburg & L. E. R. Co., 1 I. C. C. 490, 1 I. C. R. 773.

[74] Cattle Raisers' Assn. *v.* Chicago, B. & Q. R. Co., 12 I. C. C. 6.

[75] Secs. 231-233, *supra.*

However, this may be, we have never, in fact, yet refused, and should only refuse under peculiar and unusual circumstances, the application of a party to be heard orally. As above observed, testimony in these investigations is often taken without the presence of any member of the Commission. It almost never happens that a majority of the Commission hear the testimony. The only opportunity which a party has of stating his views to this body by word of mouth is upon the argument. The importance of these arguments is recognized, and they will ordinarily be allowed as a matter of course. Application for such argument should, however, be made when the testimony is concluded and not deferred as in this case, although here, even, as soon as we learned that the parties desired to present their views orally the proceeding was reopened and set down for argument."[76]

§ 266. **Estoppel by Former Order of the Commission.**— While the technical plea of *res adjudicata* does not apply to proceedings before the Commission, and the rule of *stare decisis* has been held inapplicable to its reports, that body must, of necessity, when it reaches a conclusion on a particular state of facts adhere to that conclusion unless and until the conditions upon which the conclusion was based have changed or unless the Commission acted in the first instance upon a misconception of fact or a mistake of law.[77]

Where, however, the Commission prior to the Hepburn Act, effective August 28, 1906, had declared a rate unreasonable, and its order had not been enforced by the courts, the Commission was not prevented after the passage of that Amendment from again considering the question.[78]

The statute requires that the orders of the Commission shall

[76] Ullman *v.* Adams Exp. Co., 14 I. C. C. 585, 586.

[77] Banner Milling Co. *v.* New York C. & H. R. R. Co., 14 I. C. C. 398, followed in Kansas City Traffic Bureau *v.* Atchison, T. & S. F. Ry. Co., 15 I. C. C. 491, 497; Receivers & Shippers Assn. *v.* Cincinnati, N. O. & T. P. Ry. Co., 18 I. C. C. 440; Waco Freight Bureau *v.* Houston & T. C. T. Co., 19 I. C. C. 22, 24; Hillsdale Coal & Coke Co. *v.* Pennsylvania R. Co., 19 I. C. C. 356, 361.

[78] National Hay Assn. *v.* Michigan Cent. R. Co., 19 I. C. C. 34. For a history of the first case see, National Hay Assn. *v.* Lake Shore & M. S. Ry. Co., 9 I. C. C. 264; Int. Com. Com. *v.* Lake Shore & S. Ry. Co., 134 Fed. 942; Int. Com. Com. *v.* Lake Shore & M. S. Ry. Co., 202 U. S. 613, 50 L. Ed. 1171, 26 Sup. Ct. 865.

continue in force two years, after which time the Commission has power again to consider the question and enter another and, if the facts justify, a different order.[79]

§ 267. **Rules of Procedure Prescribed by the Commission.**—By section 17 of the Act it is provided:

"That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. * * * Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney."

Under authority granted under said section, the Interstate Commerce Commission has promulgated rules of practice which are copied in the sections following.

§ 268. **Sessions of the Commission to Be Public—Its Offices in Washington.**—Sessions of the Commission for hearing contested cases, including oral arguments, will be held as ordered by the Commission.

The office of the Commission at Washington, D. C., is open each business day from 9 a. m. to 4:30 p. m.[80]

§ 269. **Parties.**—Any person, firm, company, corporation, or association, mercantile, agricultural, or manufacturing society, body politic or municipal organization, or any common carrier, or the railroad commissioner or commission of any State or Territory, may complain to the Commission of anything done, or omitted to be done, in violation of the provisions of the act to regulate commerce by any common carrier subject to the provisions of said act. If a complaint relates to matters in which two or more carriers, engaged in transportation by continuous carriage or shipment, are interested, the several carriers participating in such carriage or shipment are necessary parties defendant.

If a complaint relates to rates, regulations, or practices of carriers operating different lines, and the object of the proceeding

[79] Re Advances in Rates between the Mississippi and Missouri Rivers, Warnock v. Chicago & N. W. Ry. Co., 21 I. C. C. 546.

[80] Rule 1 of the Rules of Practice adopted by the Commission.

is to secure correction of such rates, regulations, or practices on each of said lines, all the carriers operating such lines should be made defendants.

If a complaint relates to provisions of a classification it will ordinarily be sufficient to name as defendants the principal carriers named as parties to the classification.

If the line of a carrier is operated by a receiver or trustee, both the carrier and its receiver or trustee must be made defendants in cases involving transportation over such line.

Any person may petition in any proceeding for leave to intervene prior to or at the time of the hearing and not after. Such petition shall set forth the petitioner's interest in the proceedings, but intervention will not be permitted, except upon allegations that are reasonably pertinent to the issues of the original complaint. Leave granted on such petition will entitle such interveners to have notice of hearings, to produce and cross-examine witnesses, and to be heard in person or by counsel upon brief and at the oral argument.[81]

§ 270. **Complaints.**—Complaints must be in typewriting on one side of the paper only, on paper not more than 8½ inches wide and not more than 12 inches long, and weighing not less than 16 pounds to the ream, folio base, 17 by 22 inches, with left-hand margin not less than 1½ inches wide, setting forth briefly the facts claimed to constitute a violation of the law. Complaints may also be printed in the size designated in Rule XIV regarding briefs. The corporate name of the carrier or carriers complained against must be stated in full without abbreviations, and the address of the complainant, with the name and address of his attorney or counsel, if any, must appear upon each copy of the complaint. The complaint need not be verified, but must be signed in ink by the complainant or his duly authorized attorney. The complainant must furnish as many complete copies of the complaint as there may be parties complained against to be served, including receiver or receivers, and three additional copies for the use of the Commission.

The Commission will serve the complaint upon each defendant by leaving a copy with its agent in the District of Columbia, or, if no such agent has been designated, by posting a copy in the office of the Secretary of the Commission.

Two or more complaints involving the same principle, subject,

[81] Rule 2.

of state of facts may be included in one complaint. The several rates, regulations, discriminations, and shipments involved should be separately set out and in case discrimination in rates or charges is alleged, appropriate allegation should also be made to present for decision the issue as to whether or not such rates or charges are just and reasonable. One or more persons may join in one complaint against one or more carriers if the subject matter of the complaint involves substantially the same principle, subject, or state of facts.

Except under unusual circumstances and for good cause shown, reparation will not be awarded unless specifically prayed for in the complaint or in an amendment thereto filed before the submission of the case.

After a final order has been entered upon a complaint in which reparation is not sought or, if prayed, has been denied, the Commission will not ordinarily award reparation upon a complaint subsequently filed and based upon any finding upon the first complaint.

Where reparation is demanded under a general rate adjustment challenged in the complaint, or upon many shipments under a particular rate, or where many points of origin or destination are involved, it is the practice of the Commission first to determine and make a formal announcement respecting the reasonableness of the rate or rates in issue, and whether the facts justify an award of reparation, giving to the parties thereafter an opportunity to make proof respecting the shipments upon which reparation is claimed. Freight bills and other exhibits must therefore be reserved until such further hearing and must not be filed with the complaint. In such cases the complaint, without unnecessary details, should disclose in general terms the basis and extent of the damages demanded in such manner as reasonably to advise the defendants thereof.

When a claim for reparation has been before the Commission informally and the parties have been notified by the Commission that the claim is of such a nature that it can not be determined informally, formal complaint must be filed within six months after such notification, or the parties will be deemed to have abandoned their claim: *Provided, however*, That this rule does not apply to formal complaints for reparation filed within two years from the date of the delivery of the shipments.[82]

[82] Rule 3.

§ 271. **Answer.**—One copy of each answer must, unless the Commission orders otherwise, be filed with the secretary of the Commission at his office in Washington, D. C., within thirty days after the day of service of the complaint by defendants whose general offices are at or west of El Paso, Tex., Salt Lake City, Utah, or Spokane, Wash., and within twenty days by all other defendants, and a copy of each such answer must be at the same time served personally or by mail upon the complainant or his attorney. The Commission will, when advisable, shorten or extend the time for answer. If a defendant satisfies a complaint before answering, a written acknowledgment thereof, showing the character and extent of the satisfaction given, must be filed by the complainant. In such case a statement of the fact and manner of satisfaction without other matter may be filed as answer. If the complaint is satisfied after the filing and service of answer, a written acknowledgment thereof must be filed by the complainant and a supplemental answer setting forth the fact and manner of satisfaction must be filed by the defendant. Answers in typewriting must be on one side of the paper only, on paper not more than 8½ inches wide and not more than 12 inches long and weighing not less than 16 pounds to the ream, folio base, 17 by 22 inches, with left-hand margin not less than 1½ inches wide, or may be printed in the size designated in Rule XIV regarding briefs.[83]

§ 272. **Motion to Dismiss in the Nature of a Demurrer.**—A defendant who deems the complaint insufficient to show a breach of legal duty may, instead of answering or formally demurring, serve on the complainant notice of hearing on the complaint; and in such case the facts stated in the complaint will be deemed admitted. A copy of the notice must at the same time be filed with the secretary of the Commission. The filing of an answer, however, will not be deemed an admission of the sufficiency of the complaint, but a motion to dismiss for insufficiency may be made at the hearing.[84]

§ 273. **Service of Papers.**—Copies of notices or papers, other than complaints, presented by a party must be served upon the adverse party or parties personally or by mail. When any party has appeared by attorney, service upon such attorney will be deemed proper service upon the party.[85]

[83] Rule 4.
[84] Rule 5.
[85] Rule 6.

§ 274. **Amendments to Pleadings.**—Amendments to any complaint or answer in any proceeding or investigation will be allowed by the Commission at its discretion.[86]

§ 275. **Continuances.**—Continuances and extensions of time will be granted at the discretion of the Commission.[87]

§ 276. **Stipulations Desirable and Must Be in Writing.**—Parties to any proceeding may, by stipulation in writing filed with the secretary, agree upon the facts, or any portion thereof, involved therein. It is desired that the facts be thus agreed upon whenever practicable.[88]

§ 277. **Hearings.**—Upon issue being joined by service of answer or by notice of hearing on the complaint, or by failure of defendant to answer, the Commission will assign a time and place for hearing. Witnesses will be examined orally before the Commission or one of its examiners, unless their testimony be taken by deposition or the facts be agreed upon as provided for in these rules.[89]

§ 278. **Depositions, How Taken.**—The deposition of a witness for use in a case pending before the Commission may, after such case is at issue, be taken upon compliance with the following rules of procedure, which are prescribed by the Commission under authority conferred upon it by section 17 of the act, but not otherwise.

Such depositions may be taken before a special agent or examiner of the Commission, or any judge or commissioner of any court of the United States, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation, according to such designation as the Commission may make in any order made by it in the premises, except that where such deposition is taken in a foreign country it may be taken before an officer or person designated by the Commission or agreed upon by the parties by stipulation in writing to be filed with the Commission.

Any party desiring to take the deposition of a witness in such

[86] Rule 7.
[87] Rule 8.
[88] Rule 9.
[89] Rule 10.

a case shall notify the Commission to that effect, and in such notice shall state the time when, the place where, and the name and post-office address of the party before whom it is desired the deposition be taken, the name and post-office address of the witness, and the subject matter or matters concerning which the witness is expected to testify, whereupon the Commission will make and serve upon the parties or their attorneys an order wherein the Commission shall name the witness whose deposition is to be taken and specify the time when, the place where, and the party before whom the witness is to testify, but such time and place, and the party before whom the deposition is to be taken, so specified in the Commission's order, may or may not be the same as those named in said notice to the Commission.

Every person whose deposition is so taken shall be cautioned and take oath (or affirm) to testify the whole truth and nothing but the truth concerning the matter about which he shall testify, and shall be carefully examined. His testimony shall be reduced to typewriting by the officer before whom the deposition is taken, on under his direction, after which the deposition shall be subscribed by the witness and certified in usual form by the officer. After the deposition has been so subscribed and certified it shall, together with two copies thereof made by such officer or under his direction, be forwarded by such officer under seal in an envelope addressed to the Commission at its office in Washington, D. C. Upon receipt of the deposition and copies the Commission will file in the record in said case such deposition and forward one copy to the complainant or his attorney, and the other copy to the defendant or its attorney, except that where there is more than one complainant or defendant the copies will be forwarded by the Commission to the parties designated by such complainants or defendants as the case may be.

Such depositions shall be typewritten on one side only of the paper, which shall be not more than 8½ inches wide and not more than 12 inches long and weighing not less than 16 pounds to the ream, folio base 17 by 22 inches, with left-hand margin not less than 1½ inches wide.

No deposition shall be taken except after 6 days' notice to the parties, and where the deposition is taken in a foreign country such notice shall be at least 15 days.

No such deposition shall be taken either before the case is at issue or, unless under special circumstance and for good cause

shown, within 10 days prior to the date of the hearing thereof assigned by the Commission, and where the deposition is taken in a foreign country it shall not be taken after 30 days prior to such date of hearing.

Witnesses whose depositions are taken pursuant to these rules and the magistrate or the officer taking the same, unless he be an examiner of the Commission, shall severally be entitled to the same fees as are paid for like service in the courts of the United States, which fees shall be paid by the party or parties at whose instance the depositions are taken.[90]

§ 279. **Attendance of Witnesses.**—Subpœnas requiring the attendance of witnesses from any place in the United States to any designated place of hearing may be issued by any member of the Commission.

Subpœnas for the production of books, papers, or documents (unless directed to issue by the Commission upon its own motion) will issue only upon application in writing. Applications to compel witnesses not parties to the proceeding to produce documentary evidence must be verified and must specify, as near as may be, the books, papers, or documents desired and the facts to be proven by them. Applications to compel a party to the proceeding to produce books, papers, or documents need only set forth in a general way the books, papers, or documents sought, with a statement that the applicant believes they will be of service in the determination of the case.

Witnesses whose testimony is taken orally are severally entitled to the same fees as are paid for like services in the courts of the United States, such fees to be paid by the party at whose instance the testimony is taken.[91]

§ 280. **Documentary Evidence.**—Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant and not intended to be put in evidence, such document will not be filed, but the party offering the same shall also present to opposing counsel and to the Commission in proper form for filing copies of such material and relevant matter, and that only shall be filed.

In case any portion of a tariff, report, circular, or other document on file with the Commission is offered in evidence, the party offering the same must give specific reference to the items

[90] Rule 11.

[91] Rule 12.

or pages and lines thereof to be considered. In case any testimony in other proceedings than the one on hearing is introduced in evidence, a copy of such testimony must be presented as an exhibit. When exhibits of a documentary character are offered in evidence, two copies should be furnished at the hearing for the use of the Commission and a copy for each of the principal parties represented.[92]

§ 281. **Briefs and Oral Argument.**—Unless otherwise specifically ordered, briefs may be filed upon application made at hearings or upon order of the Commission. Briefs shall be printed and contain an abstract of the evidence relied upon by the parties filing the same, assembled by subjects under findings of fact which the parties think the Commission should make; and in such abstract reference shall be made to the pages of the record wherein the evidence relied upon appears. The abstract of evidence should follow the statement of the case and precede the argument. Every brief of more than 10 pages shall contain on its front fly leaves a subject index with page references, the subject index to be supplemented by a list of all cases referred to alphabetically arranged, together with references to pages where the cases are cited. Briefs must be printed in 10 or 12 point type, on good unglazed paper, 5⅞ inches wide by 9 inches long, with inside margins not less than 1 inch wide, and with double-leaded text and single-leaded citations.

At the close of the testimony in each case the presiding commissioner or examiner will fix the time for filing and service of the respective briefs, as follows, unless good cause for variation therefrom is shown: To the complainant, 30 days from date of conclusion of the testimony; to the defendants and interveners, 15 days after the date fixed for the complainant; and to complainant for reply brief, 10 days after the date fixed for defendants or interveners. Briefs not filed and served on or before the dates fixed therefor will not be received unless a special order therefor is made by the Commission. All briefs must be filed with the secretary and be accompanied by notice, showing service upon the adverse parties, and 15 copies of each brief shall be furnished for the use of the Commission, unless otherwise ordered. Applications for extension of time in which to file briefs shall be by petition, in writing, stating the facts on which the ap-

[92] Rule 13.

plication rests, which must be filed with the Commission at least five days before the time for filing such brief.

Oral argument will be had only as ordered by the Commission. Applications therefor must be made at the hearing or in writing within 10 days after the completion of proof.[93]

§ 282. **Rehearings.**—Applications for reopening a case after final submission, or for rehearing after decision, must be by petition stating specifically the grounds relied upon; such petition must be served by the party filing same upon the opposing counsel who appeared at the hearing or on brief.

If such application be to reopen the case for further evidence, the nature and purpose of such evidence must be briefly stated, and the same must not be merely cumulative. If the application be for a rehearing, the petition must specify the matters claimed to be erroneously decided, with a brief statement of the alleged errors. If any order of the Commission is sought to be reversed, changed, or modified on account of facts and circumstances arising subsequent to the hearing, or of consequences resulting from compliance therewith, the matters relied upon by the applicant must be fully set forth. At least 10 copies of all such applications must be filed.[94]

§ 283. **Free Copies of Transcripts of Evidence, When Furnished.**—One copy of the testimony will be furnished by the Commission for the use of the complainant and one copy for the use of the defendant, without charge. If two or more complainants or defendants have appeared at the hearing, such complainants or defendants must designate to whom the copy for their use shall be delivered.

In proceedings instituted by the Commission on its own motion, including proceedings involving the suspension of tariffs, no free copies of testimony will be furnished.[95]

§ 284. **Orders Must be Complied with and Notice Thereof Given to the Secretary of the Commission.**—An order having been issued, the defendant or defendants named therein must promptly notify the secretary of the Commission on or before the date upon which such order becomes effective, whether or not compliance has been made therewith. If a change in rates is required, the notification to the secretary must be given in addition to the filing of proper tariffs.[96]

[93] Rule 14.
[94] Rule 15.
[95] Rule 16.
[96] Rule 17.

§ 285. **Fourth Section Application.**—Any common carrier may apply to the Commission, under the proviso clause of the fourth section, for authority to charge for the transportation of like kind of property less for a longer than for a shorter distance over the same line, in the same direction, the shorter being included within the longer distance, or for authority to charge more as a through rate than the aggregate of the intermediate rates subject to the act. Such application shall be by petition, which shall specify the places and traffic involved, the rates charged on such traffic for the shorter and longer distances, the carriers other than the petitioner which may be interested in the traffic, the character of the hardship claimed to exist, and the extent of the relief sought by the petitioner. Upon the filing of such a petition, the Commission will take such action as the circumstances of the case require.[97]

§ 286. **Suspensions of Rate Increases, How Obtained.**—Suspensions of rates under section 15 of the act to regulate commerce will not ordinarily be made unless request in writing therefore is made at least 10 days before the time fixed in the tariff for such rates to take effect. Requests for suspension must indicate the schedule affected by its I. C. C. number and give specific reference to the parts thereof complained against, together with a statement of the grounds thereof.[98]

§ 287. **Secretary to Give Information.**—The secretary of the Commission will, upon request, advise any party as to the form of complaint, answer, or other paper necessary to be filed in the case.[99]

§ 288. **Address of the Commission.**—All communications to the Commission must be addressed to Washington, D. C., unless otherwise specifically directed.

§ 289. **Form of Complaints.**

———— ————
vs.
The ———— Railroad Company,
———— ———— Railway Company.

(*Insert corporate title, without abbreviation, of carrier (or carriers) necessary defendants.*

The complaint of the above-named complainant respectfully shows:

I. That (*complainant should here state occupation and place*

[97] Rule 18.
[98] Rule 19.
[99] Rule 20.

of business, also whether it is a corporation, firm, or partnership, and if a firm or partnership, the individual names of the parties composing the same should be given).

II. That the defendant (defendants) above named is a common carrier (are common carriers) engaged in the transportation of passengers and property, wholly by railroad (partly by railroad and partly by water), between points in the state of ——— and points in the state of ———, and as such common carrier (carriers) is (are) subject to the provisions of the act to regulate commerce approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

III. That (*state in this and subsequent paragraphs, to be numbered numerically, the matter or matters intended to be complained of, naming every rate, rule, regulation, or practice whose lawfulness is challenged, and also each point of origin and point of destination between which the rates complained of are applied*).

(*Following this a paragraph or paragraphs should be inserted alleging that by reason of the facts stated in the foregoing paragraphs complainant (complainants) has (have) been subjected to the payment of rates of transportation which were when exacted, and still are, unjust and unreasonable in violation of section 1 of the act to regulate commerce, or unduly discriminatory in violation of sections 2, 3, or 4 thereof.*)

Wherefore complainant prays that defendants may be severally required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants and each of them to cease and desist from the aforesaid violation of said act to regulate commerce, and establish and put in force and apply as maxima in future to the transportation of ——— between the shipping and destination points named in paragraph ——hereof, in lieu of the rates named in said paragraph, such other rates as the Commission may deem reasonable and just (and also pay to complainants by way of reparation for the unlawful charges hereinbefore described the sum of ———, or such other sum as, in view of the evidence to be adduced herein, the Commission may consider complainant entitled to), and that such other and further order or orders be made as the Commission may consider proper in the premises and complainant's cause may appear to require.

Dated at ——— ———, 19—.
———— ————,
[Complainant's signature.] [100]

§ 290. **Form of Answer.**

———— ————
vs.
The ——— Railroad Company.

The above-named defendant, for answer to the complaint in this proceeding, respectfully states:

(*Here follow the usual admissions, denials, and averments, answering the complaint paragraph by paragraph.*)

Wherefore the defendant prays that the complaint in this proceeding be dismissed.

The ——— Railroad Company,
By ——— ———,
———— ————.
[Title of officer.] [101]

§ 291. **Notice of Motion to Dismiss.**

———— ————
vs.
The ——— Railroad Company.

Notice is hereby given under Rule V of the Rules of Practice in proceedings before the Commission that a hearing is desired in this proceeding upon the facts as stated in the complaint.

The ——— Railroad Company,
By ——— ———,
———— ————.
[Title of officer.] [102]

[100] Form No. 1 prescribed by the Commission.

[101] Form No. 2.

[102] Form No. 3.

CHAPTER VII.

Enforcement by the Courts of the Act to Regulate Commerce, Including a Discussion of the Effect Given by the Courts to the Orders and Findings of the Interstate Commerce Commission.

§ 292. Jurisdiction of the Courts of the States to Enforce Provisions of the Act to Regulate Commerce.
293. Same Subject. Statutory Provisions.
294. Same Subject. Awards of Damages.
295. Same Subject. Suit for Damages Against an Initial Carrier.
296. Compelling a Common Carrier to Transport.
297. Jurisdiction. General Statement.
298. Commerce Court.
299. Jurisdiction of the Courts of the United States to Compel the Attendance of Witnesses Before the Commission and Enforce Obedience to Act.
300. Enforcement of Forfeitures.
301. Mandamus.
302. To Enforce Rights under Act to Aid Railroads and Telegraph Companies.
303. Injunctions in Aid of Enforcement of Act.
304. Injunctions Against Unlawful Rates and Practices.
305. Same Subject. Conclusion.
306. Same Subject. Effect of Amendment of 1910.
307. Same Subject. Venue.
308. Jurisdiction of Suits to Set Aside Orders of the Commission.
309. Grounds upon Which Orders of the Commission May Be Set Aside.
310. Same Subject. Violations of the Constitution—Fourth Amendment.
311. Violation of the Fifth Amendment.
312. Mistake of Law.
313. Lack of Jurisdiction.
314. The Substance and Not the Form of the Finding Determines.
315. Disregard of the Legal Effect of Undisputed Testimony.
316. Lack of Full Hearing.
317. Awards of Damages.
318. Awards of Damages—Parties and Procedure.
319. Procedure to Enforce or Annul Orders of the Commission.
320. Interlocutory Injunctions—Three Judges to Hear Application for.
321. Interlocutory Injunctions—Notice and Hearing.
322. Interlocutory Injunctions—Appeal from.
323. Appeal from Final Judgment.
324. Venue of Suits.

§ 292. **Jurisdiction of the Courts of the States to Enforce the Provisions of the Act to Regulate Commerce.**— The act to regulate commerce in the rights therein specified does little more than express the law as it existed at common law. The right to reasonable rates was admittedly a common-law right, and the Supreme Court of the United States we have seen *supra* Sec. 133 decided that equality of treatment under substantially similar circumstances was also a common-law right. The prohibition of pooling, the requirement of continuous transportation, that through routes and joint rates shall be established, that tariffs shall be filed, maintained and made public, and the other limitations on the conduct of common carriers, while requiring more than was their duty at common law, are but provisions to make effective the great common-law right to reasonable charges without unjust discrimination or undue preference. These remedies and others provided in the act are in addition to, although not in derogation of, the common-law remedies.

Congress may provide that the judicial power of the United States shall be exercised by the federal courts to the exclusion of any jurisdiction in the courts of the states,[1] but, as said by the Supreme Court: "If an act of Congress gives a penalty (meaning civil and remedial) to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court."[2] In the same case the court said that the jurisdiction of the federal courts is "sometimes exclusive by implication," while in a more recent case the Supreme Court said that "jurisdiction (of the state courts) is not defeated by implication."[3] What may be stated as the rule in harmony with these decisions is, where by express enactment of the statute the jurisdiction of the state courts is excluded, or where the character of the remedy provided is such that the evident legislative intent was to exclude such courts, the federal courts have exclusive jurisdiction; but where no such definite

[1] Martin *v.* Hunter, 1 Wheat. 14 U. S. 304, 377, 4 L. Ed. 97; Osborn *v.* Bank of the United States, 9 Wheat. 738, 6 L. Ed. 204.

[2] Claflin *v.* Houseman, 93 U. S. 3 Otto 130, 23 L. Ed. 833.

[3] Galveston, H. & S. A. Ry. Co. *v.* Wallace, 223 U. S. 481, 56 L. Ed. 516, 32 Sup. Ct. 205; affirming 117 S. W. 169.

statement or clear legislative intent exists, the law will not be construed to exclude by implication the exercise by the state courts of jurisdiction.

§ 293. **Same Subject—Statutory Provisions.**—Whenever a court is named in the Acts to Regulate Commerce it is a federal court, except in the Amendment of June 18th, 1910, to section 16, by which Amendment suits on awards of damages may be filed either in a federal court or "in any state court of general jurisdiction having jurisdiction of the parties." Section 9 of the Act provides: "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act * * * may bring suit * * * in any district or circuit court of the United States."[4] Nowhere in the statute is there express prohibition against a state court exercising jurisdiction, but some of the procedure is such that it is clear that the legislative intent was to exclude the jurisdiction of the state courts.

The Amendment to section 16 above shows a legislative construction indicating a necessity for a specific provision giving jurisdiction to the courts of the states. That a state court may enforce laws of Congress was held in the Second Employers' Liability cases,[5] and in the course of this chapter the cases in which the state courts have concurrent jurisdiction will be stated, as will also those questions over which it would seem that the state courts have no jurisdiction.

§ 294. **Same Subject—Awards of Damages.**—By the express provisions of section 16 of the Act to Regulate Commerce the state courts have jurisdiction over suits brought on an order issued by the Commission for the payment of money, although prior to the Amendment of June 18, 1910, it would seem that no such jurisdiction existed.[6] That such suits may be brought in a

[4] The abolition of Circuit Courts would leave this to read "District Court of the United States," Judicial Code, Sec. 289.

[5] Mondou *v.* New York, New H. & H. R. Co., 223 U. S. 1, 57, 56 L. Ed. 327, Sup. Ct. 169; reversing Hoxie *v.* N. Y., N. H. & H. R. Co., 82 Conn. 373, 73 Atl. 754 and affirming, Walsh *v.* New York, N. H. & H. R. Co., 173 Fed. 694.

[6] Connor *v.* Vicksburg & M. R. Co., 36 Fed. 273, 1 L. R. A. 331; Kentucky & Indiana Bridge Co. *v.* Louisville & N. R. Co., 37 Fed. 567, 614, 2 L. R. A. 289, 2 I. C. R. 351; Van Patten *v.* Chicago, M. & St. P. R. Co., 74 Fed. 981. See also Sheldon *v.* Wabash R. Co., 105 Fed. 785.

state court has been stated by the Supreme Court which gave the Amendment to section 16 as authority for such statement.[7]

In the case in which the statement just referred to was made, suit had been brought in a state court from which it was removed to a federal district court. The complainant alleged a finding of the Interstate Commerce Commission that a particular rate was unreasonable to a designated extent, although there had been no award of damages to the plaintiff. The cause of action, therefore, if any existed, was based upon section 8 of the Act and must have been brought under section 9 and not under section 16. Under these facts the district court held that the state court had no jurisdiction, although the federal court would had the action been brought therein.[8] The Supreme Court, as shown *supra,* dismissed a direct writ of error thereto, holding that the jurisdiction of the federal court was not involved and that the question was merely one where was to be determined whether or not a cause of action was stated. It has, however, been held that a suit for damages under sections 8 and 9 "could only be brought in a district or circuit (*sic*) court of the United States," and then when the reasonableness of rates was involved only after an order by the Interstate Commerce Commission.[9]

Where suit was brought in a state court for damages for alleged discrimination prior to a determination by the Interstate Commerce Commission that unlawful discrimination existed, the Supreme Court sustained a judgment for the carrier in an opinion which would have applied with the same force had suit been brought in a federal court.[10]

§ 295. **Same Subject—Suits for Damages against an Initial Carrier.**—At common law a carrier must transport to the end of its line, but when the commodity was delivered to the connecting carrier in good order, its liability ceased, unless it contracted to deliver at the point of final destination, and even when such a contract was made, by the same contract the carrier

[7] Darnell *v.* Illinois C. R. Co., 225 U. S. 243, 56 L. Ed. 1072, 32 Sup. Ct. 760; Dismissing writ of error from the decision in Darnell *v.* Illinois C. R. Co., 190 Fed. 656.

[8] Darnell *v.* Illinois C. R. Co., 190 Fed. 656.

[9] Mitchell Coal & Coke Co. *v.* Penn. R. Co., 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916.

[10] Robinson *v.* Baltimore & O. R. Co., 222 U. S. 506, 56 L. Ed. 288, 32 Sup. Ct. 114; affirming same styled case, 64 W. Va. 406, 63 S. E. 323.

could limit its liability to its own line. Where commodities were transported over several lines and damage resulted, the shipper was frequently unable to prove which particular carrier was liable for the loss or injury.[11] The last connecting carrier receiving goods "as in good order" was presumptively liable for the damage. This is a statute in Georgia.[12] To make it possible for shippers to collect for loss and damage and at the same time to allow carriers to adjust between themselves the loss so that the innocent would not suffer, the Amendment of 1906, known as the Hepburn Act, gave the shipper the right to recover for loss or damage against the carrier receiving the commodity for shipment.[13] Speaking of this provision, the Supreme Court said: "The cause of action was the loss of plaintiff's property * * * and that loss is in no way traceable to the violation of any provision of the Act to Regulate Commerce."[14]

There is no doubt that in suits under this provision against an initial carrier for loss or damage to freight that action is maintainable in state courts.[15]

§ 296. **Compelling a Common Carrier to Transport.**—A shipper has a right to have his commodities transported by a

[11] Hutcheson on Carriers, 3d Ed., Sec. 225 *et seq.*

[12] Georgia Code 1910, Sec. 2752.

[13] An excellent statement of the reasons for this amendment was made by Judge Speer in Riverside Mills *v.* Atlantic C. L. R. Co., 168 Fed. 987, 990, 991. Except as to attorney's fees this case was affirmed, Atlantic C. L. R. Co. *v.* Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7. See also *post,* Sec. 439, and Woodruff *v.* Atlantic C. L. R. Co., 138 Ga. 763, 76 S. E. 45, citing Sec. 201 of the first Ed. of this book.

[14] Atlantic C. L. R. Co. *v.* Riverside Mills, *supra.*

[15] Galveston, H. & S. A. Ry. Co. *v.* Wallace, 223 U. S. 481, 56 L. Ed. 516, 32 Sup. Ct. 205; affirming—117 S. W. 169; Robb *v.* Connally, 111 U. S. 624, 637, 28 L. Ed. 542, 4 Sup. Ct. 544; Cases brought in state courts: St. L. S. W. Ry. Co. *v.* Alexander, 227 U. S. 218, 57 L. Ed. 486, 33 Sup. Ct. 245; Wells, Fargo & Co. *v.* Neiman-Marcus Co., 227 U. S. 469, 57 L. Ed. 600, 33 Sup. Ct. 267; Wells, Fargo & Co. *v.* Neiman-Marcus Co., 125 S. W. 614; Norfolk & W. Ry. Co. *v.* Dixie Tobacco Co., 228 U. S. 593, 57 L. Ed. 980, 33 Sup. Ct. 609, 111 Va. 813, 69 S. E. 1106; Southern Pac. Co. *v.* Crenshaw, 5 Ga. App. 675, 63 S. E. 865. See also cases cited, and Central of Ga. Ry. Co. *v.* City Mills Co., 128 Ga. 841, 58 S. E. 197; Atlantic C. L. R. Co. *v.* Henderson, 131 Ga. 75, 61 S. E. 1111; Southern Ry. Co. *v.* Frank, 5 Ga. App. 574, 63 S. E. 656.

common carrier. This right as to interstate shipments may not be taken away by a state statute, and a shipper seeking relief because of a refusal of a carrier to accept interstate shipments may invoke the jurisdiction of a state court, the question involved being one of general law. This principle was held in a case brought by a manufacturer of intoxicating liquors to compel the transportation of his product in interstate commerce. The suit was brought in a state court and removed to a federal court; the jurisdiction of the latter court therefore rested upon the original jurisdiction of the state court. While the question of the jurisdiction of the state court was not discussed, the jurisdictional question raised being the claim that no court had jurisdiction prior to action by the Interstate Commerce Commission, the fact that jurisdiction was retained and relief granted was a holding that the state court had jurisdiction.[16]

When a carrier engaged in interstate commerce violated its common-law duty to treat all shippers alike by refusing to transfer cars between a flour mill and the line of a connecting carrier, a state court had jurisdiction to compel a performance of this duty, at least until Congress or the Interstate Commerce Commission had taken specific action.[17] This rule would hardly apply now as to interstate commerce because Congress has enlarged the jurisdiction of the Commission in this respect.[18]

[16] Louisville & N. R. Co. *v.* F. W. Cook Brewing Co., 172 Fed. 117, 96 C. C. A. 322, 40 L. R. A. (N. S.) 798; affirming same styled case, 223 U. S. 70, 56 L. Ed. 355, 32 Sup. Ct. 189. Where nothing but the common law duty to furnish cars is involved, the state courts have jurisdiction to maintain suits for damages for a failure to perform that duty. Penn. R. Co. *v.* Puritan Coal Co., 237 U. S. 121, 59 L. Ed. —, 35 Sup. Ct. 484, affirming Penn. R. Co. *v.* Puritan Coal Co., 237 Pa. 420, 85 Atl. 426, Ann. Cas. 1914B 37; Illinois C. R. Co. *v.* Mulberry Hill Coal Co., 238 U. S. 275, 59 L. Ed. —, 35 Sup. Ct. 760; affirming Illinois C. R. Co. *v.* Mulberry Hill Coal Co., 257 Ill. 80, 100 N. E. 151.

[17] Lovelace Flour Mills Co. *v.* Mo. Pac. Ry. Co., 74 Kans. 808, 88 Pac. 72; affirmed, Mo. Pac. Ry. Co. *v.* Lovelace Flour Mills Co., 211 U. S. 612, 53 L. Ed. 352, 29 Sup. Ct. 214.

[18] Baltimore & O. R. Co. *v.* United States ex rel. Pitcairn Coal Co., 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164; reversing United States ex rel. Pitcairn Coal Co. *v.* Baltimore & O. R. Co., 165 Fed. 113, 91 C. C. A. 147, and see *post*, this chapter, Secs. 297, 299. But when the suit related "solely to interstate trans-

§ 297. **Jurisdiction—General Statement.**—Judicial power may be exercised to enforce rights under the Commerce Acts sometimes without prior action by the Interstate Commerce Commission and sometimes only after the Commission has acted and to enforce such action or to determine the legality thereof.

That section 9, giving a person damaged by violation of the Act the option to bring complaint before the Commission or suit in a district or circuit court, and section 22 providing that common-law remedies were neither abridged nor altered, should be construed in connection with the whole Act, and that as so construed the courts had no jurisdiction to determine whether a rate published as prescribed by law was unlawful, was held by the Supreme Court in the Abilene case.[19]

There are sections of the Act giving jurisdiction to the courts without prior action by the Commission. Cases arising thereunder will be discussed in the course of this chapter. The principle determining the circumstances under which the Commission alone can act can not be better or more briefly stated than by copying from an opinion of the Supreme Court written by Mr. Justice Lamar. He said:

"Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals."[20]

portation," the state court may enforce a duty to make connections, Chicago, M. & St. P. Ry. Co. *v.* Iowa, 233 U. S. 334, 58 L. Ed. 988, 34 Sup. Ct. 592; affirming same styled case, 152 Iowa 317, 130 N. W. 802.

[19] Texas & Pac. Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350.

[20] Penn. R. Co. *v.* Int. Coal Co., 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893.

In cases where prior action of the Interstate Commerce Commission is not necessary, and when the statute does not exclude the state courts, and in cases where the suit is based on a common-law right, the state courts may exercise jurisdiction.[21]

§ 298. **Commerce Court.**—By the amendment of 1910, a commerce court was created and given exclusive jurisdiction as follows:

First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than that for the payment of money.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

Third. Such cases as by section three of the act entitled "An Act to further regulate commerce with foreign nations and among the states," approved February 19, 1903, are authorized to be maintained in a circuit court of the United States.

Fourth. All such mandamus proceedings as under the provisions of section 20 or section 23 of the act entitled "An act to regulate commerce," approved February 4, 1887, as amended, are authorized to be maintained in a circuit court of the United States.[22]

This court was by a provision of the Appropriations Act approved October 22, 1913, "abolished from and after December 31, 1913, and the jurisdiction vested in said Commerce Court * * * is (was) transferred to and vested in the several district courts of the United States;" and it was further provided that "the procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this act shall be

[21] Starks Co. *v.* Grand Rapids & I. Ry. Co., 165 Mich. 642, 131 N. W. 143; Hardaway *v.* So. Ry. Co., 90 S. C. 485, 75 S. E. 1020; Lilly Co. *v.* Northern Pac. Ry. Co., 64 Wash. 689, 117 Pac. 401; Kansas City So. Ry. Co. *v.* Tonn, 102 Ark. 20, 143 S. W. 577; Chicago, R. I. & P. Ry. Co. *v.* Lena Lumber Co., 99 Ark. 105, 137 S. W. 562; Central of N. J. R. Co. *v.* Hite, 166 Fed. 976. Cases where jurisdiction was held to be exclusively in the Federal courts: Pittsburg C. C. & St. L. Ry. Co. *v.* Wood, 84 N. E. 1009; Note 16 *supra*.

[22] Act June 18, 1910, chap. 309, 36 Stat. at L., p. 539, Secs. 1 to 5 inclusive, Judicial Code, Secs. 200 to 214 inclusive.

the same as that heretofore prevailing in the Commerce Court."[23]

The procedure in the district courts in cases in which jurisdiction formerly existed in the Commerce Court as well as the procedure in other cases arising under the Act to Regulate Commerce will be discussed in subsequent sections of this chapter.

§ 299. **Jurisdiction of the Courts of the United States to Compel the Attendance of Witnesses before the Commission and Enforce Obedience to Act.**—Upon request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this act. In case of disobedience of the *subpœna* of the Commission, it may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of the Act to Regulate Commerce. And any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a *subpœna* issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said commission and produce books and papers if so ordered and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Section 9 of the original Act provides that certain named officers and agents shall testify and that "the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding." The Supreme Court having held that the law must give the witness absolute immunity from prosecution before he could be compelled to testify,[24] the Compulsory Testimony Act,[25] the Immunity of Witnesses Act,[26]

[23] For a discussion of the procedure in the Commerce Court, see article thereon by the author hereof in Standard Encyclopedia of Procedure, vol. 5, p. 153.

[24] Counselman *v.* Hitchcock, 142 U. S. 547, 35 L. Ed. 1110, 12 Sup. Ct. 195.

[25] Sec. 479, *post.*

[26] Sec. 480, *post.*

and section 3 of the Elkins Act [27] met this condition and a witness may be required to testify as provided in those statutes,[28] subject of course to the rule that the testimony is relevant to a question over which the Commission has jurisdiction.[29]

§ 300. **Enforcement of Forfeitures.**—Section 16 of the Act provides for forfeitures for any neglect to obey an order of the Commission made under authority of section 15. A forfeiture is provided for failure to comply with the duties of carriers under the valuation of the Act,[30] as also under the government-aided railroad and telegraph Act.[31] A carrier who after written request to quote a rate refuses so to do or misquotes the rate is subject to a penalty of $250.00.[32]

These forfeitures are recoverable in a court suit in the name of the United States brought in the district where the carrier has its principal office, or through which the road runs.

It is the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.[33]

§ 301. **Mandamus.**—Section 19 of the Act gives jurisdiction to the district courts of the United States upon application of the Attorney General at the request of the Commission to issue a writ or writs of mandamus to compel a compliance with the provisions of that section, and general authority to be exercised in like manner is given to enforce by mandamus compliance with any of the provisions of the act. This general authority was conferred by the amendment of 1906, to meet a decision of the Supreme Court holding that no jurisdiction existed to compel a carrier to file reports with the Commission, although the court stated that Congress could confer such authority.[34]

[27] Sec. 457, *post*.

[28] Brown *v.* Walker, 161 U. S. 591, 40 L. Ed. 819, 16 Sup. Ct. 644.

[29] Int. Com. Com. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 Sup. Ct. 1125; 4 I. C. R. 545; Int. Com. Com. *v.* Baird, 194 U. S. 25, 48 L. Ed. 860, 867, 24 Sup. Ct. 563; Harriman *v.* Int. Com. Com., 211 U. S. 407, 419, 420, 53 L. Ed. 253, 29 Sup. Ct. 115. See also Sec. 219, *ante*, and United States *v.* Skinner, 218 Fed. 870.

[30] *Post*, Sec. 384.

[31] Sec. 474, *post*.

[32] Sec. 6 of Act; Sec. 368, *post*.

[33] Sec. 16 of Act; *post*, Sec. 413.

[34] United States ex rel. Knapp *v.* Lake Shore & M. S. Ry. Co.,

District courts of the United States have jurisdiction upon the relation of any person, firm, or corporation alleging a violation of the provisions of the act which prevents the relator from having interstate traffic moved by a common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ. The writ of mandamus is cumulative and may issue upon such terms as the court may prescribe, notwithstanding there may be undetermined questions of fact as to the proper compensation to the carrier.[35] The remedy is limited to compelling the performance of duties which are either so plain as not to require previous action by the Commission or which plainly arise from some provision of the statute or existing order of the Commission within the lawful scope of its authority.[36] This writ, however, can not issue to prevent undue discrimination prior to action by the Commission determining that the particular acts complained of are unlawful. When it is the duty of the Interstate Commerce Commission to act, action may be compelled by the writ.[37]

§ 302. **To Enforce Rights under the Act to Aid Railroads and Telegraph Companies.**—By section 4 of the act of August 7, 1888, entitled "An act to aid in the construction of a railroad and telegraph lines," etc.,[38] it is made the duty of the Attorney General of the United States by proper proceedings to protect and enforce the rights of the United States thereunder. This section makes no provision concerning jurisdiction to enforce these rights and, under the rule hereinbefore stated, section 292, it would seem that the Attorney General might file suit in a state court if he chose so to do.

197 U. S. 536, 49 L. Ed. 870, 25 Sup. Ct. 538, citing Kendall *v.* United States, 12 Pet., 37 U. S. 584, 9 L. Ed. 1181; United States *v.* Schurz, 102 U. S. 378, 26 L. Ed. 167. See under present law, Int. Com. Com. *v.* Goodrich Transit Co., 224 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436; Kansas City So. Ry. Co. *v.* United States, 231 U. S. 423, 58 L. Ed. 296, 34 Sup. Ct. 125.

[35] Sec. 23 of Act; Sec. 445, *post.*

[36] See note 18, *supra.*

[37] Int. Com. Com. *v.* Humbolt Steamship Co., 224 U. S. 474, 56 L. Ed. 849, 32 Sup. Ct. 556; affirming same styled case, 37 App. D. C. 266.

[38] Sec. 473, *post.*

The next section giving a right to sue for penalties and damages prescribes that the "action for damages" may be brought in the "district court of the United States in any state or territory in which any portion of the road or telegraph line of said company may be situated." In construing this statute it was held that the special remedy provided did not exclude the equitable remedies, for, said the court: "It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."[39]

§ 303. **Injunctions in Aid of Enforcement of Act.**—An order of the Commission "regularly made and duly served" may be enforced by the district courts of the United States at the suit of the United States or any party injured by a violation of such order.[40]

The district courts of the United States sitting in equity may restrain carriers subject to the provisions of the Commerce Acts from charging less than the legally published rates and from committing any discrimination forbidden by law, and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or state, it may be dealt with, inquired of, tried, and determined in either such judicial district or state, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary.

District attorneys, when directed by the Attorney General, are required to institute and prosecute such proceedings, which shall not preclude a suit for damages by the party injured.[41]

Under this provision, express companies were enjoined at the suit of the United States from giving or using franks.[42]

[39] United States *v.* Union Pac. R. Co., 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319.

[40] Sec. 16 of Act amended by the District Court Act, by substituting District for Commerce Court, *post*, Sec. 407.

[41] Sec. 3 Elkins Act, Sec. 456, *post*.

[42] United States *v.* Wells-Fargo Express Co., 161 Fed. 606; approved, American Ex. Co. *v.* United States, 212 U. S. 522, 53 L. Ed. 635, 29 Sup. Ct. 315.

Rebating may be enjoined,[43] and the practice of paying for transportation in advertising, being an illegal discrimination, could be and was enjoined.[44] Injunction was sought against alleged violation of the commodities clause of the act.[45] Injunctions against discriminations were granted prior to the date of the Act to Regulate Commerce.[46]

§ 304. **Injunctions against Unlawful Rates and Practices.**—Prior to the amendment of 1910, which gave the Commission power to suspend tariffs affecting rates or increasing rates, it was a mooted question as to whether, before action by the Commission, a court could enjoin a rate or practice contained in a legally filed tariff. Rates and practices inaugurated before the effective date of that amendment could not be held unlawful by the Commission until after a full hearing. When after such hearing the rate or practice was declared illegal, damage could be awarded, but this remedy was inadequate. Each individual had to show the amount of his damages and had to pay the unlawful rate until it was decided unlawful after a hearing which sometimes took years to conclude. In a well considered case it was said: "A denial of the entire right of service by a refusal to carry differs, if at all, in degree only, and in the amount of damages done, and not in the essential character of the act, from a denial of the right in part by an unreasonable discrimination in terms, facilities or accommodations." [47]

Injunctions were granted prior to the enactment of the Act to Regulate Commerce as has been shown in the next preceding

[43] United States *v.* Milwaukee Refrigerator & Transit Co., 145 Fed. 1007.

[44] Chicago, Ind. & L. Ry. Co. *v.* United States, 219 U. S. 486, 55 L. Ed. 305, 31 Sup. Ct. 272, citing and following Louisville & N. R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. 265; United States *v.* Baltimore & O. R. Co., 225 U. S. 306, 56 L. Ed. 1100, 32 Sup. Ct. 817.

[45] United States ex rel. Atty. Gen. *v.* Delaware & H. R. Co., 213 U. S. 366, 53 L. Ed. 836, 29 Sup. Ct. 527; United States *v.* Lehigh Valley R. Co., 220 U. S. 257, 55 L. Ed. 458, 31 Sup. Ct. 387.

[46] Coe *v.* Louisville & N. R. R. Co., 3 Fed. 775; So. Ex. Co. *v.* Memphis & L. R. R. Co., 8 Fed. 799, 2 McCray 570, approved, So. Ex. Co. *v.* St. L. I. M. & S., 10 Fed. 210, 3 McCray 147; reversed, but not on this point, Memphis & L. R. Co. *v.* So. Ex. Co., 117 U. S. 1, 29 L. Ed. 791, 6 Sup. Ct. 542, 628; Menacho *v.* Ward, 27 Fed. 529, 23 Blatchf. 502; Watson *v.* Sutherland, 5 Wall. 74, 72 U. S. 74, 18 L. Ed. 580.

[47] McDuffie *v.* Portland & R. R. Co., 52 N. H. 430, 13 Am. Rep. 72.

section. The Supreme Court cited a case in which an injunction had been granted against unlawful discrimination,[48] and assumed for the purposes of that decision that rights to a legal rate could be "enforced by a bill in equity."

Since the Act to Regulate Commerce was passed injunctions have been granted by different district judges,[49] in some of which cases the district courts were affirmed by the circuit court of appeals.[49] In the Macon Grocery Co. case,[50] the question was presented to the Supreme Court and not decided, the circuit court of appeals having been affirmed because the venue had been improperly laid. Mr. Justice Harlan, dissenting, thought that the decision should have been placed on the Abilene case. The question was, therefore, not definitely determined by the Supreme Court.

§ 305. **Same Subject—Conclusion.**—In the first edition of this book published in 1908 it was said: In view of the language used in the Tift case, it can not be said that the Supreme Court

[48] Central Stock Yards Co. *v.* Louisville & N. R. Co., 192 U. S. 568, 570, 48 L. Ed. 565, 569, 24 Sup. Ct. 339, citing Interstate Stock Yards Co. *v.* Indianapolis U. Ry. Co., 99 Fed. 472.

[49] Injunction granted Tift *v.* So. Ry. Co., 123 Fed. 789, 138 Fed. 753, affirmed So. Ry. Co. *v.* Tift, 148 Fed. 1021, 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. 709; the affirmance, however, was based upon a stipulation in judicio; Toledo A. A. & N. M. Ry. Co. *v.* Penn. Co., 54 Fed. 730, 19 L. R. A. 387, 5 I. C. R. 545, 22 U. S. App. 561, citing Coe *v.* Railroad Co., 3 Fed. 775; Chicago & A. Ry. Co. *v.* New York, L. E. & W. Ry. Co., 24 Fed. 516; Wolverhampton & W. Ry. Co. *v.* London & N. W. Ry. Co., L. R. 16, Eq. 433; Denver & N. O. R. Co. *v.* Atchison, T. & S. F. Ry. Co., 15 Fed. 650; Scofield *v.* Railway Co., 43 Ohio St. 571, 3 N. E. 907; Kalispel Lumber Co. *v.* Great N. Ry. Co., 157 Fed. 845; Kiser *v.* Central of Ga. Ry. Co., 158 Fed. 193; Northern Pac. Ry. Co. *v.* Pacific Coast Lumber Mfg. Asso., 165 Fed. 1; Macon Grocery Co. *v.* Atlantic C. L. R. Co., 163 Fed. 738. Injunction denied: Potlatch Lumber Co. *v.* Spokane Falls & N. Ry. Co., 157 Fed. 588; but that decision was placed on the ground that the alleged rate was already in force; Jewett Bros. & Jewett *v.* Chicago, M. & St. P. Ry. Co., 156 Fed. 160, but sustaining the jurisdictional right. Great N. R. Co. *v.* Kalispel Lumber Co., 165 Fed. 25; on the ground that the rate was effective before an application for injunction was made. Atlantic C. L. R. Co. *v.* Macon Grocery Co., 166 Fed. 206, 92 C. C. A. 114; reversing the District Judge. See also citing Cases Long *v.* So. Ex. Co., 201 Fed. 441.

[50] Macon Grocery Co. *v.* Atlantic C. L. R. Co., 215 U. S. 501, 54 L. Ed. 300, 30 Sup. Ct. 184.

has definitely determined the question as to whether or no the United States courts may, without previous action by the Commission, enjoin an illegal rate already in existence, or enjoin the putting in effect a proposed rate claimed to be illegal. The Supreme Court does hold that the Abilene case is not authority against such jurisdiction, and it would seem that a stipulation of counsel could not confer jurisdiction on a court unless the court at least had jurisdiction over the subject-matter. The question must be determined by the Supreme Court and no more important question is now pending before that great tribunal.

If a shipper may not enjoin an unjust advance pending a determination by the Commission of its reasonableness, his remedy is clearly inadequate for the injury he may suffer from the exaction of the unjust rate.

Congress has been urged to give the Commission power to suspend an advance. The Senate Committee on Interstate Commerce, Senate bill 423, report No. 933, February 8, 1909, reported against giving such power to the Commission. One of the arguments used in that report is as follows:

"It is claimed that the indefinite suspension of the rate until final hearing is to deprive the carrier, if the rate advanced is reasonable, of his right of property during the period of suspension, without having given it any opportunity to be heard prior to the act of suspension. Due process of law must precede, and should not follow, the suspension. To set aside the carriers' act in fixing the rate pending the investigation required by due process of law is to deprive the carrier, *pro tanto,* of its property right to charge a reasonable rate. The fact that the statute requires an investigation after the suspension of the rate does not avoid the constitutional inhibition, as that provision can only be satisfied when the investigation precedes any disturbance of property rights. The carrier is entitled to the investigation before it is restrained in the *exercise* of its property rights; the theory of the amendment suggested is that the shipper is entitled to an investigation before the carrier can *exercise* its property rights."

This argument would not apply to injunctions granted by courts because when such injunction is granted "the carrier *receives* an investigation before it is restrained in the exercise of its property rights." The shipper also has "an investigation before the carrier can exercise" the power to deprive him of the

right to trade in such a way that the remedy is inadequate and the damage irreparable.

§ 306. **Same Subject—Effect of Amendment of 1910.**—As to all rates, rules and regulations which may be suspended by the Commission under section 15 of the act of 1910, it would seem that the remedy at law is adequate and that, therefore, courts of equity would have no jurisdiction to enforce its extraordinary equitable remedies.

The power to suspend now existing in the Commission applies only to a new individual or joint rate, fare, or charge, or any new individual or joint regulation or practice affecting any rate, fare, or charge.

There may be rules, regulations and practices which do not affect any rate, fare, or charge, and as to such the question is the same as that presented prior to the amendment of 1910. Judge Mayer in New York, in an unreported case, enjoined a tariff which, changing the former practice, eliminated the right of a consignee to inspect shipments of eggs prior to giving a receipt therefor. This new tariff did not affect a "rate, fare or charge," and was not suspended by the Commission although the reasonableness of the tariff was subsequently passed upon by that tribunal.[51]

§ 307. **Same Subject—Venue.**—Suits seeking to enjoin a rate averred to be an "arbitrary and manifold exaction" brought in a federal court are not dependent for jurisdiction solely upon the ground of diversity of citizenship and can not be brought in a federal district in which none of the defendants reside.[52]

[51] New York Mercantile Ex. *v.* Baltimore & O. R. Co., 36 I. C. C. 156.

[52] Macon Grocery Co. *v.* Atlantic C. L. R. Co., 215 U. S. 501, 54 L. Ed. 300, 30 Sup. Ct. 184; Act Aug. 13, 1888, 25 Stat. L. 433, chap. 866, U. S. Comp. Stat. 1901, 508, 4 Fed. Stat. Ann. 265. Prior to the decision of the Supreme Court in the Macon Grocery case other courts had held differently: United States *v.* Standard Oil Co., 152 Fed. 290; Van Patten *v.* Chicago, etc., Ry. Co., 74 Fed. 981; Toledo, etc., Ry. Co. *v.* Penn. Co., 54 Fed. 730, 19 L. R. A. 387, 5 I. C. R. 545, 22 U. S. App. 561; United States *v.* Mooney, 116 U. S. 104, 29 L. Ed. 550, 6 Sup. Ct. 304; Atkins *v.* Fiber Disintegrating Co., 18 Wall. 85 U. S. 272, 21 L. Ed. 841; Re Louisville Underwriters, 134 U. S. 488, 33 L. Ed. 991, 10 Sup. Ct. 587; Re Hohorst, 150 U. S. 653, 37 L. Ed. 1211, 14 Sup. Ct. 221; Westinghouse Air Brake Co. *v.*

§ 308. **Jurisdiction of Suits to Set Aside Orders of the Commission.**—All orders of the Commission, except orders for the payment of money, shall continue in force as may be provided by the Commission not exceeding two years, "unless the same shall * * * be suspended or set aside by a court of competent jurisdiction." Section 16 of the act provides for the "venue of suits * * * to enjoin, set aside, annul or suspend any order or requirement of the Commission;" and it is further provided that such a suit "may be brought at any time after such order is promulgated."

In addition to these provisions, the Commerce Court Act, as shown in a preceding section of this chapter, gave the court jurisdiction over cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission. This jurisdiction was transferred to the district courts by the act abolishing the Commerce Court.

When the Commission has denied relief to a complainant it has been held that no court has jurisdiction to set aside the order.[53]

§ 309. **Grounds upon Which Orders of the Commission May Be Set Aside.**—Orders of the Interstate Commerce Commission other than awards of damage made within the jurisdiction conferred on that tribunal are binding upon the carriers and companies subject thereto and, since the Amendment of 1906 a failure to obey such, subjects those corporations and persons included within the provisions of the Acts to Regulate Commerce to penalties.

Under the old law the Commission had no power to fix rates or prescribe practices for the future guidance of carriers subject to its jurisdiction. What orders it could make under that law had to be enforced by suits in the circuit and district courts, and on the hearings of such suits all reports of the Commission upon

Great N. Ry. Co., 88 Fed. 258, 31 C. C. A. 525; Kalispell Lumber Co. *v.* Great N. Ry. Co., 157 Fed. 845; Northern Pac. Ry. Co. *v.* Pacific Coast Lumber Manufacturers' Assn., 16 Fed. 1, 91 C. C. A. 39.

[53] Procter & Gamble *v.* United State, 225 U. S. 282, 56 L. Ed. 1091, 32 Sup. Ct. 761; reversing same styled case, 188 Fed. 221, Opinion Com. Ct. No. 9, p. 67; Hooker *v.* Int. Com. Com., 225 U. S. 302, 56 L. Ed. 1099, 32 Sup. Ct. 769; reversing same styled case, 188 Fed. 242, Opinion Com. Ct. No. 5, p. 33.

which such suits were brought were made "*prima facie* evidence of the matters therein stated." Under that law the Commission's report was not a "rule of action" but a finding of facts. The Hepburn Amendment gave the Commission power to make rates, to legislate for the future; it did not take away its administrative power to make findings of fact in certain cases.

If the order is deemed to be unlawful, suit to determine that question must be filed in the proper district court of the United States. The grounds upon which the courts may set aside such orders as determined by the courts may be grouped into these: (1) That the order violates some provision of the Constitution of the United States; (2) That in making the order the Commission has relied on some mistake of law; (3) That the order is not included within the powers conferred by the statute upon the Commission; (4) That the order is, although in form correct, in substance so unreasonable as to violate the law; (5) That the legal effect of undisputed testimony has been disregarded by the Commission; (6) That a full hearing was not had before the order was entered.

These different reasons overlap and to some extent are statements of the same ground of illegality expressed in somewhat different phraseology, but the classification is deducible from the decisions and its use tends to make clear the principles which have been applied by the courts.[54]

§ 310. **Same Subject. Violations of the Constitution—Fourth Amendment.**—The Fourth Amendment of the Constitution of the United States guarantees the security of persons, houses, papers and effects against unreasonable searches and seizures." Should an order of the Commission violate this provision, such order would be void.

[54] Int. Com. Com. *v.* Illinois Cent. R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. 155; reversing the Circuit Court in Chicago & A. R. Co. *v.* Int. Com. Com. and Illinois Cent. R. Co. *v.* Int. Com. Com., 173 Fed. 930; and sustaining the order of the Commission in Traer *v.* Chicago & A. R. Co., 13 I. C. C. R. 451. Mr. Justice Lamar stated these grounds somewhat differently, but in substance the same, in Int. Com. Com. *v.* Union Pac. R. Co., 222 U. S. 541, 56 L. Ed. 308, 32 Sup. Ct. 108. Florida East Coast R. Co. *v.* U. S., 234 U. S. 167, 58 L. Ed. 1267, 34 Sup. Ct. Rep. 867; Int. Com. Com. *v.* Louisville & N. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. Rep. 185; Louisville & N. R. Co. *v.* U. S., 238 U. S. 1, 59 L. Ed. —, 35 Sup. Ct. 696.

The provision has been urged in suits to annul orders of the Commission.[55] An order of the Commission requiring an officer of a carrier to make reports under oath showing what employees had rendered service in excess of the hours prescribed in the hours of service law, was held not to violate this provision.[56] When, however, an order requires an unreasonable search and seizure it is void.[57]

§ 311. **For a Violation of the Fifth Amendment.**—The Fifth Amendment provides that "no person shall * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

The decisions of the Supreme Court relating to rates fixed by state authority, the exercise of which authority was alleged to violate the Fourteenth Amendment by fixing a confiscatory rate, are valuable in determining the same question arising under the Fifth Amendment which limits the powers of the federal government as the fourteenth limits the powers of the state governments.[58] In an opinion of the Supreme Court, Mr. Chief Justice White said: "Beyond controversy in determining whether an order of the Commission shall be suspended or set aside we must consider all relevant questions of constitutional power."[59]

[55] Goodrich Transit Co. *v.* Int. Com. Com., 190 Fed. 943, Opinions Com. Ct. Nos. 21 to 24, p. 95. While the Commerce Court did not place its decision on the ground of the Fourth Amendment, it set aside the order of the Commission on other grounds, and was reversed by the Supreme Court, Int. Com. Com. *v.* Goodrich Transit Co., 224 U. S. 194, 56 L. Ed. 729, 30 Sup. Ct. 436. Holding that the Commission had no jurisdiction to require answers to the questions asked, see United States *v.* L. & N. R. Co., 236 U. S. 318, 59 L. Ed. —, 35 Sup. Ct. 363; Ellis *v.* Int. Com. Com., 237 U. S. 434, 59 L. Ed. —, 35 Sup. Ct. 645.

[56] Baltimore & O. R. Co. *v.* Int. Com. Com., 221 U. S. 612, 55 L. Ed. 878, 31 Sup. Ct. 621.

[57] Harriman *v.* Int. Com. Com., 211 U. S. 407, 419, 420, 53 L. Ed. 253, 29 Sup. Ct. 115. See also Weeks *v.* United States, 232 U. S. 383, 58 L. Ed. 652, 34 Sup. Ct. 341; Int. Com. Com. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 Sup. Ct. 1125; Int. Com. Com. *v.* Baird, 194 U. S. 25, 48 L. Ed. 860, 867, 24 Sup. Ct. 563; United States *v.* Skinner, 218 Fed. 870; and see also cases cited note 55, *supra*.

[58] See *ante*, Secs. 47, 48, 49, and notes thereto.

[59] Int. Com. Com. *v.* Illinois C. R. Co., 215 U. S. 452, 54 L. Ed.

A corporation is not entitled to the constitutional exemption from producing records, nor can an officer thereof refuse to produce the corporate records. "An officer of a corporation is protected by the self incrimination provision of the Fifth Amendment against the compulsory production of his private books and papers, but this privilege does not extend to books of the corporation in his possession."[60]

"The carrier can not complain of a violation of its constitutional rights, if not to favor some person or class, but for the general welfare, it is compelled to make a rate for some particular service which, though in excess of the out of pocket expense, would nevertheless be confiscatory if it were applied to all its freight, that is, the carrier has no constitutional right to a rate for each distinct kind of service which will equal its proportionate share of the entire operating expenses."[61]

If the foregoing language means that it is legal and proper to classify commodities so that those of unequal value may yield varying rates of return on the property investment, the court was correct. But it violates the constitutional rights of a carrier to require it to transport property at a rate which yields no sub-

280, 30 Sup. Ct. 155; Constitutional question argued but Commission sustained as no violation shown. Int. Com. Com. *v.* Union Pac. R. Co., 222 U. S. 541, 56 L. Ed. 308, 32 Sup. Ct. 108.

[60] Wilson *v.* United States, 221 U. S. 361, 55 L. Ed. 771, 31 Sup. Ct. 1538; cited and applied in Baltimore & O. R. Co. *v.* Int. Com. Com., 221 U. S. 612, 55 L. Ed. 878, 31 Sup. Ct. 621.

[61] Lemon Rates Case, Atchison, T. & S. Ry. Co. *v.* United States, 203 Fed. 56, Opinion Com. Ct. No. 61, p. 537, citing, Minneapolis & St. L. R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 900; St. Louis & S. F. R. Co. *v.* Gill, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484; Atlantic C. L. R. Co. *v.* North Carolina Corp. Com., 206 U. S. 1, 51 L. Ed. 933, 27 Sup. Ct. 585, 11 Ann. Cas. 398. In the final Lemon Rate Case, Atchison, T. & S. F. Ry. Co. *v.* Int. Com. Com., 190 Fed. 591, Opinion Com. Ct. No. 7, p. 83, the order of the Commission was set aside because as stated by the Court the Commission gave force to the tariff law. The Commission, on a supplementary proceeding, disclaimed such an intention and entered an order fixing rates as in the original order, and this second order was sustained by the Commerce Court. For Commission cases, see Arlington Heights Fruit Exchange *v.* Southern Pac. Co., 19 I. C. C. 148, and same styled case 22 I. C. C. 149.

stantial amount above the actual operating expense of the haul.[62]

§ 312. **For Mistake of Law.**—While the law in force prior to the enactment of the Hepburn Amendment made the order of the Commission only *prima facie* lawful, even under that law force was given the findings of the Commission upon disputed questions of fact. The present law gives the courts no jurisdiction over questions involving the credibility of witnesses or the weight of evidence.

In the Yellow Pine case[63] the Supreme Court discussed former cases and in summing up the decisions therein said: "In all these cases, therefore, there was a single, distinct and dominant proposition of law which the Commission had rejected and the exact influence of which on its decisions could not be estimated," and even under the then statute it was held that the orders of the Commission would not be disturbed because the Commission did not adopt certain presumptions of mixed law and fact put forward as factors in determining the reasonableness of a rate, and the court there stated as a suggestive applicable principle to the conclusions of the Commission that "such conclusions of fact were to be arrived at, looking at the matter broadly and applying common sense to the facts that are proved," and, said the court: "This court has ascribed to them (the findings and conclusions of the Commission) the strength due to judgments of a tribunal appointed by law and informed by experience."

The Commission's orders were set aside, because it held that under the law a carrier was not entitled to a profit for a service in stopping hay for purposes of treatment or reconsignment;[64]

[62] Northern Pac. Co. *v.* North Dakota, 236 U. S. 585, 59 L. Ed. —, 35 Sup. Ct. 429; Norfolk & W. Ry. Co. *v.* Conley, 236 U. S. 605, 59 L. Ed. —, 35 Sup. Ct. 437.

[63] Illinois C. R. Co. *v.* Int. Com. Com., 206 U. S. 441, 51 L. Ed. 1128, 27 Sup. Ct. 700; discussing Texas & Pac. Ry. Co. *v.* Int. Com. Com., 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666; Cincinnati, N. O. & T. P. Ry. Co. *v.* Int. Com. Com., 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700; Int. Com. Com. *v.* Alabama M. Ry. Co., 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45; Louisville & N. R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209; East Tenn., Va. & Ga. Ry. Co. *v.* Int. Com. Com., 181 U. S. 127, 45 L. Ed. 719, 21 Sup. Ct. 516. See also Cincinnati, etc., R. Co. *v.* Int. Com. Com., 206 U. S. 142, 51 L. Ed. 995, 27 Sup. Ct. 648.

[64] So. R. Co. *v.* St. Louis Hay & Grain Co., 214 U. S. 297, 53 L. Ed. 1004, 29 Sup. Ct. 678.

because it struck down a reasonable terminal charge on the erroneous ground that, taken with a prior unreasonable charge, the total charge was too high;[65] because it required a switch connection when no one authorized by the statute filed application therefor;[66] because, as was held by the court, it determined the lawfulness of a rate from an application of the law of estoppel;[67] because it held that a payment of an elevator allowance was illegal;[68] because an allowance for terminal facilities was held illegal;[69] because there was no evidence.[70]

Where the question involved in a suit to set aside the order of the Commission is one of fact, the principle stated by the Supreme Court is, "The outlook of the Commission and its powers must be greater than the interest of the railroads, or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it, therefore, are complex and difficult, the means of solving them are as great and adequate as can be provided."[71]

§ 313. **Lack of Jurisdiction.**—The powers of the Interstate Commerce Commission find their limitation as well as their grant in the statute, and should the Commission attempt to exercise any power not contained in the grant, its action would

[65] Int. Com. Com. *v.* Stickney, 215 U. S. 98, 54 L. Ed. 112, 30 Sup. Ct. 66.

[66] Int. Com. Com. *v.* Delaware, L. & W. Ry. Co., 216 U. S. 531, 54 L. Ed. 605, 30 Sup. Ct. 415.

[67] Southern Pac. Co. *v.* Int. Com. Com., 219 U. S. 433, 55 L. Ed. 283, 31 Sup. Ct. 288. See also Lemon Rate Case, Atchison, T. & S. F. Ry. Co. *v.* Int. Com. Com., 190 Fed. 591, Opinion Com. Ct. No. 20, p. 83, and 203 Fed. 56, Opinion Com. Ct. No. 61, p. 537.

[68] Int. Com. Com. *v.* Diffenbaugh, 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22. The Commission had put its finding on the *fact* that unjust discrimination existed, but evidence was undisputed and the conclusion from the admitted facts was one of law. Traffic Bureau Merchants Ex. of St. Louis *v.* Chicago, B. & Q. R. Co., 14 I. C. C. 317, 510, 551.

[69] Sugar Literage Case, United States *v.* Baltimore & O. R. Co., 231 U. S. 274, 58 L. Ed. 218, 34 Sup. Ct. 75, affirming Baltimore & O. R. Co. *v.* United States, 200 Fed. 779; Opinion Com. Ct. No. 38, p. 499.

[70] Florida E. C. R. Co. *v.* U. S., 234 U. S. 167, 58 L. Ed. 1267, 34 Sup. Ct. 867.

[71] Int Com. Com. *v.* Chicago, R. I. & P. R. Co., 218 U. S. 88, 54 L. Ed. 946, 30 Sup. Ct. 651. For a full discussion of the right of the Commission to exercise its judgment on questions of fact, see Illinois Cent. R. Co. *v.* Int. Com. Com., 206 U. S. 441, 51 L. Ed. 1128, 27 Sup. Ct. 700.

be void. The old law gave power to the Commission to establish through routes and joint rates applicable thereto when no reasonable through route existed. The non-existence of a reasonable through route was a necessary prerequisite to the exercise of the power to prescribe through routes, and whether or not this jurisdictional prerequisite existed was a question which the courts could determine, and when that question was found against the jurisdiction, the order of the Commission was set aside.[72] Under the present law the power of the Commission is broader and discretion is given to establish through routes "as the circumstances and conditions developed in each inquiry may seem to require." [73]

That the Commission has power to regulate transportation over the terminals at Galveston, when the transportation is within the Act to Regulate Commerce, has been determined.[74]

Orders held valid requiring the same rates on fuel coal as on commercial coal;[75] regulating the distribution of cars;[76] reducing rates;[77] regulating terminal charges:[78] carload rating for bulked shipments;[79] reports and accounting;[80] precooling charges.[81]

[72] Int. Com. Com. *v.* Northern Pac. Ry. Co., 216 U. S. 538, 54 L. Ed. 608, 30 Sup. Ct. 417; and so where no jurisdiction existed over a street railroad, Omaha and C. B. Street Ry. Co. *v.* Int. Com. Com., 230 U. S. 324, 57 L. Ed. 1501, 33 Sup. Ct. 890.

[73] Crane Iron Works *v.* United States, Opinion Com. Ct., No. 55, p. 453, 209 Fed. 238; Truckers Transfer Co. *v.* Charleston & W. C. Ry. Co., 27 I. C. C. 275, 277.

[74] Southern Pac. Terminal Co. *v.* Int. Com. Com., 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279.

[75] Int. Com. Com. *v.* Baltimore & O. R. Co., 225 U. S. 326, 56 L. Ed. 1107, 32 Sup. Ct. 742.

[76] Int. Com. Com. *v.* Illinois C. R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. 153; Int. Com. Com. *v.* Chicago & A. R. Co., 215 U. S. 479.

[77] Int. Com. Com. *v.* Chicago, R. I. & P. R. Co., 218 U. S. 88, and Int. Com. Com. *v.* Union Pac. R. Co., 222 U. S. 541, 56 L. Ed. 308, 32 Sup. Ct. 108; Int. Com. Com. *v.* Louisville & N. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185.

[78] Southern Pac. Terminal Co. *v.* Int. Com. Com., 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279.

[79] Int. Com. Com. *v.* Delaware, L. & W. Ry. Co., 220 U. S. 235, 55 L. Ed. 448, 31 Sup. Ct. 392.

[80] Int. Com. Com. *v.* Goodrich Transit Co., 224 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436; Kansas City So. Ry. Co. *v.* United States, 231 U. S. 423, 58 L. Ed. 296, 34 Sup. Ct. 125.

[81] Atchison, T. & S. F. Ry. Co. *v.* United States, 232 U. S. 199, 58 L. Ed. 568, 34 Sup. Ct. 291.

§ 314. **The Substance and Not the Form of the Finding Determines.**—Prescribing rates, rules and regulations for the future is a legislative act.[82] Congress has prescribed the general rules of action under which the Commission shall proceed, leaving to the Commission the application of those rules to particular situations and circumstances.[83]

That the power delegated to the Commission may be exercised within the form delegated does not deprive the courts of jurisdiction to review its orders if such orders be in substance a violation of the delegated authority for "the substance and not the shadow determines the validity of the exercise of the power."[84]

In the language of a Circuit Judge, "The power is vested in and the duty is imposed upon the circuit courts (now the district courts) to relieve from orders * * * which, though in form within its (the Commission's) delegated power, evidence so unreasonable an exercise of it that they are in substance beyond it."[85]

§ 315. **Disregard of the Legal Effect of Undisputed Testimony.**—Where there are disputed questions of fact, as has been stated many times, the jurisdiction of the Commission to determine what is the truth is exclusive and its conclusions are not subject to review by the courts.[86] Carriers, however, under the law at present have the primary right to make rates. If, after hearing, such rates are shown to be unreasonable or other-

[82] Hooker *v.* Int. Com. Com., 188 Fed. 242, and cases cited at p. 252, Opinion Com. Ct. No. 5, p. 33; reversed by Sup. Ct. on the ground that when relief is denied a shipper by the Commission the courts have no jurisdiction. Hooker *v.* Knapp, 225 U. S. 302, 56 L. Ed. 1099, 32 Sup. Ct. 769. See also Baer Bros. Mer. Co. *v.* D. & L. G. R. Co., 233 U. S. 479, 58 L. Ed. 1055, 34 Sup. Ct. 641.

[83] Int. Com. Com. *v.* Goodrich Transit Co., 224 U. S. 194, 210, 56 L. Ed. 729, 735, 32 Sup. Ct. 436; Kansas City So. R. Co. *v.* United States, 231 U. S. 423, 58 L. Ed. 296, 34 Sup. Ct. 125, 131.

[84] Int. Com. Com. *v.* Illinois C. R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. 153, citing Postal Cable-Tel. Co. *v.* Adams, 155 U. S. 688, 698, 39 L. Ed. 311, 15 Sup. Ct. 360. See also Southern Pac. Co. *v.* Int. Com. Com., 219 U. S. 433, 55 L. Ed. 283, 31 Sup. Ct. 288.

[85] Peavy *v.* Union Pac. R. Co., 176 Fed. 409, 418; on appeal modified on other points: Int. Com. Com. *v.* Diffenbaugh, 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22.

[86] Int. Com. Com. *v.* Delaware, L. & W. Ry. Co., 220 U. S. 235, 55 L. Ed. 448, 31 Sup. Ct. 392.

wise unlawful, the Commission may set them aside and require the substitution of just and lawful rates. If there is no evidence of the unlawfulness of an existing rate, the Commission has no power to prescribe another and different rate. When there is no disputed question of fact, the legal effect of evidence is a question of law over which the courts have jurisdiction,[87] and a finding of the Commission without evidence or contrary to the legal effect of undisputed evidence is void.[88] In discussing the general question Mr. Justice Lamar, delivering the opinion of the Supreme Court, said: "The reasonableness of rates can not be proved by categorical answers," and after stating facts considered by the Commission, he continued, "with that sort of evidence before them, rate experts of acknowledged ability and fairness, and each independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that, out of which experts could have named a rate. The law makes the Commission's findings on such facts conclusive."[89]

In the Precooling case,[90] Mr. Justice Lamar, after stating the power of the Commission, said: "All these matters are committed to the decision of the administrative body, which in each instance is required to fix reasonable rates, and establish reasonable practices. The courts have not been vested with any such power. They can not make rates. They can not interfere with rates fixed or practices established by the Commission unless it is made plainly to appear that those ordered are void."

§ 316. **Lack of Full Hearing.**—The language of the statute requires a full hearing. It was contended on behalf of the Commission that if after a hearing the Commission was of the opin-

[87] Int. Com. Com. *v.* Louisville & N. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185.

[88] Atchison, T. & S. Ry. Co. *v.* Int. Com. Com. and the United States, 188 Fed. 229, Opinion Com. Ct. No. 2, P. 3.

[89] Int. Com. Com. *v.* Union Pac. R. Co., 222 U. S. 541, 549, 56 L. Ed. 308, 32 Sup. Ct. 108.

[90] Atchison, T. & S. Ry. Co. *v.* United States, 232 U. S. 199, 58 L. Ed. 568, 34 Sup. Ct. 291, affirming same styled case, 204 Fed. 647, Opinion Com. Ct. No. 41, p. 627, and citing Int. Com. Com. *v.* Union Pac. R. Co., 222 U. S. 547 56 L. Ed. 311, 32 Sup. Ct. 108.

ion that a particular rate was unreasonable, its order based on such opinion was conclusive. Answering this contention, Mr. Justice Lamar, delivering the opinion of the Supreme Court said:

"But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficiently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence * * *, or if the facts do not as a matter of law support the order made.' "[91]

§ 317. **Awards of Damages.**—Section 8 of the act gives the person injured the right to recover "the full amount of damages sustained," and the Commission having made an award of damages, section 16 provides:

"If a carrier does not comply with an order for the payment of

[91] Int. Com. Com. *v.* Louisville & N. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185, citing Int. Com. Com. *v.* Union Pac. R. Co., 222 U. S. 541, 56 L. Ed. 311, 32 Sup. Ct. 108; Tang Tun *v.* Edsell, 223 U. S. 673, 681, 56 L. Ed. 606, 32 Sup. Ct. 359; Chin Yoh *v.* U. S., 208 U. S. 8, 13, 52 L. Ed. 369, 28 Sup. Ct. 201; Low Wah Suey *v.* Backus, 225 U. S. 460, 468, 56 L. Ed. 1165, 32 Sup. Ct. 734; Zakonite *v.* Wolf, 226 U. S. 272, 56 L. Ed. 218, 33 Sup. Ct. 31; United States *v.* B. & O. S. W. R. R., 226 U. S. 14, 57 L. Ed. 104, 33 Sup. Ct. 5, 9; Atlantic C. L. R. Co. *v.* North Carolina Corp. Com., 206 U. S. 1, 20, 51 L. Ed. 933, 27 Sup. Ct. 585; Wisconsin, M. & P. R. Co. *v.* Jacobson, 179 U. S. 287, 301, 45 L. Ed. 194, 21 Sup. Ct. 115.

money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or *in any state court of general jurisdiction* having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated. * * * If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

Orders making an award of damages must be lawful, and such orders are not binding if the Commission has violated the Constitution, exceeded its jurisdiction or acted without evidence or contrary to the undisputed evidence.[92] The circuit court of appeals held that an order of the Commission awarding damages which failed to prescribe a rate for the future was void.[93] This decision was reversed by the Supreme Court which held that the questions could be considered separately or together, for, said the court, "Awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its quasi-judicial capacity to measure past injuries sustained by a private shipper; the other in its quasi-legislative capacity, to prevent future injury to the public."[94]

The award is not a judgment but is *prima facie* evidence of the facts therein stated, and the finding that a rate exacted is un-

[92] Western N. Y. & P. R. Co. *v.* Penn Refining Co., 137 Fed. 343, 70 C. C. A. 23, affirmed, Penn Refining Co. *v.* Western N. Y. & P. Ry. Co., 208 U. S. 208, 52 L. Ed. 456, 28 Sup. Ct. 268.

[93] Denver & R. G. R. Co. *v.* Baer Bros. Mer. Co., 187 Fed. 485, 109 C. C. A. 337.

[94] Baer Bros. Mercantile Co. *v.* Denver & R. G. R. Co., 233 U. S. 479, 58 L. Ed. 1055, 34 Sup. Ct. 641, citing Tex. & Pac. Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350; Robinson *v.* Baltimore & O. R. Co., 222 U. S. 506, 56 L. Ed. 288, 32 Sup. Ct. 114.

reasonable and that the plaintiff has suffered damage, does not preclude the defendant from showing in court facts constituting a defense.[95] Interest may be allowed by the Commission in fixing the amount of an award, and the courts in suits thereon may allow attorneys fees for services before the courts.[96]

The Commission having once acted, declaring a particular rate unlawful, it was held unnecessary for an injured shipper again to present the same question to the Commission before electing to sue directly in a federal court to recover his damages.[97]

The reasonableness of a rate is not involved in a suit on an award of damages made by the Commission and based upon a charge in excess of a rate legally filed with the Commission, and

[95] Meeker *v.* Lehigh Valley R. Co., 236 U. S. 412, 59 L. Ed. —, 35 Sup. Ct. 328; reversing Circuit Court of Appeals, Lehigh Valley R. Co. *v.* Meeker, 211 Fed. 785; Meeker *v.* Lehigh Valley R. Co., 236 U. S. 434, 59 L. Ed. —, 35 Sup. Ct. 328; Mills *v.* Lehigh Valley R. Co., 238 U. S. 473, 59 L. Ed. —, 35 Sup. Ct. 888, reversing Circuit Court of Appeals in Lehigh Valley R. Co. *v.* Clark, 207 Fed. 717, 125 C. C. A. 235. See related questions in Penn. R. Co. *v.* International Coal Co., 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893; Penn. R. Co. *v.* Clark Bros. Coal Mining Co., 238 U. S. 456, 59 L. Ed. —, 35 Sup. Ct. 896; Penn. R. Co. *v.* Clark Bros. Coal Mining Co., 241 Pa. 515, 88 Atl. 754.

[96] Cases Note 95, *supra,* and Denver & R. G. R. Co. *v.* Baer Bros. Mer. Co., 209 Fed. 577, 126 C. C. A. 399. The history of this case is interesting. Baer Bros. Mercantile Co. brought suit in the United States Court, but upon the decision of the Supreme Court in Texas & Pacific Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, the suit was voluntarily dismissed. Complaint was then filed with the Commission, Baer Bros. Mercantile Co. *v.* Mo. Pac. Ry. Co., 13 I. C. C. 329, upon which an order awarding damages was entered. Upon this order the District Court entered a judgment and allowed attorney's fees. This decision and decree were reversed by the Circuit Court of Appeals. Denver & R. G. R. Co. *v.* Baer Bros. Mercantile Co., 187 Fed. 485, 109 C. C. A. 337. The Court of Appeals was reversed and the District Court affirmed by the Supreme Court: Baer Bros. Mer. Co. *v.* Denver & R. G. R. Co., note 94, *supra,* and see Baer Bros. Mer. Co. *v.* Mo. Pac. Ry. Co., 17 I. C. C. 225. The petition to set aside this order was dismissed, a preliminary injunction having been denied, Denver & R. G. R. Co. *v.* Int. Com. Com., 195 Fed. 968, Opinion Com. Ct. No. 35, p. 401.

[97] National Pole Co. *v.* Chicago & M. O. Ry. Co., 211 Fed. 65, See also Note 65, *supra.*

on such an award attorneys fees may be allowed by the court.[98]

It would seem, therefore, that when the Commission follows the authority given in the statute, the power of attorney under which it acts, the effect given its findings should be those stated in Cincinnati, H. & D. R. Co. *v.* Int. Com. Com., where the Supreme Court says:[99]

"The statute gives *prima facie* effect to the findings of the Commission, and, when those findings are concurred in by the circuit court, we think they should not be interfered with unless the record established that clear and unmistakable error has been committed."

§ 318. **Awards of Damages—Parties and Procedure.**—In suits on orders of the Commission awarding damages, all parties in whose favor the Commission may have made an award by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.[100]

§ 319. **Procedure to Enforce or Annul Orders of the Commission.**—The jurisdiction conferred on the Commerce Court stated in section 298 above was transferred to the district courts by the Act of October 22, 1913,[101] and that Act further provides that the procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States.

Cases pending in the Commerce Court at the date that court

[98] Chicago, B. & Q. R. Co. *v.* Feintuck, 191 Fed. 482, 112 C. C. A. 126.

[99] Cincinnati, H. & D. R. Co. *v.* Int. Com. Com., 206 U. S. 142, 51 L. Ed. 995, 27 Sup. Ct. 648.

[100] Sec. 16 of Act; Sec. 407, *post.*

[101] Sec. 460, 461, 463, *post.*

became abolished were by the statute transferred to the proper district courts, and authority was given to the Judges of the Commerce Court to make orders necessary to effectuate such transfer. And after that date, cases remanded by the Supreme Court which had been appealed from the Commerce Court were to be remanded to a district court, designated by the Supreme Court, wherein it might have been instituted at the time it was instituted in the Commerce Court.

§ 320. **Interlocutory Injunctions—Three Judges to Hear Application for.**—The District Court Jurisdiction act provides:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges."

This provision is similar to section 17 of the Act June 18, 1910, which section had reference to injunctions against state laws and, as amended, against orders made by administrative state officers,[102] and the decisions on that statute are of value in considering this provision.

Where only one judge acts on an application for an interlocutory injunction his order is a nullity. As said by the Supreme Court, "the hearing and determination of the request for a temporary injunction should have been had before a court consisting of three judges constituted in the mode specified by the statute. * * * A tribunal not so constituted did not possess jurisdiction."[103]

[102] Judicial Code, Sec. 266, amended by act March 4, 1913, 37 Stat. 1013; Louisville & N. R. Co. *v.* U. S., 238 U. S. 1, 59 L. Ed. —, 35 Sup. Ct. 696.

[103] Ex parte Metropolitan Water Co., 220 U. S. 539, 55 L. Ed. 576, 31 Sup. Ct. 600; and see Louisville & N. R. Co. *v.* Garrett, 231 U. S. 298, 58 L. Ed. 229, 34 Sup. Ct. 48; Louisville & N. R. Co. *v.* Railroad Com. of Ala., 208 Fed.

§ 321. **Interlocutory Injunctions—Notice and Hearing.**—No application for an interlocutory injunction enjoining, in whole or in part, any order of the Interstate Commerce Commission shall "be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, and to such other persons as may be defendants in the suit; *provided* that in cases where irreparable damages would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judge may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for."[104]

The language relating to a statement of facts as to irreparable damages to be made by the court granting an injunction is the same as that in the Commerce Court Act. Construing the language in that Act the Supreme Court held that there were three things provided for, (1) a temporary restraining order, (2) an injunction *pendente lite*, and (3) a perpetual injunction, and that "the statement of facts as to irreparable damages relate only to the first class of cases," and it was ruled that the granting of an injunction *pendente lite* rested in the sound discretion of the trial court.[105]

35; where an order of a State Railroad Commission was involved but no interlocutory injunction asked, three judges were not necessary, Seaboard Air Line Ry. Co. *v.* Railroad Com. of Ga., 213 Fed. 27.

[104] Judicial Code Sec. 208.

[105] United States *v.* Baltimore & O. R. Co., 225 U. S. 306, 56 L. Ed. 1100, 32 Sup. Ct. 817. See same case, United States *v.* Baltimore & O. R. Co., 231 U. S. 274, 58 L. Ed. 218, 34 Sup. Ct. 75, 76.

The reënactment of the statute in the District Court Jurisdiction Act adopts this prior construction whether it be fully supported by the language of the statue or not.

§ 322. **Interlocutory Injunctions—Appeal from.**—An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused.

This provision for appeal applies to interlocutory injunctions and not to a temporary stay or suspension.[106]

§ 323. **Appeal from Final Judgment.**—Upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to the judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the Attorney General of the state.

Section two of the Act of June 18, 1910, relating to appeals from the Commerce Court gave the Commerce Court power to "direct the original record to be transmitted on appeal instead of a transcript thereof," and provided that an appeal should not stay or supersede the judgment appealed from unless so ordered by the Supreme Court or a justice thereof, and that appeals should have priority in hearing and determination. Neither of these provisions is contained in the repealing Act.

§ 324. **Venue of Suits.**—The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Com-

[106] See construction by Supreme Court, Sec. next preceding.

mission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.[107]

The venue here prescribed is not so broad as that stated in section 16 of the Act under which suit may be brought wherein is the residence of the party upon whose petition or for whose benefit the order was made, and also in the district "in which is located the principal operating office of the carrier, or through which the road of the carrier runs."[108]

[107] Secs. 462 to 469, *post.*

[108] Sec. 407, *post.*

CHAPTER VIII.

ACTS OF CONGRESS INDIRECTLY AFFECTING INTERSTATE TRANSPORTATION.

§ 325. Scope of Chapter.
326. Quarantine Laws Relating to Transportation.
327. Sherman Anti-Trust Law.
328. Clayton Anti-Trust Law.
329. Federal Trade Commission Law.
330. Safety Appliance Law.
331. Hours of Service Law.
332. Employers' Liability Law.
333. Arbitration Law.
334. Breaking Seals of Railroad Cars Containing Interstate or Foreign Commerce.

§ 325. **Scope of Chapter.**—The general purpose of this work is to state the law governing the transportation of freight and passengers. It is not a treatise on the general law of carriers, nor is it a discussion of the commerce clause of the Constitution of the United States. These questions are incidentally involved, but the main purpose of the work is to treat of the rights of shippers and carriers which arise out of, relate to or are affected by the acts of Congress. Of these acts, the act to regulate commerce, the amendments thereof and supplements thereto, including the Elkins law, are the most important. These acts are herein copied and annotated (see chapter nine).

The so-called anti-trust statutes being the act of July 2, 1890 and known as the Sherman Act, and the act of Oct. 15, 1914, known as the Clayton Act, do affect carriers, and the Clayton Act expressly confers jurisdiction on the Interstate Commerce Commission.

The 28-hour law directly affects the questions discussed in this book and that statute is discussed in chapter 10 *post*. A knowledge of the other statutes hereinafter referred to is sometimes necessary to a clear understanding of the questions affecting the rights and duties of carriers engaged in interstate transportation. Other statutes herein referred to and inserted in appendices more or less directly affect the questions which must be ascertained in the regulation of interstate transportation of

freights and passengers. For this reason, reference to these statutes will be made in this chapter.

§ 326. **Quarantine Laws Relating to Transportation.**— Health and quarantine laws generally have little relation to rail carriers, although by Sec. 3 of the act of 1890 it was made a misdemeanor for any common carrier to violate any quarantine laws of the United States.[1]

By the act of Mch. 3, 1905, railroad companies and carriers and masters of steam vessels or other vessels or boats are prohibited from receiving for transportation and from transporting in interstate commerce, cattle or other live stock except in conformity to the act, and it is provided that the Secretary of Agriculture shall make and promulgate rules and regulations governing such transportation. Meat inspection is provided for by the act of 1907, and the transportation in interstate commerce of "any carcasses or parts thereof, meat or other meat products which have not been inspected, examined and marked "Inspected and passed" in accordance with terms of (said) this act, and with the rules and regulations prescribed by the Secretary of Agriculture," is prohibited. In the agricultural appropriation act of 1908, the Act of 1907 is extended to include "dairy products."[2] The Bureau of Animal Industry, a bureau of the Department of Agriculture, has charge of making, promulgating and enforcing regulations under these statutes, and the Act of 1913[3] makes all the

[1] Act March 27, 1890, ch. 51, 26 Stat. 31. See also for health and quarantine laws relating to vessels, 3 Fed. Stat. Ann. pp. 214, 228. See also Sec. 6 Act March 3, 1905, ch. 1496, 33 Stat. 1264, 10 Fed. Stat. Ann. 37.

[2] Act March 3, 1905, ch. 1496, 33 Stat. 1264, 10 Fed. Stat. Ann. 37, Act March 4, 1907, ch. 2907, 34 Stat. 1260, Fed. Stat. Ann. March 1909, p. 46. See Sec. 484, Post Meat Inspection Act, Act May 23, 1908, ch. 192 Fed. Stat. Ann. Supp. 1909, p. 92. See also Acts May 29, 1884, 23 Stat. 31; March 3, 1891, March 2, 1895, 1 Fed. Stat. Ann. 448, February 2, 1903, 32 Stat. 791. Regulations made by the Secretary of Agriculture have the force of a statute. State *v.* Peet, 80 Vt. 449, 68 Atl. 661.

[3] Act March 4, 1913, 37 Stat., pt. I, C. 831. The Supreme Court held that a carrier receiving the cattle from a connecting carrier at a point outside the quarantine district was not within the provision of the act of 1905. United States *v.* B. & O. S. W. R. Co., 222 U. S. 8, 56 L. Ed. 68, 32 Sup. Ct. 6, and this act apparently was introduced to meet this decision. An ordinance prohibiting the shipment of milk in interstate commerce that had not been inspected, was held valid. Adams *v.* City of Milwaukee, 228

provisions of the Act of 1905 "apply to any railroad company or other common carrier whose road or line form any part of a route over which cattle or other live stock are transported in the course of shipment from any quarantined state or territory or the District of Columbia, or from the quarantined portion of any" such state, territory or district.

Regulations have been issued under authority of these statutes which prescribe in detail the rules to which the carriers must conform. The acts of Congress relating to federal quarantine are compiled with the regulations prescribed by the United States Department of Agriculture in Bureau of Animal Industry Order 210, issued June 18, 1914, and an amendment thereto issued August 22, 1914.

§ 327. **Sherman Anti-Trust Law.**—The Sherman Anti-Trust Law is copied and annotated in chapter eleven hereof. The act was at first construed as not applying to carriers. This question was definitely settled in Trans-Missouri Freight Asso. case.[4] In this case the court said:

"The language of the act includes every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations. So far as the very terms of the statute go, they apply to any contract of the nature described. A contract therefore that is in restraint of trade or commerce is by the strict language of the act prohibited even though such contract is entered into between competing carriers by railroad, and only for the purposes of thereby affecting traffic rates for the transportation of persons and property. * * * The point urged on the defendants' part is that the statute was not really intended to reach that kind of an agreement relating only to traffic rates entered into by competing common carriers by railroad; that it was intended to reach only those who were engaged in the manufacture or sale of articles of commerce, and who by means of trusts, combinations and conspiracies were engaged in affecting the supply or the price or the place of manufacture of such articles. The

U. S. 572, 57 L. Ed. 971, 33 Sup. Ct. 610. Same style case, 144 Wis. 371, 129 N. W. 518, 43 L. R. A. (N. S.) 1066. To same effect see Asbell *v.* Kansas, 209 U. S. 2513, 52 L. Ed. 778, 28 Sup. Ct. 485 and Note 26 L. R. A. (N. S.) 279.

[4] United States *v.* Trans-Missouri Freight Asso., 166 U. S. 290, 41 L. Ed. 1007, 17 Sup. Ct. 540, 1 Fed. Anti-Trust Dec. 648.

terms of the act do not bear out such construction. Railroad companies are instruments of commerce, and their business is commerce itself."

This ruling was followed in the Joint Traffic case.[5]

That a violation of this act in advancing rates was a proper matter to be considered when complaint was brought against the advanced rates, was determined in the Tift case.[6] The amendment of June 18, 1910[7] placing the burden on the carriers to show that rates increased after January 1, 1910, are just and reasonable applies the same burden which the Commission held resulted when rates were increased as an effect of an illegal combination. However, interstate carriers may not by consolidation or combination create a dominating control and thereby unduly restrict or suppress competition in transportation.[8] In establishing through routes and joint rates, a common carrier may not with the intent and result of eliminating competition select one carrier and exclude others.[9] Where a carrier had established a wharf as a public terminal station for the delivery of coal, it could not lawfully contract granting the exclusive right to a single tug to dock and undock vessels thereat.[10] While such a contract might be illegal under the provisions of the act to regulate commerce prohibiting undue discrimination, the anti-trust statutes and such provisions have as one common object the requirement that no undue or unjust preference shall be accorded. This rule was not applied to a contract by which a long distance telephone company made an agreement for the interchange of

[5] United States *v.* Joint Traffic Asso., 171 U. S. 505, 43 L. Ed. 259, 19 Sup. Ct. 25, 1 Fed. Anti-Trust Dec. 869.

[6] Tift *v.* Southern Ry. Co., 138 Fed. 753, 2 Fed. Anti-Trust Dec. 733; Tift *v.* S. Ry. Co., 10 I. C. C. 548.

[7] Sec. 92. Ante, *Post.*

[8] United States *v.* Union P. R. R. Co., 226 U. S. 61, 57 L. Ed. 124, 33 Sup. Ct. 53, United States *v.* Reading Co., 226 U. S. 324, 57 L. Ed. 243, 33 Sup. Ct. 90.

[9] United States *v.* Pacific & A. Ry. & Nav. Co., 228 U. S. 87, 57 L. Ed. 742, 33 Sup. Ct. 433.

[10] Baker-Whiteley Coal Co. *v.* Baltimore & O. R. Co., 188 Fed. 405, 110 C. C. A. 234, reversing same style case 176 Fed. 632, and citing and discussing cases, distinguishing Weems Steamboat Co. *v.* Peoples Co., 214 U. S. 345, 53 L. Ed. 1024, 29 Sup. Ct. 661, and Louisville & N. R. R. Co. *v.* West Coast Naval Stores Co., 198 U. S. 483, 49 L. Ed. 1135, 25 Sup. Ct. 745.

messages with a local company to the exclusion of all other like companies.[11]

§ 328. **The Clayton Anti-Trust Law.**—The purpose of the anti-trust statute approved Oct. 15, 1914,[12] was to make more definite the provisions of the Sherman Act, and to provide more effective means for enforcing the former act. Section 11 of the Clayton Act gives authority to the Interstate Commerce Commission to enforce the provisions of designated sections of the act, and section 10 is a regulation of interstate carriers with reference to certain contracts therein specified. This act and the Sherman Anti-Trust Act are contained in chapter 11 of this book.

§ 329. **Federal Trade Commission.**—The act to create a federal trade commission, approved September 26, 1914,[13] gives the commission so created certain regulatory powers over corporations, firms and partnerships engaged in interstate commerce other than those subject to regulation by the Interstate Commerce Commission. The Act. Sec. 4, defines certain words, among which are:

"Commerce means commerce among the several states or with foreign nations, or in any territory of the United States, or in the District of Columbia, or between any such territory and another, or between any such territory and any state or foreign nation, or between the District of Columbia and any state or territory or foreign nation."

" 'Acts to regulate commerce' means the act entitled 'An Act to Regulate Commerce' approved February 14th, 1887, and all acts amendatory thereof and supplementary thereto."

Sec. 11 provides: "Nothing contained in this act shall be construed to prevent or interfere with the enforcement of the

[11] Pacific Telephone & Tel. Co. *v.* Anderson, 196 Fed. 699, citing and discussing State *v.* Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; Home Tel. Co. *v.* Sarcoxie Light & Tel. Co., 236 Mo. 114, 139 S. W. 108; Home Tel. Co. *v.* People's Tel. Co., 125 Tenn. 270, 141 S. W. 845; Home Tel. Co. *v.* Granby Tel. Co., 147 Mo. App. 216, 126 S. W. 773; Atchison T. & S. F. Ry. Co. *v.* Denver, etc., R. R. Co., 110 U. S. 667, 28 L. Ed. 291, 4 Sup. Ct. 185; St. Louis I. M. & S. Ry. Co. *v.* Southern Express Co. Express Cases, 117 U. S. 1, 29 L. Ed. 791, 6 Sup. Ct. 542, 628; Union Pac. Ry. Co. *v.* United States, 59 Fed. 813, 827, 8 C. C. A. 282, 296.

[12] See Secs. 495, et seq., *post.*

[13] Appendix A.

provisions of the anti-trust acts, or the acts to regulate commerce, nor shall anything contained in this act be construed to alter, modify or repeal the said anti-trust acts, or the acts to regulate commerce, or any part or parts thereof."

§ 330. **Safety Appliance Law.**—Under the title Safety Appliance Acts may be included the Automatic Coupler Act (Appendix B), of March 2, 1893; as amended April 1, 1896; a supplement to the Automatic Coupler Act passed March 2, 1903, (Appendix C); the supplement to the Automatic Coupler Act approved April 14, 1910, and March 4, 1911, (Appendix D); the act requiring reports of accidents, approved May 6, 1910, (Appendix E); the Medals of Honor Acts, approved Feb. 23, 1905, (Appendix F); the Hours of Service Act (Appendix G), approved March 4, 1907; the Ash Pan Act, approved May 30, 1908, (Appendix H); the Explosive Acts, approved March 4, 1909, (Appendix I); the Boiler Inspection Act approved Feb. 17, 1911, (Appendix J).

These acts may not all be logically classed as safety appliance acts, yet they all relate to the safety of interstate transportation and may properly be considered together.

These acts rest upon the right of Congress to regulate commerce with foreign nations and among the several states. The primary object of all these acts was to promote the public welfare by securing the safety of employees and travelers; the acts are, therefore, remedial, and should be so construed as not to defeat the obvious intentions of Congress.

By the Sundry Civil Appropriation Act of June 28, 1902, the Commission is given authority to employ "inspectors to execute and enforce the requirements of the Safety Appliance Acts."

§ 331. **Hours of Service Law.**—The Hours of Service Act limits the time for which railroads may require or permit employees subject to be or remain on duty, gives the Commission power "after full hearing in a particular case and for good cause shown to extend" the time within which the carriers included in the act shall employ with the proviso of Section 2, and provides for penalties for violations of the act.[14]

The Commission has held that this act applies to street car

[14] Schweig v. Chicago M. & St. P. Ry. Co., 205 Fed. 96. See for a full discussion of these acts Kent's Digest of Decisions under Safety Appliance Acts.

lines which are interstate carriers;[15] that it does not apply to employees deadheading on passenger trains not engaged in the performance of any service,[16] nor to a ferry owned by a railroad not used as a car ferry,[17] nor to a trainman occasionally using the telegraph or telephone to meet an emergency.[18] The Commission by conference rulings 88 and 287 has interpreted the act, and these rulings are inserted in a note hereto.[19] A sep-

[15] Conf. Rul. 56.

[16] Conf. Rul. 74; South Covington R. Co. *v.* Covington, 235 U. S. 537, 59 L. Ed. —, 35 Sup. Ct. 158.

[17] Conf. Rul. 108.

[18] Conf. Rul. 342.

[19] Conf. Rul. 88 is as follows:

88. HOURS-OF-SERVICE LAW.—(*a*) The specific proviso of the law in regard to hours of service is:

"That no operator, train dispatcher, or other other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour-period in all towers, offices, places and stations continuously operated night and day, for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week."

These provisions apply to employees in towers, offices, places, and stations, and do not include train employees who, by the terms of the law, are permitted to be or remain on duty sixteen hours consecutively or sixteen hours in the aggregate in any twenty-four hour period, and who may occasionally use telegraph or telephone instruments for the receipt or transmission of orders affecting the movement of trains. (See Ruling 287.)

(*b*) Section 3 of the law provides that:

"The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."

Any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip. (See Ruling 287.)

Conf. Rul. 287 is as follows:

March 16, 1908.

287. THE HOURS OF SERVICE LAW.—(*a*) The provisions of this act apply to all common carriers by railroad in the District of Columbia, or in any Territory of the United States, or engaged in the movement of interstate or foreign traffic; and to all employees of such com-

arate penalty is incurred for each employee remaining on duty in

mon carriers who are engaged in or connected with the movement of any train carrying traffic in the District of Columbia, or in any Territory, or carrying interstate or foreign traffic.

(*b*) SEC. 2. The requirement for ten consecutive hours off duty applies only to such employees as have been on duty for sixteen consecutive hours. The requirement for eight consecutive hours off duty applies only to employees who have not been on duty sixteen consecutive hours, but have been on duty sixteen hours in the aggregate out of a twenty-four hour period. Such twenty-four period begins at the time the employee first goes on duty after having had at least eight consecutive hours off duty. The term "on duty" includes all the time during which the employee is performing service, or is held responsible for performance of service. An employee goes "on duty" at the time he begins to perform service, or at which he is required to be in readiness to perform service, and goes "off duty" at the time he is relieved from service and from responsibility for performance of service.

(*c*) The act does not specify the classes of employees that are subject to its terms. All employees engaged in or connected with the movement of any train, as described in section 1, are within its scope. Train dispatchers, conductors, engineers, telegraphers, firemen, brakemen, train baggagemen, who, by rules of carriers, are required to perform any duty in connection with the movement of trains, yardmen, switch tenders, tower men, block-signal operators, etc., come within the provisions of the statute. (See also Ruling 88.)

(*d*) The proviso in section 2 covers every employee who, by the use of the telegraph or telephone, handles orders pertaining to or affecting train movements. In order to preserve the obvious intent of the law this provision must be construed to include all employees who, by the use of an electrical current, handle train orders, or signals which control movements of trains. (See Ruling 88.)

(*e*) The prime purpose of this law is to secure additional safety by preventing employees from working longer hours than those specified in the act. Therefore a telegraph or telephone operator who is employed in a night and day office may not be required to perform duty in any capacity or of any kind beyond nine hours of total service in any twenty-four hour period.

(*f*) The phrase "towers, offices, places, and stations" is interpreted to mean particular and definite locations. The purpose of the law and of the proviso for nine hours of service may not be avoided by erecting offices, stations, depots, or buildings in close proximity to each other and operating from one a part of the day while the other is closed, and *vice versa*.

The statute is remedial in its intent and must have a broad construction so that the purpose

violation of the act, and the statute relates to employees on duty, although they may be inactive.[20]

of the Congress may not be defeated.

(*g*) The Commission interprets the phrase "continuously operated night and day" as applying to all offices, places, and stations operated during a portion of the day and a portion of the night, a total of more than thirteen hours.

The phrase "operated only during the daytime" refers to stations which are operated not to exceed thirteen hours in a twenty-four hour period, and is not considered as meaning that the operator thereat may be employed only during the daytime.

(*h*) The act provides that operators employed at night and day stations or at daytime stations may, in case of emergency, be required to work four additional hours on not exceeding three days in any week. Manifestly, the emergency must be real and one against which the carrier can not guard.

"In any week" is construed to mean in any calendar week, beginning with Sunday.

(*i*) SEC. 3. The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point. (See Ruling 88.)

"Casualty," like its synonyms "accident" and "misfortune," may proceed or result from negligence or other cause known or unknown. (Words and Phrases Judicially Defined, vol. 2, 1003.)

Act of God. Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight, and pains, and care reasonable to have been expected. (Bouvier's Law Dictionary, vol. 1, 79.)

(*j*) It will be noted that the penalties for violation of this act are against the "common carriers, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty," in violation of the law. It is clear that the officers and agents of carriers who are liable to the penalties provided in the act are those who have official direction or control of the employees; and that the penalties do not attach to the employees who, subject to such supervision or control, perform the service prohibited.

(*k*) SEC. 4. To enforce this act Interstate Commerce Commission has all the powers which have been granted to it for the enforcement of the act to regulate commerce, including authority to appoint employees, to require reports, to examine books, papers, and documents, to administer oaths, to issue subpœnas, and to interrogate witnesses.

[20] Mo., Kan. & Tex. Ry. Co. *v.* U. S., 231 U. S. 112, 58 L. Ed. 144, 34 Sup. Ct. 26.

§ 332. **Employers' Liability Law.**—The first Employers' Liability Act, that of June 11, 1906, chap. 3073, 34 Stat. L. 232, was declared by the Supreme Court of the United States to be unconstitutional, because, as construed, it applied not only to the employees of carriers engaged in interstate, but also to carriers while engaged in intrastate commerce. Whether the act violated the 14th Amendment was not decided, but reference was made to decisions of the court holding valid state laws making a special regulation as to a carrier's liability to its employees.[21]

The present act (Appendix K) was approved April 22, 1908,[22] and its validity has been sustained by the Supreme Court.[23] Differences of opinion having arisen as to the jurisdiction of the state courts, the act was amended in 1910, by providing that state and federal courts should have concurrent jurisdiction in suits brought under the act and for the survivorship of causes of action.[24]

This act indirectly affects the questions considered in this book, and further discussion thereof is unnecessary.

§ 333. **Arbitration Law.**—The act of June 1, 1898,[25] known as the Arbitration Act, or sometimes as the Erdman Act, had as its purpose the settlement of controversies between carriers and their employees. This statute is persuasive and does not attempt to be compulsory. Arbitrators under the act are essentially common law arbitrators and rights of the parties thereto rest upon the contract of arbitration, which contract must be

[21] Employers' Liability Cases, Howard *v.* Ill. Cent. R. Co., 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. 141; Missouri, P. R. Co. *v.* Mackey, 127 U. S. 205, 32 L. Ed. 107, 8 Sup. Ct. 1161; Minneapolis & St. L. R. Co. *v.* Herrick, 127 U. S. 210, 32 L. Ed. 109, 8 Sup. Ct. 1176; Chicago, K. & W. R. Co. *v.* Pontius, 157 U. S. 209, 39 L. Ed. 675, 15 Sup. Ct. 585.

[22] 35 Stat. 65, ch. 149, U. S. Comp. Stat. Supp. 1911, p. 1322; Fed. Stat. Ann. 1909 Supp., p. 584, 1912 Supp., p. 1735.

[23] Mondou *v.* New York, N. H. & H. R. Co. (Second Employers' Liability Act), 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 38 L. R. A., N. S., 44; Philadelphia B. & W. R. Co. *v.* Schubert, 224 U. S. 603, 56 L. Ed. 911, 32 Sup. Ct. 589.

[24] Act Apr. 5, 1910, C. 143, 36 Stat. 391. U. S. Comp. Stat. Supp. 1911, p. 1322; Fed. Stat. Ann. 1912, Supp. p. 335. See proviso to Sec. 28 Judicial Code. Barnett *v.* Spokane P. & S. Ry. Co., 210 Fed. 94.

[25] Arbitration Act, also called Erdman Act, approved June 1, 1898, chap. 370, 30 Stat. L. 424, *et seq.*, 4 Fed. Stat. Ann. 784, U. S. Comp. Stat. 1901, p. 3205.

construed in accordance with the rules governing contracts. In an arbitration had in accordance with the terms of the act, Judge Van Fleet speaks of the "very commendable object aimed at by the act" and says:[26] "The evident purpose of the law was to afford a ready summary, and speedy method of amicably adjusting labor disputes arising between the class of employers and employees to which it applies."

By act of March 4, 1911, 36 Stat. 1397, Fed. Stat. Ann. Supp. 1912, p. 260, it is provided: "The President of the United States from and after the passage of this act is authorized to designate from time to time any member of the Interstate Commerce Commission by the provisions of the 'act concerning carriers engaged in interstate commerce and their employees,' approved June first, eighteen hundred and ninety-eight; and the member so designated, during the period for which he designated, shall have the powers now conferred by said act on the chairman of the Interstate Commerce Commission."

The Erdman Act was repealed by the more comprehensive act of July 15, 1913.[27]

§ 334. **Breaking Seals of Railroad Cars Containing Interstate or Foreign Shipments.**—By act of Feb. 13, 1913, it was made a crime unlawfully to break the seal of any railroad car containing interstate or foreign shipments of freight or express, or to enter such car with intent to commit larceny therein, or to steal, unlawfully take, carry away or conceal goods or chattels moving as interstate freight, or to buy or receive such when unlawfully taken by another.[28]

[26] Re Southern Pacific Co., 155 Fed. 1001.

[27] Act July 15, 1913, 38 Stat. 103, chap. 6, Fed. Stat. Ann. 1914 Supp. p. 244; Appendix L. Superceding Act Note 25, *supra*.

[28] Act Feb. 13, 1913, 37 Stat. 670, chap. 50, Fed. Stat. Ann. 1914 Supp. 203, Appendix M. See also Train Robbery Act, July 1, 1902, 62 Stat. 727; chap. 1376; Fed. Stat. Ann., vol. 6, p. 758.

CHAPTER IX.

ACTS REGULATING COMMERCE.

Including act approved February 4, 1887, chapter 104, effective April 5, 1887, 24 Stat. L. 379, U. S. Comp. Stat. 1901, p. 3154, 3 Fed. Stat. Ann. 809, et. seq. Known as the Cullom Act.

Amendment of March 2, 1889, 25 Stat. L. 855, Chap. 382, U. S. Comp. Stat. 1901, p. 3158, 3 Fed. Stat. Ann. 852, et. seq.

Amendment of February 10, 1891, Chapter 128, 26 Stat. L. 753, U. S. Comp. Stat. 1901, p. 3163, 3 Fed. Stat. Ann. 839.

Amendment of February 8, 1895, Chap. 61, 28 Stat. L. 643, U. S. Comp. Stat. 1901, p. 3171, 3 Fed. Stat. Ann. 851.

Act February 11, 1893, 27 Stat. L. 443, Chap 83, U. S. Comp. Stat. 1901, p. 3173, 3 Fed. Stat. Ann. 855. Known as the Testimony Act.

Act February 11, 1903, Chapter 544, 32 Stat. L. 823, U. S. Comp. Stat. Supp. 1907, 10 Fed. Stat. Ann. 199. Known as the Expediting Act.

Act February 19, 1903, Chap. 708, 32 Stat. L. 847, U. S. Comp. Stat. Supp. 1907, p. 880, 10 Fed. Stat. Ann. 170. Known as the Elkins Act.

Act February 25, 1903, Chap. 755, 32 Stat. L. 903, 10 Fed. Stat. Ann. 173, being section one of the Appropriation Act.

Act June 29, 1906, 34 Stat. L. 584, Chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892, Fed. Stat. Ann. Supp. 1907, p. 167. Known as the Hepburn Act.

Act June 30, 1906, Chap. 3920, 34 Stat. L. 798, U. S. Comp. Stat. Supp. 1907, p. 900, Fed. Stat. Ann. Supp. 1907, p. 382.

Act April 13, 1908, 35 Stat. L. 60, Chap. 143

Act of June 18, 1910, 36 Stat. L. 539, Chap. 309, U. S. Comp. Stat. Supp. 1911, p. 1288, Fed. Stat. Ann. Supp. 1912, pp. 111 to 127.

Act Aug. 24, 1912, 37 Stat. L. 566, Chap. 390, Fed. Stat. Ann. Supp. 1914, p. 378. Known as Panama Canal Act.

Act Mch. 4, 1913, 37 Stat. L. 1013, Chap. 160, Fed. Stat. Ann. Supp., p. 226.

Act Mch. 1, 1913, 37 Stat. L. 701, Chap. 92, Fed. Stat. Ann. Supp. 1914, p. 204.

Act Oct. 22, 1913. Known as District Court Act.

Government Aided Railroad and Telegraph Lines Act.

Lake Erie and Ohio Ship Canal Act.

Parcel Post Act.

Witness Acts.

Act March 4, 1915. Known as Cummins Amendment

§ 335. Scope of Act to Regulate Commerce.
336. Not Applicable to Intrastate Transportation.
337. Terms "Common Carrier," "Railroad," and "Transportation" Defined.

338. Duty of Carrier to Furnish Transportation and to Establish Through Routes.
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341. Classifications, Regulations and Practices Must be Reasonable.
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344. Terms under Which Switch Connections Shall Be Made.
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360. No Change of Schedules of Rates Shall Be Made Without Notice.
361. Names of All Carriers Parties to Schedules Must Be Specified.
362. Carriers Shall File Contracts Relating to Traffic Arrangements.
363. Commission May Prescribe Form of Schedules.
364. No Carrier Shall Participate in Interstate Commerce Unless the Charges Therefor are Published, and No Such Carrier Shall Deviate from the Published Schedules.
365. Preference and Precedence May Be Given Military Traffic in Time of War.
366. The Commission May Reject Schedules.
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371. Rebate. Punishment for Offering, Granting, Soliciting, or Accepting.

372. Act of Officer or Agent, When Binding.
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374. Forfeiture for Rebating in Addition to Penalties. Limitation of Six Years Fixed.
375. Jurisdiction over Water Carriers.
376. Physical Connection Between Rail Lines and Dock of Water Carriers.
377. Through Routes and Joint Rates Between Rail and Water Carriers.
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380. Conditions under Which Through Routes and Joint Rates with Water Carriers May Be Operated to Be Prescribed by the Commission.
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382. Damages and Attorneys' Fees Allowed for Violations.
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384. Penalties for Violations of the Act.
385. Penalties for False Billing, False Classification, False Weighing, etc., by Carriers.
386. Penalties against Shippers for False Billing, etc.
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388. Appointment and Term of Office of Commissioners.
389. Power and Duty of Commissioners.
390. Power of Courts to Punish for Disobedience, Witnesses Not Excused Because Testimony May Incriminate.
391. Right to Take Testimony by Depositions and the Manner Thereof Prescribed.
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404. Charges for Instrumentalities Furnished by Shipper, Must Be Reasonable.
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406. Award of Damages Shall Be Made by Commission after Hearing.
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409. All Parties Jointly Awarded Damages May Sue as Plaintiffs Against All Carriers Parties to the Award.
410. Service of Orders of Commission.
411. Commission May Suspend or Modify Its Orders.
412. Punishment for Knowingly Disobeying an Order Issued under Section Fifteen.
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414. Courts May Enforce Obedience to Commission's Order, Mandatory or Otherwise.
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418. Salaries and Expenses of the Commission.
419. Principal Office of Commission in Washington, but May Prosecute Inquiries Elsewhere.
420. The Commission Is Authorized to Investigate, Ascertain and Report the Value of Railroad Property.
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422. How Such Investigation Is Prosecuted.
423. Duty of Carriers to Aid the Investigation.
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425. Carrier to Make Reports.
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427. Hearings Before Valuation Fixed.
428. Effect of Valuation as Evidence.
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433. Commission May Prescribe Form of Keeping Accounts and Inspect Same.
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435. The Commission May Permit the Destruction of Papers.
436. Penalty for an Examiner Divulging Information Received as Such.
437. United States Circuit and District Courts May, Upon Application of Attorney-General at Request of Commission, Enforce Provisions of Act.
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440. Carriers Liable for Full Value of Property Transported—Cummins Amendment.
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442. Circumstances under Which Reduced or Free Fares and Rates May Be Given.
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451. Pending Cases Not Affected.
452. Commission to Investigate Questions Pertaining to Issuance of Stocks and Bonds.
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455. Parties Defendant Other than Carriers in Suit to Enforce Provisions of Act.
456. Equitable Proceedings May Be Instituted by the Commission to Restrain Discrimination or Departures from Published Rates.
457. Immunity and Compulsory Attendance of Witnesses, Production of Books and Papers.
458. Expediting Act Applicable to Suits Brought under Direction of Attorney-General.
459. Repealing Clause Not Affecting Pending Suits or Accrued Rights.
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463. Procedure in the District Courts..
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473. Duty of the Attorney-General.
474. Penalties Provided.
475. Duty of Telegraph and Railroad Companies to File Contracts with and Make Reports to Interstate Commerce Commission.
476. Right of Congress to Alter or Annul Act.
477. Lake Erie and Ohio River Ship Canal.
478. Parcel Post.
479. Compulsory Attendance of Witnesses and Production of Papers Provided for.
480. Amendment to Compulsory Attendance Act.

§ 335. **Scope of Act to Regulate Commerce.**—That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from

a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country:

Paragraph one of section one of act to regulate commerce, as amended by act of June 18, 1910. The original act read:

"That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country."

The act of June 18, 1910, amended the act of June 29th, 1906, by including "telegraph, telephone and cable companies whether wire or wireless."

Original act constitutional. Int. Com. Com. *v.* Brimson, 154 U. S. 447, 448, 38 L. Ed. 1047, 14 Sup. Ct. 1125.

A purely intrastate carrier not participating in a through movement is not within the act because the ultimate destination of the traffic may be beyond the state. Mo. & Ill. Rd. Tie & Lumber Co. *v.* Cape, etc., R. Co., 1 I. C. C. 30, 1 I. C. R. 607; New Jersey Fruit Exp. *v.* Central R. Co. of New Jersey, 2 I. C. C. 142, 2 I. C. R. 84. Express companies not within original act, though railroads conducting an express business are. Re Express Companies, 1 I. C. C. R. 349, 1 I. C. R. 677; United States *v.* Morsman, 42 Fed. 448.

A state road owning no rolling stock but used as a means of interstate traffic within act. Heck *v.* E. T. V. & G. R. Co., 1 I. C. C. 495, 1 I. C. R. 775. An interstate bridge subject to act. Ky. & Ind. Bridge Co. *v.* L. & N. R. Co., 2 I. C. C. 162, 2 I. C. R. 102. Order not enforced. Same style case, 37 Fed. 567.

Commerce between points in the state but passing through another state in interstate commerce. New Orleans Cotton Exchange *v.* Cincinnati, N. O. & T. P. R. Co., 2 I. C. C. 375, 2 I. C. R. 289; Milk Producers Asso. *v.* Delaware etc. R. Co., 7 I. C. C. 92, 162. Foreign carriers participating in traffic from points in the United States to adjacent countries subject. Re Investigation Acts Grand Trunk Railway of Canada, 3 I. C. C. 89, 2 I. C. R. 496. Independent water lines not subject. New Orleans Cotton Exchange *v.* Ill. Cent. R. Co., 3 I. C. C. 534, 562, 2 I. C. R. 777.

When a state carrier engages in interstate commerce it becomes subject to the act. Mattingly *v.* Penn. Co., 3 I. C. C. 592, 2 I. C. R. 806. State steamboat not within act. Capehart & Smith *v.* L. & N. R. Co., 4 I. C. C. 265, 3 I. C. R. 278. "Common control, management or arrangement" defined. Boston Fruit & Produce Exchange *v.* New York and New England Co., 4 I. C. C. 664, 3 I. C. R. 493. See same case, 5 I. C. C. 1, 3 I. C. R. 604. See also Trammel Railroad Commission of Ga. *v.* Clyde Steamship Company, 5 I. C. C. 324, 4 I. C. R. 120. All roads, including purely state roads, participating in an interstate haul subject to act. James and Mayer Buggy Company *v.* Cincinnati, N. O. & T. P. R. Co., 4 I. C. C. 744, 3 I. C. R. 682. Order not enforced in circuit but was enforced in Supreme Court. Int. Com. Com. *v.* Cincinnati, N. O. & T. P. R. Co., 56 Fed. 925, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700. Same rule when all water carrier joins. R. R. Com. of Florida *v.* Savannah, Fla. & W. R. Co., 5 I. C. C. 13, 136, 3 I. C. R. 688, 750. Order not enforced. Savannah, F. & W. R. Co. *v.* Florida Fruit Exchange, 167 U. S. 512, 42 L. Ed. 257, 17 Sup. Ct. 998. The charter of the Northern Pacific Railroad Company does not exempt it from control of act. Raworth *v.* N. Pac. R. Co., 5 I. C. C. 234, 3 I. C. R. 857. Merchants Union of Spokane Falls *v.* N. Pac. R. Co., 5 I. C. C. 478, 4 I. C. R. 183. Order not enforced. Farmers' L. & T. Co. *v.* N. Pac. R. Co., 83 Fed. 249. Receivers of railroad companies subject to act. Independent Refiners Asso. *v.* W. N. Y. & Penn. R. Co., 6 I. C. C. 378, 386. Order not enforced. W. N. Y. & P. R. Co. *v.* Penn. Refining Co., 137 Fed. 343, 70 C. C. A. 23. Affirmed, 208 U. S. 208, 52 L. Ed. 456, 28 Sup. Ct. 268. Electric Railway partly in Maryland and party in District of Columbia subject to act. Wilson *v.* Rock Creek Ry. Co., 7 I. C.

C. 83. Does not apply to transportation by wagon. Cary *v.* Eureka Springs Ry. Co., 7 I. C. C. 286. Stock Yards Terminal Road at Chicago not a common carrier. Cattle Raisers Asso. of Texas *v.* Ft. Worth & D. C. Ry. Co., 7 I. C. C. 513, 555-a. Order not enforced. Int. Com. Com. *v.* C. B. & Q. R. Co., 98 Fed. 173, 103 Fed. 249, 43 C. C. A. 209, 186 U. S. 320, 46 L. Ed. 1182, 22 Sup. Ct. 824. Import and export traffic over rail carriers within jurisdiction. Ocean carriers not. Kemble *v.* Boston & A. R. Co., 8 I. C. C. 110, 119. The determinating features of a through shipment is the contract. Matter of Alleged Unlawful Rates and Practices in Transportation of Cotton, 8 I. C. C. 121. Within act when engaged with other carriers in through transportation. Alleged Violation of Act by St. L. & S. F. Ry. Co., 8 I. C. C. 290; Penn. Millers Asso. *v.* Philadelphia & R. Ry. Co., 8 I. C. C. 531, 549. Applies on a movement from Canada to United States, Cist. *v.* Mich. Cent. R. Co., 10 I. C. C. 217. Shipment from one to another local point even though there may be an intention thereafter to ship to another and an interstate point is entitled to the local rate. Hope Cotton Oil Co. *v.* Tex. & Pac. Ry. Co., 10 I. C. C. 696, 703. After a car has arrived at its destination a subsequently contracted for switching movement to another place in the same city and state is not within the act. St. Louis Hay and Grain Company *v.* Chicago, B. & Q. R. Co., 11 I. C. C. 82. Refrigeration charges within act. Re Charges for Transportation and Refrigeration of Fruit, 11 I. C. C. 129. Stage line over which part of a through movement is had not within act. Wylie *v.* N. Pac. Ry. Co., 11 I. C. C. 145. Baggage transfer not within act. Re Exchange of Free Transportation, 12 I. C. C. 39. A ferry transport joining in a through route and joint rate is within act. Enterprise Transportation Co. *v.* Penn. R. Co., 12 I. C. C. 326, 335, 336. While a shipment to a local point with intention thereafter to make a new contract for shipment to an interstate point is not within the act, the carrier must not act as agent of the shipper in making the reconsignment. Morgan *v.* M. K. & T. Ry. Co., 12 I. C. C. 525. No distinction between electric and steam roads. Chicago & M. Electric R. Co. *v.* Ill. Cent. R. Co., 13 I. C. C. 20. No jurisdiction over shipments from ports of United States to a foreign country not adjacent to this country. Cosmopolitan Shipping Co. *v.* Hamburg Am. Packet Co., 13 I. C. C. 266, 272, 273, 274; Lykes S. S. Line *v.* Commercial Union,

13 I. C. C. 310. Interstate movement regarded as an entirety and all carriers participating therein are subject to the act. Subject fully discussed and cases cited. Leonard *v.* Kansas City S. Ry. Co., 13 I. C. C. 573. A terminal company owned by the same interests as a railroad within act. "Railroad" includes depots, yards and grounds. Eichenberg *v.* So. Pac. Co., 14 I. C. C. R. 250. Order not enjoined. So. Pac. T. Co. *v.* Int. Com. Com., 166 Fed. 134. Interstate carriers by water are subject to act only in respect to traffic transported under a common control, management or arrangement with a rail carrier. With respect to other traffic such water carriers are exempt from the provisions of the act. Re Jurisdiction Over Water Carriers, 15 I. C. C. 205. Switching not within act. Chicago, M. & St. P. Ry. Co. *v.* Becker, 32 Fed. 849. Water carrier from one state to another not joining in a through bill of lading with rail carriers not subject to act. Terms of section defined. Ex parte Koehler, 30 Fed. 867. A bridge crossing a stream from one state to another which is leased to a railroad is not a common carrier. Ky. & Ind. Bridge Co. *v.* L. & N. R. Co., 37 Fed. 567. A shipment from one to another point in a state and which was immediately reshipped by the agent of consignor to a point without the state within section. Cutting *v.* Fla. Ry. & Nav. Co., 46 Fed. 641. A state road by joining in a contract for through traffic becomes subject to the act to regulate commerce. Augusta S. R. Co. *v.* Wrightsville & T. R. Co., 74 Fed. 522; United States *v.* Seaboard Ry. Co., 82 Fed. 563; Interstate Stock Yards Co. *v.* Indianapolis U. Ry. Co., 99 Fed. 472; Cassatt *v.* Mitchell Coal & Coke Co., 150 Fed. 32, 81 C. C. A. 80, 10 L. R. A. (N. S.) 99; Mitchell Coal & Coke Co. *v.* Cassatt, 207 U. S. 181, 187, 52 L. Ed. 160, 163, 28 Sup. Ct. 108, 110; U. S. *v.* New York, C. & H. R. R. Co., 153 Fed. 630. Affirmed, New York C. & H. R. R. Co., 212 U. S. 481, 500, 53 L. Ed. 613, 29 Sup. Ct. 304; United States *v.* Standard Oil Co., 155 Fed. 305. Reversed on another ground. Standard Oil Co. *v.* U. S., 164 Fed. 376, 90 C. C. A. 364. United States *v.* Union Stock Yards Co. of Omaha, 161 Fed. 919; United States *v.* Sioux City Stock Yards, 162 Fed. 556. If the state carrier received no freight on nor issues through bills of lading it is not subject. Int. Com. Com. *v.* Bellaire Z. & C. Ry. Co., 77 Fed. 942; United States *v.* Chicago, K. & S. R. Co., 81 Fed. 783; United States *v.* Geddes, 131 Fed. 452, 65 C. C. A. 320; State of Iowa *v.* Chicago,

M. & St. P. Ry. Co., 33 Fed. 391, 145 U. S. 632, 36 L. Ed. 857, 12 Sup. Ct. 978. Transportation from one point to another in the same state, though passing through another state, is not interstate commerce. United States *v.* Lehigh Valley R. Co., 115 Fed. 373; Lehigh Valley R. Co. *v.* Pennsylvania, 145 U. S. 192, 36 L. Ed. 672, 12 Sup. Ct. 806. Contra United States *v.* Delaware, L. & W. R. Co., 152 Fed. 269, citing Hanley *v.* Kansas City, etc., R. Co., 187 U. S. 617, 47 L. Ed. 333, 23 Sup. Ct. 214; Lord *v.* Goodall N. & P. Steamship Co., 102 U. S. 541, 26 L. Ed. 224; Pacific Coast S. S. Co. *v.* Railroad Comrs., 9 Sawy. 253, 18 Fed. 10. Hanley *v.* R. R., *supra,* definitely settles the question that such transportation is interstate commerce. Private car companies furnishing their cars indiscriminately to carriers subject to act. Int. Com. Com. *v.* Reichmann, 145 Fed. 235.

The test of subjection to the act is through routing in interstate commerce. United States *v.* Wood, 145 Fed. 405, 411. All carriers engaged in transporting interstate freight by a continuous passage are within the regulation of interstate commerce by Congress. United States *v.* Colorado and N. W. R. Co., 157 Fed. 321, 85 C. C. A. 27; same style, 157 Fed. 342, 85 C. C. A. 48. Phillips, district judge, dissenting in an able opinion. Chicago, B. & Q. R. Co. *v.* United States, 157 Fed. 830, 85 C. C. A. 194.

A water carrier operating entirely within a state but engaged in transporting interstate commerce is subject to regulation by Congress. The steamer Daniel Ball, 10 Wall. 77 U. S. 557, 19 L. Ed. 999. Exportation begins when goods are committed to a common carrier for transportation beyond the state. Coe *v.* Errol, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. 475. A local carrier transporting interstate commerce under through bills of lading is engaged in interstate commerce. Cincinnati, New Orleans & T. P. Ry. Co. *v.* Int. Com. Com., 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700. For Commission decision see James & Mayer Buggy Co. *v.* Cincinnati, N. O. & T. P. Ry. Co., 4 I. C. C. 744, 2 I. C. R. 625, 3 id. 682, Circuit Court, 56 Fed. 925, Circuit Court of Appeals, 64 Fed. 981, 13 U. S. App. 730. Int. Com. Com. *v.* Detroit, G. H. & M. Ry. Co., 167 U. S. 633, 42 L. Ed. 306, 17 Sup. Ct. 986. Affirming, 74 Fed. 803, 21 C. C. A. 103. Norfolk & W. R. Co. *v.* Penn., 136 U. S. 114, 34 L. Ed. 394, 10 Sup. Ct. 958; United States *v.* Wood, 145 Fed. 405; United

States *v.* New York C. & H. R. R. Co., 153 Fed. 630, 632. Through transportation without through bills of lading make interstate commerce subject to the act. United States *v.* Colorado and N. W. R. Co., 157 Fed. 321, and cases cited. Railroads that share in an agreed interstate rate subject to act. L. & N. R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209. See same case 6 I. C. C. 257, 4 I. C. R. 520, 71 Fed. 835, 83 Fed. 898, 28 C. C. A. 229, 42 U. S. App. 581. Mere intention to continue the transportation of an interstate shipment after it reaches its destination to another point in the same state as such destination will not make the last shipment interstate. Gulf, etc., R. Co. *v.* Texas, 204 U. S. 403, 51 L. Ed. 540, 27 Sup. Ct. 360. Express companies under the amendment of June 29, 1906, included. United States *v.* Wells Fargo Exp. Co., 161 Fed. 606. American Exp. Co. *v.* United States, 212 U. S. 522, 53 L. Ed. 635, 29 Sup. Ct. 315.

Notes of Decisions Rendered Since 1909.

"Wholly by Railroad" discussed, Federal Sugar Refinery Company *v.* B. & O. R. Co., 17 I. C. C. 40, 46, 20 I. C. C. 200, Opin. of Com. Ct. Baltimore & O. R. Co. *v.* U. S., 200 Fed. 779, Opinion Com. Court No. 38, page 499; for a related case see American Sugar Ref. Co. *v.* Delaware, L. & W. Ry. Co., 200 Fed. 652. Same styled case, 207 Fed. 733, 125 C. C. A. 251. Commerce Court sustained. U. S. *v.* B. & O. R. Co., 231 U. S. 274, 58 L. Ed. 218, 34 Sup. Court 75, known as Sugar Lighterage Case.

The provisions of the Act of June 18, 1910 stated; Shoemaker *v.* C. & P. Telephone Co., 20 I. C. C. 614. Section quoted in its application to pipe lines, Re Pipe Lines, 24 I. C. C. 1; order of Int. Com. Com. enjoined; Prairie Oil & Gas Co. *v.* United States, 204 Fed. 798, Com. Court Nos. 75 to 80, p. 545, Com. Court reversed in part; U. S. *v.* Ohio Oil Co., 234 U. S. 548, 58 of L. Ed. 1394, 34 Sup. Ct. 956. State rates not to be used in interstate shipments. Kanotex Refinery Co. *v.* A. T. & S. F. R. Co., 34 I. C. C. 271. Applies to rate in Alaska. Int. Com. Com. *v.* U. S. ex rel. Humbolt S. S. Co., 224 U. S. 474, 56 L. Ed. 849, 32 Sup. Ct. 556; reversing the Int. Com. Com. in Re Jurisdiction in Alaska, 19 I. C. C. 81, and affirming U. S. ex rel. Humbolt S. S. Co. *v.* Int. Com. Com., 39 Wash. Law Rep. 386. Jurisdiction over Canadian Railroads discussed but not determined. Rates on High Explosives, 33 I. C. C. 567. May require carriers in United

States to cease from concurring in joint rates with Canadian lines. International Paper Co. *v.* D. & H. Co., 33 I. C. C. 270. Jurisdiction over Cable Companies. White *v.* W. U. Tel. Co., 33 I. C. C. 500. Whether or not a shipment of freight is within the provision of the act must be determined by "the essential character of the commerce, not its mere accidents." Tex. & N. O. R. Co. *v.* Sabine Tram Co., 227 U. S. 111, 129, 130, 57 L. Ed. 442, 449, 33 Sup. Ct. 229, 234. Citing, Coe *v.* Errol, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. 475; So. Pac. Terminal Co. *v.* Int. Com. Com., 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279; Railroad Com. of Ohio *v.* Worthington, 225 U. S. 101, 56 L. Ed. 1004, 32 Sup. Ct. 653; State *v.* Southern Kan. Ry. Co., 49 S. W. 252; State *v.* International & Gt. Nor. R. Co., 71 S. W. 994; Gulf, C. & S. F. Ry. Co. *v.* Fort Grain Co., 72 S. W. 419; Same *v.* Same, 73 S. W. 845, and distinguishing Gulf C. & S. F. Ry. Co. *v.* Texas, 204 U. S. 403, 51 L. Ed. 540, 27 Sup. Ct. 360. But see Chicago M. & St. P. R. Co. *v.* Iowa, 233 U. S. 334, 58 L. Ed. 988, 34 Sup. Ct. 592.

§ 336. **Not Applicable to Intrastate Transportation.**—*Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.

Proviso as amended by Act June 18, 1910.

The proviso to paragraph one, section one, as originally enacted, read:

Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country from or to any state as aforesaid. For annotations, see next preceding section.

Notes of Decisions Rendered Since 1909.

This proviso does not prevent granting relief under Sec. 3 of Act, although the discrimination is caused by a state made intrastate rate. Railroad Com. of La. *v.* St. L. S. W. Ry. Co.

(Shreveport case), 23 I. C. C. 31; order sustained Texas & P. Ry. Co. *v.* United States, Houston E. & W. T. Ry. Co. *v.* Same, 205 Fed. 380, 391, Com. Ct. No. 68, p. 655; Com. Ct. affirmed, Houston E. & W. T. Ry. Co. *v.* U. S., 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833. State Rates not the Measure of Interstate Rates. Corp. Com. of Okla. *v.* A. T. & S. F. R. Co., 31 I. C. C. 532; Trier *v.* C. St. P. M. & O. R. Co., 30 I. C. C. 352. Rates on Beer, 31 I. C. C. 544. Rates on Live Poultry, 32 I. C. C. 380, but see Western Rate Advance case 1915, 35 I. C. C. 497. A terminal company part of a railroad and steamship system not excluded from the jurisdiction of the Commission by this proviso. So. Pacific Terminal Co. *v.* Int. Com. Com., 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279. Same styled case, 166 Fed. 134, sustaining the Commission in Eichenberg *v.* So. Pac. Co., 14 I. C. C. 250. See Texas & No. R. Co. *v.* Sabine Tram Co., *supra,* Sec. 335 together with cases cited and discussed in that case, and Chicago M. & St. P. R. Co. *v.* Iowa, also cited in Sec. 335.

§ 337. **Terms "Common Carrier," "Railroad," and "Transportation" Defined.**—The term "common carrier" as used in this act shall include express companies and sleeping car companies. The term "railroad" as used in this act, shall include all bridges and ferries used or operated in connection with any railroads, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease, and shall also include all switches, spurs, tracks and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities, of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all service in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

Paragraph two, section one, of act as amended by act of June 29, 1906. The paragraph of the original act read:

"The term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad,

whether owned or operated under a contract, agreement, or lease; and the term 'transportation' shall include all instrumentalities of shipment or carriage."

A privately owned stock car not a common carrier. Burton Stock Car Co. *v.* Chicago, B. & Q. R. Co., 1 I. C. C. 132, 1 I. C. R. 329, 353. Express companies not included in original act. Re Express Companies, 1 I. C. C. 349, 369, 1 I. C. R. 677. Report of Commission 1887, 1 I. C. R. 650, 657. An interstate bridge a common carrier. Ky. & I. Bridge Co. *v.* L. & N. R. Co., 2 I. C. C. 162, 2 I. C. R. 102. *Contra* holding the bridge company not a common carrier. Ky. & I. Bridge Co. *v.* L. & N. R. Co., 37 Fed. 567. A stock yards terminal road not a common carrier. Cattle Raisers Asso. *v.* Ft. W. & D. C. Ry. Co., 7 I. C. C. 513, 555-a. Order not enforced. Int. Com. Com. *v.* Chicago, B. & Q. R. Co., 98 Fed. 173, 103 Fed. 249, 43 C. C. A. 209, 186 U. S. 320, 46 L. Ed. 1182, 22 Sup. Ct. 824. Stage line not a common carrier within meaning of this act. Wylie *v.* N. Pac. Ry. Co., 11 I. C. C. 145. Baggage company not within act, and "common carrier" means a carrier subject to the act. Re Right of R. R. Co's. to Exchange Free Transportation with Local Transfer Co's., 12 I. C. C. 39. A ferry transportation company entering into a through transportation arrangement is a common carrier. Enterprise Trans. Co. *v.* Penn. R. Co., 12 I. C. C. 326, 335. "Railroad" defined. Eichenberg *v.* So. Pac. Co., 14 I. C. C. 250. "Common carrier" defined. United States *v.* Sioux City Stock Yards Co., 162 Fed. 556.

Notes of Decisions Rendered Since 1909.

Applies to street railways. West End Imp. Club *v.* O. & C. B. R. & B. Co., 17 I. C. C. 239. Jurisdiction Over Urban Electric Lines, 33 I. C. C. 536. Commission held to be without jurisdiction. O. & C. B. St. Ry. Co. *v.* Int. Com. Com., 179 Fed. 243, Commission sustained by Com. Ct. Omaha & C. B. St. Ry. Co. *v.* Int. Com. Com., 191 Fed. 40, Opin. Com. Ct. No. 25, p. 147; Com. Ct. & Com. reversed without passing on the effect of the amendment of June 18, 1910, passed subsequent to the action of the Commission. Omaha & C. B. St. Ry. *v.* Int. Com. Com., 230 U. S. 324, 57 L. Ed. 1501, 46 L. R. A. (N. S.) 385, 33 Sup. Ct. 890. Outbound shipment under a transit privilege is transportation. Brook-Rauch Mill & Elevator Co. *v.* St. L. I. M. & S. Ry. Co., 21 I. C. C. 651. Bridge Company under the facts stated not sub-

ject to Act. Kansas City *v.* K. C. V. & T. Ry. Co., 24 I. C. C. 22. Elevation connected with transportation may be paid for by the carriers. Re Elevation Allowances, 24 I. C. C. 197. For history of decisions relating to elevation see Re Allowances to Elevators by Mo. Pac., 14 I. C. C. 315; Traffic Bureau, Merchants Exchange of St. Louis *v.* C. B. & C. R. R. Co., 14 I. C. C. 317, 22 I. C. C. 496; Peavy & Co. *v.* N. Pac., 176 Fed. 409; Int. Com. Com. *v.* Diffenbaugh, 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22. Union P. R. Co. *v.* Updike Grain Co., 222 U. S. 215, 56 L. Ed. 171, 32 Sup. Ct. 39, affirming Updike Grain Co. *v.* N. P. R. Co., 178 Fed. 223, 101 C. C. A. 583. Meaning of Transportation as Applied to Lining Cars. S. W. Mo. Millers' Club *v.* St. L. & S. F. R. Co., 26 I. C. C. 245; Heating Cars, Protection of Potato Shipments in Winter, 26 I. C. C. 681. A sleeping car destined over an interstate route is an instrumentality of interstate commerce while lying over at a junction. Pullman Co. *v.* Linke, 203 Fed. 1017. Icing Car Load Shipments within the act. Cudahy Packing Co. *v.* G. W. Ry. Co., 215 Fed. 93.

Congress has occupied the field as to express companies engaged in interstate commerce, thus excluding the power of state laws to affect. Barrett *v.* New York, 232 U. S. 14, 58 L. Ed. 483, 34 Sup. Ct. 203. A jitney a common carrier. Nolen *v.* Riechman, 225 Fed. 812.

§ 338. **Duty of Carrier to Furnish Transportation and to Establish Through Routes.**—It shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.

This section is part of Par. 2 Section 1 of the act amended by the act of as of June 18, 1910. The amendment added by act June 29, 1906 read:

And it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

The original act did not compel or empower the Commission to compel the establishment of through routes. Chicago & A. R. Co. *v.* Penn. Co., 1 I. C. C. 86, 1 I. C. R. 357; Little Rock & M. R. Co. *v.* East Tenn., Va. & Ga. R. Co., 3 I. C. C. 1, 2 I. C. R. 454, citing English law and recommending amendments. Commercial Club of Omaha *v.* Chicago, Rock I. & P. Ry. Co., 6 I. C. C. 647, 677; Gustin *v.* Ill. Cent. R. Co., 7 I. C. C. 376. And carriers could make through routes with one road and not with others. Capeheart *v.* L. & N. R. Co., 4 I. C. C. 265, 3 I. C. R. 278. When through routes are established they must be kept open to public use. Consolidated Forwarding Co. *v.* So. Pac. Co., 9 I. C. C. 182, 205. Order enforced. Int. Com. Com. *v.* So. Pac. Co., 123 Fed. 597, 132 Fed. 829. Circuit court reversed. 200 U. S. 536, 50 L. Ed. 585, 26 Sup. Ct. 330. See same case, 10 I. C. C. 590. Through route ordered established. Cattle Raisers Asso. of Texas *v.* Galveston, H. & S. A. Ry. Co., 12 I. C. C. 20; Birmingham Packing Co. *v.* Tex. & Pac. Ry. Co., 12 I. C. C. 29, 500; American National Live Stock Asso. *v.* Tex. & Pac. Ry. Co., 12 I. C. C. 32; Star Grain & Lumber Co. *v.* A. T. & S. F. Ry. Co., 14 I. C. C. R. 364. Through routes and through rates discussed and defined. Re Through Routes and Through Rates, 12 I. C. C. 163. Indemnity may be required of an irresponsible carrier before compelling through route and joint rate. Enterprise Transportation Co. *v.* Penn. R. Co., 12 I. C. C. 326. Where a reasonable through route exists, the law does not require the Commission to establish another through route. Loup Creek Colliery Co. *v.* Va. Ry. Co., 12 I. C. C. 471; Stedman *v.* Chicago & N. W. R. Co., 13 I. C. C. 167; Chicago & M. Elec. R. Co. *v.* Ill. Cent. R. Co., 13 I. C. C. 20; Cardiff Coal Co. *v.* Chicago, M. & St. P. R. Co., 13 I. C. C. 460; Crane R. Co. *v.* Philadelphia & R. Ry. Co., 15 I. C. C. 248. When all parties are before it, the Commission will fix through routes and joint rates. Merchants Traffic Asso. *v.* New York, N. H. and H. R. Co., 13 I. C. C. R. 225. Section cited Enterprise Fuel Co. *v.* Penn. R. Co., 16 I. C. C. 219, 221.

Notes of Decision Rendered Since 1909.

See Sections 377, 400 and 401, *post*.

Construing the statute as it existed prior to the amendment of 1910 with the provisions of Sec. 3, *post*, Sec. 377, and Sec. 15, *post* Sec. 400, it was held then through routes could not be es-

tablished if "reasonable and satisfactory" through routes already existed. Enterprise Fuel Co. *v.* P. R. R. Co., 16 I. C. C. 219. This limitation taken away by amendment of 1910. Flour City S. S. Co. *v.* L. V. R. R. Co., 24 I. C. C. 179, 185. Carriers must not discriminate in establishing through routes. Wichita Falls System Joint Coal Rate Cases, 26 I. C. C. 215, 222; St. Louis S. & P. R. R. Co. *v.* P. & P. N. Ry. Co., 26 I. C. C. 226, 234, 235. Through routes established over interurban lines—See also cases cited—Louisville Board of Trade *v.* I. C. & S. T. Co., 27 I. C. C. 499. Construed in connection with a further provision of Sec. 1 *post* Sec. 402. Huerfano Coal Co. *v.* C. & S. E. R. R. Co., 28 I. C. C. 502, 505; Campbell's Creek Coal Co. *v.* A. A. R. R. Co., 29 I. C. C. 682, 690. Limitation on power of Commission under act 1906. Int. Com. Com. *v.* D. L. & W. R. R. Co., 216 U. S. 531, 54 L. Ed. 605, 30 Sup. Ct. 415. But the amendment of 1910 gives the Commission a discretion. Crane Iron Works *v.* U. S., 209 Fed. 238, Op. Com. Ct. No. 55, p. 453; Crane Iron Works *v.* P. & R. Ry. Co., 15 I. C. C. 248; Crane Iron Works *v.* C. R. R. Co. of N. J., 17 I. C. C. 514; Truckers' Transfer Co. *v.* C. & W. C. Ry. Co., 27 I. C. C. 275; and Manufacturers Ry. Co. *v.* St. L. I. M. & S. Ry. Co., 28 I. C. C. 93, 120; Decatur Nav. Co. *v.* L. & N. R. Co., 31 I. C. C. 281 and cases cited. Pacific Navigation Co. *v.* So. Pacific Co., 31 I. C. C. 472; Port Huron & Duluth S. S. Co. *v.* P. R. Co., 35 I. C. C. 475; Federal Sugar Refining Co. *v.* Central of New Jersey R. Co., 35 I. C. C. 488.

§ 339. **All Transportation Charges Must Be Reasonable.** —All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service, or any part thereof, is prohibited and declared to be unlawful.

Part of paragraph three, section one, as amended by act 1910.

The old act read as follows:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, *or for the receiving, delivering, storage, or handling of such property*, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Provision applies to exceptional charges under section four.

Re Southern Railway & Steamship Asso. (Re Petition of L. & N. R. Co.) 1 I. C. C. 57, 1 I. C. R. 278. A rate might not violate this section yet be illegal because discriminatory. Raymond *v.* Chicago, M. & St. P. Ry. Co., 1 I. C. C. 230, 1 I. C. R. 627. A carrier should not make rates for the purpose of keeping a commodity on its line. Reynolds *v.* W. N. Y. & P. R. Co., 1 I. C. C. 393, 1 I. C. R. 685. What must be considered in determining the reasonableness of a rate. Boston Chamber of Commerce *v.* Lake Shore, etc., R. Co., 1 I. C. C. 436, 1 I. C. R. 754. An intermediate local rate should not exceed the through rate plus the local back to the intermediate point. Martin *v.* So. Pac. Co., 2 I. C. C. 1, 2 I. C. R. 1. Rates may be fixed on other than a mileage basis. La Crosse M. & J. Union *v.* Chicago, M. & St. P. R. Co., 11 I. C. C. 629, 2 I. C. R. 9. All surrounding circumstances and conditions must be considered in determining what is a reasonable rate. Bus. Men's Asso. of Minn. *v.* Chicago, St. P. & M. R. Co., 2 I. C. C. 52, 2 I. C. R. 41. Apportionment of rates between different parts of a line may be considered. Brady *v.* Penn. R. Co., 2 I. C. C. 131, 2 I. C. R. 78. No jurisdiction to increase rates. Re Chicago, St. P. & K. C. R. Co., 2 I. C. C. 231, 2 I. C. R. 137. Question a perplexing one involving a great variety of situations. Howell *v.* N. Y., L. E. & W. R. Co., 2 I. C. C. 272, 2 I. C. R. 162. Excessive rates not justified even when road earns little more than operating expenses. New Orleans Cotton Ex. *v.* Cincinnati, N. O. & T. P. R. Co., 2 I. C. C. 375, 2 I. C. R. 289. The fact that cost of transportation is exceedingly great by reason of the peculiar situation of a road should be considered. Rice *v.* W. N. Y. & Penn. R. Co., 2 I. C. C. 389, 2 I. C. R. 298. Through rates may be proportionately less than local rates. Lippman *v.* Ill. Cent. R. Co., 2 I. C. C. R. 584, 2 I. C. R. 414. Long maintenance of a rate evidence that it is reasonably low. Logan (Northwestern Iowa Grain & Stock Shippers Asso.) *v.* Chicago & N. W. R. Co., 2 I. C. C. 604; 2 I. C. R. 431. Mileage should be considered. McMorran *v.* Grand Trunk R. Co., 3 I. C. C. 252, 2 I. C. R. 604. Classification of freight legal. Thurber *v.* N. Y. Cent. & H. R. R. Co., 3 I. C. C. 473, 2 I. C. R. 742. The proportion of a through rate may be less than the local. New Orleans Cotton Exp. *v.* Ill. Cent. R. Co., 3 I. C. C. 534, 2 I. C. R. 777. Equitably graduated charges for like traffic having regard to amount of traffic is just. Lehman *v.* So. Pac. Co., 4 I. C. C. 1, 3 I. C. R. 80. In the carriage of the great

staples which supply an enormous business and which in market value and actual cost of transportation are among the cheapest articles of commerce, rates yielding moderate profit are both justifiable and necessary. Re Alleged Excessive Freight Rates on Food Products, 4 I. C. C. 48, 3 I. C. R. 93, 104; Mayor, etc., *v.* A. T. & S. F. Ry. Co., 9 I. C. C. 534; Farmers' etc., Club *v.* A. T. & S. F. Ry. Co., 12 I. C. C. 351, 360. As a general rule, the charge per ton mile should decrease with distance. Manufacturers & Jobbers Union of Mankato *v.* Minneapolis & St. L. R. Co., 4 I. C. C. 79, 3 I. C. R. 115; Hilton Lumber Co. *v.* Wilmington, etc., R. Co., 9 I. C. C. 17, 31. Commodity rates legal. New York Board of Trade *v.* Penn. R. Co., 4 I. C. C. 447, 3 I. C. R. 417. Order enforced. Int. Com. Com. *v.* Tex. & Pac. Ry. Co., 52 Fed. 187, 57 Fed. 948, 6 C. C. A. 653, 20 U. S. App. 1, 4 I. C. R. 408. Circuit court reversed. Texas & Pac. Ry. Co. *v.* Int. Com. Com., 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666. Classification and group rates legal. Coxe Bros. & Co. *v.* Lehigh Valley R. Co., 4 I. C. C. 535, 3 I. C. R. 460. Order not enforced. Int. Com. Com. *v.* Lehigh Valley R. Co., 74 Fed. 784. Elements to be considered in fixing rates on perishable fruits. Boston Fruit & Pro. Ex. *v.* New York & N. E. R. Co., 4 I. C. C. 664, 3 I. C. R. 493, 604, 5 I. C. C. R. 1. Comparison with rates of other localities not alone sufficient to show unreasonableness. Lincoln Creamery *v.* Union Pac. Ry. Co., 5 I. C. C. 156, 3 I. C. R. 794. Salt requires a relatively low rate, but should not be moved at unremunerative rates. Anthony Salt Co. *v.* Mo. Pac. R. Co., 5 I. C. C. 229, 4 I. C. R. 33. Rates should bear a fair relation to antecedent cost of production. Loud *v.* S. C. R. Co., 5 I. C. C. 529, 4 I. C. R. 205. A local rate is *prima facie* excessive as part of a through rate. Board of Trade of Troy *v.* Ala. M. R. Co., 6 I. C. C. 1. Order not enforced. Int. Com. Com. *v.* Ala. M. R. Co., 69 Fed. 227, 74 Fed. 715, 21 C. C. A. 51, 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45. Cost of service only one element in determining reasonableness of rates. Schumacher Milling Co. *v.* Chicago, R. I. & Pac. Ry. Co., 6 I. C. C. 61, 4 I. C. R. 373. Transportation charges on rival companies or branch lines are to be considered in fixing rates. Morrel *v.* U. Pac. Ry. Co., 6 I. C. C. 121, 4 I. C. R. 469, 473. The value of comparisons depends upon the degree of similarity of circumstances. Freight Bureau of Cincinnati *v.* Cincinnati, N. O. & T. P. Ry. Co., 6 I. C. C. 195, 4 I. C. R. 592. Order not en-

forced. Int. Com. Com. *v.* Cincinnati, N. O. & T. P. Ry. Co., 76 Fed. 183, 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896. There is no necessary connection between rates between the same points in opposite directions. Duncan *v.* A. T. & S. F. Ry. Co., 6 I. C. C. 85, 103, 4 I. C. R. 385; Macloon *v.* Boston & M. R. Co., 9 I. C. C. 642. Rates on steel and iron equal to the average rates unjust, different cost of manufacturing the same product, no reason for different rate. Colorado Fuel & Iron Co. *v.* So. Pac. Co., 6 I. C. C. 488, 515. Order not enforced. So. Pac. Co. *v.* Colorado Fuel & Iron Co., 101 Fed. 779, 42 C. C. A. 12. For a comparison in rates to be of any value there must be substantial similarity. Evans *v.* U. Pac. Co., 6 I. C. C. 520. Rates must be relatively as well as absolutely just. Page *v.* Delaware, L. & W. R. Co., 6 I. C. C. 548. Financial necessities of carrier entitled to weight but not controlling. Jerome Hill Cotton Co. *v.* Mo. Kan. & Tex. R. Co., 6 I. C. C. R. 601, 622. Uniform blanket rate from all stations held unreasonable. Milk Producers Protective Asso. *v.* Delaware, L. & W. R. Co., 7 I. C. C. 92, 164. Distance an important element in determining reasonableness of rates. Freight Bureau of Cincinnati *v.* Cincinnati, N. O. & T. P. Ry. Co., 7 I. C. C. 180. Group rates applied to cities considerable distance apart *prima facie* illegal. Commercial Club of Omaha *v.* Chicago & N. W. Ry. Co., 7 I. C. C. 386. Interstate rates are not required to conform to those fixed under state laws. Savannah Bureau of Freight & Transportation *v.* Charleston & S. Ry. Co., 7 I. C. C. 601. Principles of rate making discussed. Grain Shippers Asso. of Northwest Iowa *v.* Ill. Cent. R. Co., 8 I. C. C. R. 158. Rate per ton mile while valuable is not controlling. Gustin *v.* A. T. & S. F. R. Co., 8 I. C. C. 277. A rate can seldom be considered "in and of itself." Tileston Milling Co. *v.* N. Pac. Ry. Co., 8 I. C. C. 346, 361. Basing point system of the south disapproved. Board of Trade of Hampton *v.* N. C. & St. L. R. Co., 8 I. C. C. 503, 521. Order not enforced. Int. Com. Com. *v.* N. C. & St. L. R. Co., 120 Fed. 934. Storage is a service rendered and must be reasonable. Penn. Millers Asso. *v.* Philadelphia & R. R. Co., 8 I. C. C. 531. A rate long in existence *prima facie* reasonably high. Holmes & Co. *v.* So. Ry. Co., 8 I. C. C. 561. Must consider all circumstances affecting rates. Mayor and Council of Tifton *v.* L. & N. R. Co., 9 I. C. C. 160, 179. Reasons for a general advance not sufficient to show advance on particular commodity reasonable.

National Hay Asso. *v.* Lake Shore, etc., Ry. Co., 9 I. C. C. 264, 304, 305. Order not enforced. Int. Com. Com. *v.* Lake Shore, etc., Ry. Co., 134 Fed. 942. Cost of service may legally produce a higher rate on less than car load than on car load shipments. Business Men's League of St. Louis *v.* A. T. & S. F. R. Co., 9 I. C. C. 318, 358. Transportation is not controlled by the law of supply and demand and is not to be sold to the highest bidder. Re Proposed Advances in Freight Rate, 9 I. C. C. 382. See also discussion of principles at pp. 395, 402, 405, 413. Presumption that a rate is reasonably high does not apply to a rate established by the Commission. Proctor & Gamble Co. *v.* Cincinnati, H. & D. R. Co., 9 I. C. C. 440. Order enforced. Int. Com. Com. *v.* Cincinnati, H. & D. Ry. Co., 146 Fed. 559, 206 U. S. 142, 51 L. Ed. 995, 27 Sup. Ct. 648. May compare a rate with a less rate for a longer haul. Mayor, etc., of Wichita *v.* A. T. & S. F. R. Co., 9 I. C. C. 534, 552. May not refuse car load rating because consignee obtained title from different consignors. Buckeye Buggy Co. *v.* Cleveland, etc., R. Co., 9 I. C. C. 620. Rates may differ in reverse direction. MacLoon *v.* Boston & M. R. Co., 9 I. C. C. 642, citing Duncan *v.* A. T. & S. F. Ry. Co., 6 I. C. C. 85, 4 I. C. R. 385. May require purchase of tickets in order to obtain a reduced fare. Cist *v.* Mich. Cent. R. Co., 10 I. C. C. 217. Rate according to valuation of fruit unreasonable and unjust. Georgia Peach Growers' Asso. *v.* Atlantic C. L. R. Co., 10 I. C. C. 255. Can not distinguish in rates on commodities, because of method of loading. Glade Coal Co. *v.* B. & O. R. Co., 10 I. C. C. 226. Under the circumstances of this case, there should be no higher rate on cattle and hogs than on their products. Chicago Live Stock Exp. *v.* Chicago Great W. Ry. Co., 10 I. C. C. 428. Order not enforced. Int. Com. Com. *v.* Chicago Great W. Ry. Co., 141 Fed. 1003, 209 U. S. 108, 52 L. Ed. 705, 28 Sup. Ct 493. Effect of prosperity of shipper, increased cost of transportation, long continued rate and a combination to advance rates discussed. Central Yellow Pine Asso. *v.* Ill. Cent. R. Co., 10 I. C. C. 505. Order enforced. Ill. Cent. R. Co. *v.* Int. Com. Com., 206 U. S. 441, 51 L. Ed. 1128, 27 Sup. Ct. 700. Tift *v.* So. R. Co., 10 I. C. C. 548, 123 Fed. 789, 138 Fed. 753; So. R. Co. *v.* Tift, 148 Fed. 1021, 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. 709; Tift *v.* So. Ry. Co., 159 Fed. 555. Effect of long continuance of rate and of financial condition of carrier considered. Re Class and Commodity Rates St. Louis to Texas. 11 I.

C. C. R. 238. Facts considered in arriving at a conclusion as to reasonableness of rates. Cattle Raisers' Asso. of Texas *v.* M. K. & T. Ry. Co., 11 I. C. C. 296. Classification must have reference to general shipments and not to a special shipper. Planters Compress Co. *v.* Cleveland, etc., R. Co., 11 I. C. C. 382, 606. Cost of service may not be ignored, but there are other matters of equal importance. Cannon *v.* M. & O. R. Co., 11 I. C. C. 537. Volume of traffic an argument for comparatively low rates. Farrar *v.* So. Ry. Co., 11 I. C. C. 632, 640. Single rates should be considered as part of the whole system. Hastings Malting Co. *v.* Chicago, M. & St. P. R. Co., 11 I. C. C. R. 675. Expense of delivery should not increase the rate more than such expense. Society of American Florists *v.* United States Exp. Co., 12 I. C. C. 120. Existence of a lower rate in remote past no probative value. Enterprise Mfg. Co. *v.* Georgia R. Co., 12 I. C. C. 130. Distance can not be made the sole factor in rate making. Wilhoit *v.* M. K. & T. Ry. Co., 12 I. C. C. 138. Revenue per ton mile over other routes and lines not conclusive. Dallas Freight Bureau *v.* Gulf, etc., R. Co., 12 I. C. C. 223. Mere fact that an advance was the result of a combination not sufficient to condemn it. China & Japan Trading Co. *v.* Georgia R. Co., 12 I. C. C. 236; Mayor of Bristol *v.* Virginia & S. W. R. Co., 15 I. C. C. 543. Rate fixed by a state Commission not binding on Interstate Commerce Commission. Hope Cotton Oil Co. *v.* Texas & Pac. R. Co., 12 I. C. C. 265. Grain a desirable traffic and entitled to low rate. Roswell Commercial Club *v.* A. T. & S. F. Ry. Co., 12 I. C. C. 339, 360, citing Mayor of Wichita *v.* A. T. & S. F. Ry. Co., 9 I. C. C. 534. Long existence of a rate not conclusive against the carrier. Warren Mfg. Co. *v.* So. R. Co., 12 I. C. C. 381. See Green Bay Bus. Men's Asso, *v.* B. & O. R. Co., 15 I. C. C. 59. Cotton waste should bear a lower rate than cotton goods. Riverside Mills *v.* So. R. Co., 12 I. C. C. 388. Expedited services charged for must be supplied. American Fruit Union *v.* Cincinnati, N. O. & T. P. R. Co., 12 I. C. C. 411. Prohibitive rates can not be established. Poor *v.* Chicago, B. & Q. R. Co., 12 I. C. C. 418. Mere comparisons with other rates under different conditions not sufficient to establish unreasonableness of rates. Dallas Freight Bureau *v.* M. K. & T. R. Co., 12 I. C. C. R. 427. Rates unreasonable. Farmers Warehouse Co. *v.* L. & N. R. Co., 12 I. C. C. 457. May in some cases charge more where a line is composed of two roads than when it is composed of only

one. Loup Creek Colliery Co. *v.* Va. R. Co., 12 I. C. C. 471. Can make no general ruling that through rates must not exceed the sum of the locals. Coffeyville Vitrified Brick & Tile Co. *v.* St. L. & S. F. R. Co., 12 I. C. C. 498. Not unlawful to refuse to carry at car load rates mixed cars of mineral water and beer. Milwaukee, etc., Brewing Co. *v.* Chicago, M. & St. P. R. Co., 13 I. C. C. 28. Ordinarily joint through rate should be lower than sum of the locals. Laning-Harris Coal & Grain Co. *v.* Mo. Pac. R. Co., 13 I. C. C. 154; Flaccus Glass Co. *v.* Cleveland, etc., R. Co., 14 I. C. C. R. 333. Burnham, etc., Dry Goods Co. *v.* Chicago R. T. Co., 14 I. C. C. 299; Gump *v.* B. & O. R. Co., 14 I. C. C. 98; Payne-Gardner Co. *v.* L. & N. R. Co., 13 I. C. C. R. 638; Randolph Lumber Co. *v.* Seaboard A. L. Ry. Co., 14 I. C. C. 338; Sylvester *v.* Penn. R. Co., 14 I. C. C. 573. A railroad constructed for a special purpose is entitled to have that fact considered in making rates. Am. Asphalt Asso. *v.* Uintah Ry. Co., 13 I. C. C. 196. Capitalization and value of property employed of little value in fixing express rates. Kindel *v.* Adams Exp. Co., 13 I. C. C. 475, 485. Rule as to released rates. Re Released Rates. 13 I. C. C. 550. Improper to fix rates according to the use of a commodity. Ft. Smith Traffic Bureau *v.* St. L. & S. F. R. Co., 13 I. C. C. 651. Considerations involved in determining the reasonableness of rates. Thompson Lumber Co. *v.* Ill. Cent. R. Co., 13 I. C. C. 657, 664. Voluntary reduction of rates by a carrier does not alone prove former rate unreasonable. Ottumwa Bridge Co. *v.* Chicago, M. & St. P. R. Co., 14 I. C. C. 121. Storage charges for a reasonable time in which to remove freight part of the transportation and must be reasonable. New Yrok Hay Ex. Asso. *v.* Penn. R. Co., 14 I. C. C. 178. In exceptional cases the through rate may exceed the sum of the locals. Randolph Lumber Co. *v.* Seaboard A. L. Ry. Co., 14 I. C. C. 338, citing Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 262, 46 L. Ed. 1151, 22 Sup. Ct. 900. But see Lindsay Bros. *v.* Grand Rapids & I. Ry. Co., 15 I. C. C. 182; Michigan Buggy Co. *v.* Grand Rapids & I. Ry. Co., 15 I. C. C. 297. State rates though not binding on the Interstate Commission are valuable in determining the reasonableness of interstate rates. Corn Belt Meat Producers Asso. *v.* Chicago, B. & Q. Ry. Co., 14 I. C. C. 376. The question of the reasonableness of a rate one of fact and each case must stand upon its own record. Kansas City Hay Dealers Asso. *v.* Mo. Pac. Ry. Co., 14 I. C. C. 597; City

of Spokane *v.* N. Pac. Ry. Co., 15 I. C. C. 376. Effect of increased cost of labor and materials. Shippers and Receivers Bureau of Nekark *v.* New York, O. & W. Ry. Co., 15 I. C. C. 264. Statute declaratory of common law. Int. Com. Com. *v.* B. & O. R. Co., 43 Fed. 37, 42, 3 I. C. R. 192. Affirmed. 145 U. S. 263, 36 L. Ed. 699, 4 I. C. R. 92, 12 Sup. Ct. 844; Tift *v.* So. Ry. Co., 123 Fed. 789, 792, 138 Fed. 753; So. Ry. Co. *v.* Tift, 148 Fed. 1021, 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. 709. Can not recover for unreasonable charges except under statutes, as the United States has no common law. Swift *v.* Philadelphia & R. R. Co., 58 Fed. 858, 64 Fed. 59. Disapproved. Kinnavey *v.* Terminal R. Asso. of St. Louis, 81 Fed. 802, 804; Western Union Tel. Co. *v.* Call Publishing Co., 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561. In determining the question whether or not a rate is reasonable rigorous theoretical rules can not be adopted—circumstances that must be considered stated. Int. Com. Com. *v.* L. & N. R. Co., 73 Fed. 409, 419 to 426. Cost of service of a particular movement can not be found by taking the average cost of all movements of same commodity. Int. Com. Com. *v.* Lehigh V. R. Co., 74 Fed. 784. The word "charges" used in section defined. Detroit, G. H. & M. Ry. *v.* Int. Com. Com., 74 Fed. 803, 21 C. C. A. 103, 43 U. S. App. 308, reversing 57 Fed. 1005, 4 I. C. R. 722. Affirmed. 167 U. S. 633, 42 L. Ed. 306, 17 Sup. Ct. 986. Reasons for the act. Van Patten *v.* Chicago, M. & St. P. Ry. Co., 81 Fed. 545. Question whether or not rates are reasonable a relative one and may be determined by comparison. Int. Com. Com. *v.* East Tenn., V. & G. Ry. Co., 85 Fed. 107, enforcing order in 5 I. C. C. R. 546, 2 I. C. R. 798, 3 id. 106, 4 id. 213. Affirmed. East T. V. & G. Ry. Co. *v.* Int. Com. Com., 99 Fed. 52. Reversed 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516. Mere fact of a greater charge for a shorter than a longer haul does not prove rate unreasonable. Int. Com. Com. *v.* Western & A. R. Co., 88 Fed. 186; Allen *v.* Oregon R. & Nav. Co., 98 Fed. 16; Int. Com. Com. *v.* Nashville, C. & St. N. S. & St. L. Ry. Co., 120 Fed. 934. Refusing to enforce order, 8 I. C. C. R. 503. Section defined, its purpose stated and a statement of what must be considered in determining the reasonableness of a rate. Int. Com. Com. *v.* Chicago G. W. Ry. Co., 141 Fed. 1003. Affirmed. 209 U. S. 108, 52 L. Ed. 705, 28 Sup. Ct. 493, where is stated the probative effect of a rate long in existence. Demurrage charges must be reasonable and such charges governed by section. Michie

v. New York, N. H. & H. R. Co., 151 Fed. 694. The question of the reasonableness of a rate is a judicial one. Chicago, M. & St. P. Ry. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 981, 10 Sup. Ct. 462, 702. Under act prior to June 29, 1906, Commission could determine the reasonableness of a particular rate, but could not prescribe rates. Cincinnati, N. O. & T. P. Ry. Co. *v.* Int. Com. Com., 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700. Int. Com. Com. *v.* Cincinnati, N. O. & T. P. Ry. Co., 167 U. S. 479, 511, 42 L. Ed. 243, 17 Sup. Ct. 896. Affirming 76 Fed. 183. Int. Com. Com. *v.* Ala. M. Ry. Co., 168 U. S. 144, 162, 42 L. Ed. 414, 18 Sup. Ct. 45. This power now specifically given by act June 29, 1906. Expenditures for permanent improvements should not be charged to current expenses. Ill. Cent. R. Co. *v.* Int. Com. Com., 206 U. S. 441, 51 L. Ed. 1128, 27 Sup. Ct. 700.

Notes of Decisions Rendered Since 1909.

A published rate not just and reasonable is not lawful when attacked—"Legal" and "lawful" distinguished—Arkansas Fuel Co. *v.* C. M. & St. P. Ry. Co., 16 I. C. C. 95, 97. Applies to mileage book rates. Commutation Rate Case, 21 I. C. C. 428, 442, 443. "Lawfulness" under Sec. 1 not to be confused with "legality" under Section 6. Crescent Coal & Mining Co. *v.* C. & E. I. R. R. Co., 24 I. C. C. 149, 156. Covers all cases of unreasonableness relatively and otherwise. Board of Trade of Chicago *v.* C. & A. R. R. Co., 27 I. C. C. 530, 535. Elevation is a service in connection with transportation. Elevation Allowances at St. Louis, 30 I. C. C. 696, 697. Value of the commodity a material fact. Western Advance Rate case 1915, 35 I. C. C. 497-606.

§ 340. **Classification of Telegraph, Telephone and Cable Messages.**—*Provided,* That messages by telegraph, telephone, or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: *And provided further,* That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services.

Added to Sec. 1 by Amendment of June 18, 1910.

Classification must be initiated by the carrier—White *v.* W. U. Tel. Co., 33 I. C. C. 500. Provision for limited liability valid.

Western Union Tel. Co. *v.* Compton, — Ark. —, 169 S. W. 946, *contra,* Bailey *v.* Western Union Tel. Co., 171 S. W. 839. State laws relating to delivery of telegrams superceded by act. Norfolk Truckers Exchange *v.* Western Union Tel. Co., 82 S. E. 92; W. U. Tel. Co. *v.* First National Bank, 83 S. E. 424.

Rule that misquoting a rate does not relieve from payment of correct rate does not apply to telegraph companies. Higbee *v.* W. U. Tel. Co., 179 Mo. App. 195, 166 S. W. 825.

§ 341. **Classifications, Regulations and Practices Must Be Reasonable.**—And it is hereby made the duty of all common carriers subject to the provisions of this act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the states and with foreign countries is prohibited and declared to be unlawful.

Added to section one by Amendment of 1910.

Section quoted in considering the character of cars furnished, Southwestern Mo. Millers Club *v.* St. L. & S. F. R. R. Co., 26 I. C. C. 245, 249. Quoted in reference to baggage shape and dimensions. Regulations Restricting the Dimensions of Baggage, 26 I. C. C. 292, 293. Classification a public function principle of, discussed. Suspension of Western Classification, 25 I. C. C. 442; Western Trunk Line Rules, 34 I. C. C. 554.

§ 342. **Free Services with Certain Exceptions Prohibited and Penalties Prescribed.**—No common carrier subject to the provisions of this act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except

to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary care takers of live stock, poultry, milk and fruit; to employees on sleeping cars, express cars, and to lineman of telegraph and telephone companies; to railway mail service employees, postoffice inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation:

And provided further, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this act.

Provided further, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed and their widows during widowhood and minor children during minority of persons who

died while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the person excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an act entitled "An act to further regulate commerce with foreign nations and among the states," approved February nineteenth, nineteen hundred and three, and any amendment thereof.

Paragraph 5 of section one of act added by act of June 29, 1906, and as further amended by acts April 13, 1908, and June 18, 1910, which later act amended the section by adding part in italics.

Paragraph 4 of section one of the act of June 29, 1906, read as follows:

"No common carrier subject to the provisions of this act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge and boards of managers of such homes; to necessary care takers of live stock, poultry and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail service employees, postoffice inspectors, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents; witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: Provided, That

this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an act entitled "An act to further regulate commerce with foreign nations and among the states," approved February nineteenth, nineteen hundred and three and any amendment thereof.

The original act did not expressly prohibit free transportation, and it was only when such transportation constituted discrimination and was not in the exception contained in section 22 that it was illegal. Ex parte Koehler, 31 Fed. 315. Re Charge to Grand Jury, 66 Fed. 146.

Evils of free transportation. First Annual Report of Int. Com. Com., 1 I. C. R. 650, 654. Not to be granted for influence. Slater *v.* N. Pac. R. Co., 2 I. C. C. 359, 2 I. C. R. 243; Harvey *v.* L. & N. R. Co., 5 I. C. C. 153, 3 I. C. R. 793. Re Carriage of Persons Free, 5 I. C. C. 69, 3 I. C. R. 717. Land and immigration agents not entitled to free transportation. Re Complaint of Illinois Central R. Co., 12 I. C. C. 7. Certain employees of telegraph companies may receive free or reduced transportation. Re Railroad Telegraph Companies, 12 I. C. C. 10. Newspaper employees whose duties are to assort papers on special newspaper trains not entitled to free transportation. Re Free Transportation to Newspaper Employees, 12 I. C. C. 15. Not allowed to baggage express companies. Re Exchange of Free Transportation Between Railroads and Baggage Express Companies, 12 I. C. C. 39. Rule between express and railroad companies. Re Contracts of Express Companies for Free Transportation, 16 I. C. C. 246. The Commission holds that ministers engaged in other than pastoral work may legally be accorded special transportation privileges. Re Passes to Clergymen, 15 I.

C. C. 45. Act does not affect valid subsisting contracts for free transportation. Mottley *v.* L. & N. R. Co., 150 Fed. 406, *contra,* 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671. Kurry *v.* Kansas & C. P. Ry., 58 Kansas 6, 48 Pac. 579. Express franks illegal, even to officers and employees. United States *v.* Wells Fargo Express Co., 161 Fed. 606; American Ex. Co. *v.* United States, 212 U. S. 522, 53 L. Ed. 635, 29 Sup. Ct. 315. Contract to furnish transportation for advertising illegal. United States *v.* Chicago, etc., R. Co., 163 Fed. 114.

The amendment of 1910 relating to express and telephone passes and franks is indicated by italics.

The decision in the case of United States *v.* Wells-Fargo Ex. Co., was rendered prior to the amendment of 1910.

Notes of Decisions Rendered Since 1909.

Meaning of "employees on express cars" discussed. Re Contracts for Free Transportations, 16 I. C. C. 246, 249. Evils of giving passes, even though intrastate to interstate shipper discussed. Colorado Free Pass Investigated, 26 I. C. C. 488, 494; Montana Pass Situation, 29 I. C. C. 411; Five per cent case, 31 I. C. C. 351, 410. Contract for annual pass not valid. Louisville & N. R. R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671. Violation of law to sell a free pass to one not entitled to use it. U. S. *v.* Martin, 176 Fed. 110.

See notes to Sec. 22 of Act. Sec. 442—*post.*

§ 343. **Railroad Companies Prohibited from Transporting Commodities in Which They Are Interested, with Certain Exceptions.**—From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any state, territory or the District of Columbia, to any other state, territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

Paragraph 6, section one, of act as added by act June 29, 1906. Unconstitutional. United States *v.* Delaware & H. Co., 164 Fed.

215, 22d Annual Report Interstate Com. Com. (1908) 17. Circuit court reversed and section held valid as construed by Supreme Court. United States *v.* Delaware & H. Co., 213 U. S. 366, 53 L. Ed. 836, 29 Sup. Ct. 527. Does not apply to intrastate shipment. Central Trust Co. *v.* Pittsburg, etc., R. Co., 101 N. Y. Sup. 837, 114 App. Div. 907.

Notes of Decision Rendered Since 1909.

Cited as prohibiting carrier from transporting Coal mined by it. Consolidated Fuel Co. *v.* A. T. & S. F. Ry. Co., 27 I. C. C. 554, 556. Applies to a corporation owned by the carrier when the corporation has no real independent existence and distinguishing U. S. *v.* Delaware & H. Co., 213 U. S. 366, 53 L. Ed. 836, 29 Sup. Ct. 527—that facts fail to show clause applies. Campbell's Creek Coal Co. *v.* A. A. R. R. Co., 29 I. C. C. 682. United States *v.* Lehigh Valley R. Co., 220 U. S. 257, 55 L. Ed. 458, 31 Sup. Ct. 387. Statute valid and held that hay for animals used in coal mines owned by carrier within the provision. Delaware, L. & W. R. Co. *v.* U. S., 231 U. S. 363, 58 L. Ed. 269, 34 Sup. Ct. 65. The question relating to the provision not so presented as to require decision. United States *v.* B. & O. R. Co. Sugar Lighterage Case, 231 U. S. 274, 58 L. Ed. 218, 34 Sup. Ct. 75, affirming Baltimore & O. R. Co., 200 Fed. 779, Opin. Com. Ct. No. 381, 499. For decisions of Commission, see Federal Sugar Refining Co. *v.* B. & O. R. Co., 17 I. C. C. 40, 20 I. C. C. 200. Statute and decisions applied and questions fully discussed. U. S. *v.* Delaware, L. & W. R. Co., 213 Fed. 240. See same case United States *v.* D. L. & W. R. Co., 238 U. S. 516, 59 L. Ed.—35 Sup. Ct. 873. Citing and discussing the clause. Rates for transportation of Anthracite Coal, 35 I. C. C. 220, 248.

§ 344. **Terms under Which Switch Connections Shall Be Made.**—Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall

furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper *or owner of such lateral, branch line of railroad,* such shipper *or owner of such lateral, branch line of railroad* may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

Last paragraph, section one, of act as added by act of June 29, 1906, and June 18, 1910, which later added clause is italicised.

Under paragraph 2, section 3, of this act prior to the amendment of June 29, 1906, switch connections could be ordered when the failure to do so constituted discrimination. Red Rock Fuel Co. *v.* Balt. & O. R. Co., 11 I. C. C. R. 438. Written application must be made to give the Commission jurisdiction. Barden & S. *v.* Lehigh V. R. Co., 12 I. C. C. R. 193. Connection ordered. McRae T. Ry. *v.* So. Ry. Co., 12 I. C. C. R. 270, 545. Carriers should not repay shippers for switch connections with transportation. Weleetka Light & Water Co. *v.* Ft. Smith & W. R. Co., 12 I. C. C. R. 503. Section discussed and construed. Rahway Valley R. Co. *v.* Delaware, L. & W. R. Co., 14 I. C. C. R. 191; McCormick *v.* Chicago, B. & Q. R. Co., 14 I. C. C. R. 611. State court may in absence of action by Commission compel switch connection. Mo. Pac. R. Co. *v.* Larabee Flour Mills Co., 211 U. S. 612, 53 L. Ed. 352, 29 Sup. Ct. 214. See also Wisconsin, etc., R. Co. *v.* Jacobson, 179 U. S. 287, 45 L. Ed. 194, 21 Sup. Ct. 115.

Notes of Decision Rendered Since 1909.

Prior to amendment of 1910 held that a lateral branch railroad could not apply for a switch connection. Int. Com. Com. *v.* Delaware, L. & W. R. Co., 216 U. S. 531, 54 L. Ed. 605, 30 Sup. Ct. 415, affirming. Delaware, L. & W. Co. *v.* Int. Com. Com., 166

Fed. 498. The private track to be connected must exist. Winters Metallic Paint Co. *v.* C. M. & St. P. Ry. Co., 16 I. C. C. 687. Joint rates denied. Blakely S. R. Co. *v.* A. C. L. R. R. Co., 26 I. C. C. 344. To be read with provisions requiring transportation to be furnished and applies to lateral branch roads whether plant facilities or not. Huerfano Coal Co. *v.* C. & S. E. R. R. Co., 28 I. C. C. 502, 505. It is not illegal to require a switch connection for the use of only one shipper. Union Lime Co. *v.* C. & N. W. Ry. Co., 233 U. S. 211, 58 L. Ed. 924, 34 Sup. Ct. 522; Federal Sugar Refining Co. *v.* Central of N. J. R. Co., 35 I. C. C. 488. State law only indirectly affecting interstate commerce valid. L. & N. R. R. Co. *v.* Hidgon, 234 U. S. 592, 58 L. Ed. 1184, 34 Sup. Ct. 948.

§ 345. **Definition and Prohibition of Unjust Discrimination.**—That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Section 2 of the original act.

Modeled on § 90 English Act 1845. The Laws of Railway, by Browne & Theobald, 312, 313; Halsbury's Laws of England, Vol. 4, p. 74. Railroad Commissioners of Georgia *v.* Clyde Steamship Co., 5 I. C. C. R. 324, 4 I. C. R. 121, 140. English act is as follows:

"And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties or for the purpose of collusively or unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be unlawful, therefore, for the company, subject to the provisions and limitations herein and in the special act contained from time to time to alter or vary

the tolls by the special act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; provided, that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favor of or against any particular company or person traveling upon or using the railway."

Not violated by failure to allow same mileage to private car companies as to connecting carriers. Burton Stock Car Co. *v.* C. B. & Q. R. Co., 1 I. C. C. 132, 1 I. C. R. 329. Discrimination to allow large shippers a discount. Providence Coal Co. *v.* Providence & W. R. Co., 1 I. C. C. 107, 1 I. C. R. 316, 363. Mileage rates must be open to all. Larrison *v.* Chicago, etc., R. Co., 1 I. C. C. 147, 1 I. C. C. 369. Uniform and general regulations not illegal though more favorable to some than to other localities. Crews *v.* Richmond & D. R. Co., 1 I. C. C. R. 401, 1 I. C. R. 703, 712. Excursion rates legal. Associated Wholesale Grocers *v.* Mo. Pac. R. Co., 1 I. C. C. 156, 1 I. C. R. 321, 393. Low rates settlers' tickets must be open to all classes. Smith *v.* N. P. R. Co., 1 I. C. C. 208, I. C. R. 611; Elvey *v.* Ill. Cent. R. Co., 3 I. C. C. 652, 2 I. C. R. 804. Rates not unreasonably high may be illegal because discriminatory. Raymond *v.* Chi., M. & St. P. R. Co., 1 I. C. C. 230, 1 I. C. R. 474, 627. "Substantially similar circumstances and conditions" defined. Business Men's Asso. *v.* Chicago, St. Paul, M. & O. R. Co., 2 I. C. C. 52, 2 I. C. R. 41. Shipments of oil in barrels and in tanks should be at the same rate. Rice *v.* L. & N. R. Co., 1 I. C. C. 503, 1 I. C. R. 354, 376, 443, 722; Schofield *v.* Lake, etc., R. Co., 1 I. C. R. 593, 2 I. C. R. 90, 2 I. C. R. 67; Rice *v.* Western New York, etc., R. Co., 4 I. C. C. 131, 2 I. C. R. 298, 490; 3 id. 162; Rice *v.* Cincinnati, etc., R. Co., 5 I. C. C. 193, 3 I. C. R. 841; Independent Refiners Asso. *v.* Penn. R. Co., 6 I. C. C. 52, 4 I. C. R. 162, 369, 5 I. C. C. 415, 2 I. C. R. 294, 296, 4 I. C. R. 162. May classify immigrants for special rates. Savery *v.* New York Cent., etc., R. Co., 2 I. C. C. 338, 1 I. C. R. 695, 2 I. C. R. 210. Free transportation to obtain the in-

fluence of the holder in getting business illegal. Slater *v.* N. Pac. R. Co., 2 I. C. C. 359, 2 I. C. R. 32, 243. Mines in the same general territory may be grouped and take the same rate. Rend *v.* Chi. & N. W. R. Co., 1 I. C. C. 793, 812, 2 I. C. R. 540, 2 I. C. R. 313; Coxe *v.* Lehigh V. R. Co., 4 I. C. C. 535, 2 I. C. R. 195, 3 id. 460. Rates must be relatively fair in substance and in fact. Detroit Board of Trade *v.* Grand Trunk R. Co., 2 I. C. C. 315, 1 I. C. R. 699, 701, 2 I. C. R. 199. A carrier's percentage of a through rate may be less than the local charge for the same haul. Chamber of Commerce of Milwaukee *v.* Flint, etc., R. Co., 2 I. C. C. 553, 1 I. C. R. 774, 792, 2 I. C. R. 393; Lippman *v.* Ill. Cent. R. Co., 2 I. C. C. 584, 2 I. C. R. 414; New Orleans Cotton Exchange *v.* Ill. Cent. R. Co., 3 I. C. C. 534, 2 I. C. R. 460, 777; New York, New Haven, etc., R. Co. *v.* Platt, 7 I. C. C. 323. Mileage, excursion and commutation tickets must be offered impartially to all. Re Passenger Tariffs, 2 I. C. C. 649, 2 I. C. R. 445. Export rates ten cents per hundred less than the local rates held illegal. New York Produce Exchange *v.* New York, etc., R. Co., 3 I. C. C. 137, 2 I. C. R. 13, 28, 553. See Texas, etc., R. Co. *v.* Int. Com. Com., 162 U. S. 197, 5 I. C. R. 405, 40 L. Ed. 940, 16 Sup. Ct. 666. Through rates are not required to be made on a mileage basis. McMorran *v.* Grand Trunk R. Co., 3 I. C. C. 252, 2 I. C. R. 14, 19, 604. A through rate may be less than the sum of the locals. Chicago, Rock Island & Pacific R. Co. *v.* Chicago & Alton R. Co., 3 I. C. C. R. 450, 2 I. C. R. 581, 721. See also § 341, *supra*. Party rates less than individual rates illegal. Pittsburg, etc., R. Co. *v.* B. & O. R. Co., 3 I. C. C. 465, 2 I. C. R. 579, 720. Commission not sustained by courts. Int. Com. Com. *v.* B. & O. R. Co., 43 Fed. 37, 3 I. C. R. 192, 145 U. S. 263, 36 L. Ed. 699, 4 I. C. R. 92, 12 Sup. Ct. 844. Carriers may make exclusive contracts for sleeping cars. Worcester Excursion Co. *v.* Penn. R. Co., 3 I. C. C. 577, 1 I. C. R. 811, 2 id. 12, 792. Mere quantity of shipments not alone sufficient to affect classification. 4 I. C. C. R. 212, 2 I. C. R. 625, 3 id. 257. Imported goods are not entitled to any preference rate from the port of entry to destination over domestic goods. New York Board of Trade, etc. *v.* Penn. R. Co., 4 I. C. C. 447, 2 I. C. R. 660, 734, 755, 800, 3 id. 417. See Texas & Pac. R. Co. *v.* Int. Com. Com., 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666, 5 I. C. R. 405.

Classification may not be used to affect discrimination. Coxe *v.* Lehigh V. R. Co., 4 I. C. C. 535, 2 I. C. R. 195, 229, 3 id. 460. Discrimination to transport free, officials and persons of eminence. Re Carriage of Persons Free, 3 I. C. R. 612, 686, 717; Harvey *v.* L. & N. R. Co., 5 I. C. C. 153, 2 I. C. R. 662, 3 id. 793. Hypothetical weights must not be used to discriminate. Rice *v.* Cincinnati, etc., R. Co., 5 I. C. C. 193, 3 I. C. R. 841. Section compared with English act. Railroad Com. of Ga., Trammell et al. *v.* Clyde S. S. Co., 5 I. C. C. 324, 4 I. C. R. 120, 140. Order not enforced. Int. Com. Com. *v.* Western & A. R. Co., 88 Fed. 186, 93 Fed. 83, 35 C. C. A. 226, 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512. Lower rates on coal to special manufactures illegal. rates should not vary at different seasons of the year. Re Alleged Unlawful Charges for Transportation of Coal by L. & N. R. Co., 5 I. C. C. 466, 4 I. C. R. 157. Illegal to discriminate in the privileges relating to delivery of freight. Phelps *v.* Texas & Pac. R. Co., 6 I. C. C. 36, 4 I. C. R. 44, 104, 363. Not illegal to make a different rate on freight moving in opposite directions over same line. Business motive of shipper cannot be considered. Duncan *v.* A. T. & S. F. R. Co. et al., Duncan *v.* So. Pac. Co. et al., 6 I. C. C. 85, 3 I. C. R. 256, 4 I. C. R. 385; MacLoon *v.* Boston & M. R. Co., 9 I. C. C. R. 642. May make excursion rates different at different times. Cator *v.* So. Pac. Co., 6 I. C. C. R. 113, 4 I. C. R. 397. A carrier cannot legally use a development company in which it holds all the stock to purchase and ship commodities charging nothing therefor. Re Alleged Unlawful Rates and Practices in Transportation of Grain, 7 I. C. C. 33. Common ownership of a carrier company and a land company will not prevent the land company from buying tickets from the carrier at full prices and selling them to guests of its hotel at half price. Wilson *v.* Rock Creek, etc., R. Co., 7 I. C. C. 83. Different rate by cwt. on train loads and car loads discriminatory. Paine *v.* Lehigh Valley, etc., R. Co., 7 I. C. C. 218. Reshipping at remainder of a through rate illegal. Re Alleged Unlawful Rates and Practices in the Transportation of Grain and Grain Products, 7 I. C. C. 240. Re Rates and Practices of the M. & O. R. Co., 9 I. C. C. 373; Cannon Falls, etc., Co. *v.* Chicago G. W. R. Co., 10 I. C. C. 650. See question suggested but not decided. Commercial Club of Omaha *v.* Chicago & R. I. R. Co., 6 I. C. C. 647; Duncan et al. *v.* N. C. & St. L. R. Co., 16 I. C. C. 590.

Cannot divide rates with wagon carriers. Cary *v.* Eureka Springs R. Co., 7 I. C. C. 286. Terminal charges need not be exacted on all products alike nor at all markets. Cattle Raisers' Asso. of Texas *v.* Ft. Worth, etc., R. Co., 7 I. C. C. 513, 555-a. Commission's order not enforced. 98 Fed. 173, 103 id, 249, 43 C. C. A. 209, 186 U. S. 320, 46 L. Ed. 1182; 22 Sup. Ct. 824. Storage charges as well as other rules and regulations must not be discriminatory. American Warehousemen's Asso. *v.* Ill. Cent. R. Co.; 7 I. C. C. 556. Goods exported may move to ports at a less rate than those consumed at the port. Kemble *v.* Boston, etc., R. Co., 8 I. C. C. 110. A difference in the rates on private cars may exist when the use thereof is different. Carr *v.* N. Pac. R. Co., 9 I. C. C. 1. The rule that as distance increases the rate per ton mile shall decrease is not required by the statute and is subject to exceptions and qualifications. Hilton Lumber Co. *v.* Wilmington, etc., R. Co., 9 I. C. C. 17. To entitle a shipper to a car load rating, the shipment should be from one consignor to one consignee under one bill of lading, but where the consignee is the owner, it is immaterial whether his title was obtained from one or more persons. Whether a carrier can deny car load rate to forwarding agent not decided. Buckeye Buggy Co. *v.* Cleveland, etc., R. Co., 9 I. C. C. 620; Bell Co. *v.* Baltimore, etc., R., 9 I. C. C. R. 632. "Tap line" divisions or a division of a through rate to a short line, such line being a common carrier, is legal. Central Yellow Pine Asso. *v.* Vicksburg S. & P. R. Co., 10 I. C. C. 193. See, also, Re Transportation of Salt, 10 I. C. C. 148. Ownership of the terminal or "tap line" immaterial, but the division must be reasonable. Re Divisions of Joint Rates and Other Allowances to Terminal Roads. 10 I. C. C. 385. Where "tap line" not a common carrier, allowance illegal. Central Yellow Pine Asso. *v.* Ill. Cent. R. Co., 10 I. C. C. 505, 506. May make the charge on a minimum of 100 pounds at the rate taken by the particular commodity. Wrigley *v.* Cleveland, etc., R. Co., 10 I. C. C. 412. "Under substantially similar circumstances and conditions" defined and held that joint through rates less than the sum of the locals must be open to all. Capital City Gas Co. *v.* Central Vermont, etc., R. Co., 11 I. C. C. 104. Circumstances and conditions substantially dissimilar. City Gas Co. *v.* B. & O. R. Co., 11 I. C. C. R. 371, 379. Cotton packed by the round bale process not entitled to a different rate than that packed in square bales. Planters Compress

Co. *v.* Cleveland, etc., R. Co., 11 I. C. C. 382. A reconsignment rate may be higher than the carrier's proportion of the through rate. St. Louis Hay & Grain Co. *v.* Ill. Cent. R. Co., 11 I. C. C. 486, 496; Same *v.* M. & O. R. Co., id. 101. There should be uniformity in the relation of rates on commodities differently packed. Cannon *v.* M. & O. R. Co., 11 I. C. C. 537. Carrier can not charge more for transferring freight brought from another line than for that originating on its own line. Blackwell Milling & Elevator Co. *v.* M. K. & T. Ry. Co., 12 I. C. C. 23; Ponca City Milling Co. *v.* M. K. & T. Ry. Co., 12 I. C. C. 26. Party rate tickets must be open to all. Re Party Rate Tickets, 12 I. C. C. 95. A car load of freight though owned by different persons and known as "bulked shipments" when shipped under one bill of lading is entitled to the regular car load rate. California Commercial Asso. *v.* Wells Fargo & Co., 14 I. C. C. 422; Export Shipping Co. *v.* Wabash R. Co., 14 I. C. C. 437. Order not enforced. Delaware, L. & W. R. Co. *v.* Int. Com. Com., 166 Fed. 499. Section two in effect prohibits free passes except for the classes mentioned in section twenty-two. Ex parte Koehler, 31 Fed. 315, 12 Sawy. 446. Re Charge to Grand Jury, 66 Fed. 146. Unless pass is used no crime is committed. United States *v.* Mathews, 68 Fed. 880. Contract for rates based upon the amount of shipments void. Burlington, C. R. & N. R. Co. *v.* Northwestern Fuel Co., 31 Fed. 652. (Reversed but this question not discussed. Tozer *v.* United States, 52 Fed. 917); John Hays & Co. *v.* Penn. Co., 12 Fed. 309. Followed citing English cases. Int. Com. Com. *v.* Tex. & Pac. Ry. Co., 52 Fed. 187, 190; Kinsley *v.* Buffalo, N. Y. & P. R. Co., 37 Fed. 181; United States *v.* Tozer, 39 Fed. 369, 904. Only unjust, undue or unreasonable discrimination forbidden. Kentucky & I. Bridge Co. *v.* L. & N. R. Co., 37 Fed. 567, 624. See 2 I. C. C. 162, 2 I. C. R. 102. Not unlawful for carrier to compress cotton en route when privilege open to all. Cowan *v.* Bond, 39 Fed. 54. Not discriminative to decline to use a particular live stock car. United States *v.* Delaware, L. & W. R. Co., 40 Fed. 101. Party rate tickets at less rate than for a single ticket legal. Int. Com. Com. *v.* B. & O. R. Co., 43 Fed. 37, 46. Affirmed, 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844. May make a difference in rates for limited and unlimited tickets. United States *v.* Eagan, 47 Fed. 112. Illegal to charge less on freight from Liverpool than from New York, New Orleans, etc.,

to San Francisco. Int. Com. Com. *v.* Tex. & Pac. Ry. Co., 52 Fed. 187. Affirmed, 57 Fed. 948, 6 C. C. A. 653, 20 U. S. App. 1, 4 I. C. R. 408. Reversed, Tex. & Pac. Ry. Co. *v.* Int. Com. Com., 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666. That cotton reached Mobile by boat is no reason for charging more on a shipment to New Orleans than was charged on cotton brought to Mobile by other carriers. Bigbee & Warrior Rivers Packet Co. *v.* Mobile & Ohio R. Co., 60 Fed. 545. Rebate to one not a crime unless refused to others. United States *v.* Hanley, 71 Fed. 672. No rigid theoretical rules can be adopted to determine the question of discrimination. Int. Com. Com. *v.* L. & N. R. Co., 73 Fed. 409. Can not charge full local rate on freight delivered to one carrier, when the proportion of the through rate is charged to another. Augusta S. R. Co. *v.* Wrightsville & T. R. Co., 74 Fed. 522. Purpose of section discussed. Int. Com. Com. *v.* Alabama M. Ry. Co., 74 Fed. 715, 21 C. C. A. 51, 41 U. S. App. 453, 5 I. C. R. 685. Affirming 69 Fed. 227. Affirmed, 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45. Cartage is separated from the general charges referred to in sections one, two, three and four of act. Detroit, etc., Ry. Co. *v.* Int. Com. Com., 74 Fed. 803, 815, 21 C. C. A. 103, 43 U. S. App. 308. Reversing 57 Fed. 1005, 4 I. C. R. 722. Affirmed, 167 U. S. 633, 42 L. Ed. 306, 17 Sup. Ct. 986. What should be stated in a petition to recover damages for discrimination. Kinnavey *v.* Terminal R. Asso. of St. Louis, 81 Fed. 802. Section deals with preferences between shippers and not between localities. Int. Com. Com. *v.* Western & A. R. Co., 88 Fed. 186. Affirmed, 93 Fed. 83, 35 C. C. A. 217, 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512, refusing to enforce order in Railroad Com. of Ga. *v.* Clyde Line S. S. Co., 5 I. C. C. 324, 4 I. C. R. 120. Mere offer of discrimination not an offense. Lehigh Valley R. Co. *v.* Rainey, 112 Fed. 487, refusing motion for new trial. See 99 Fed. 596. Carriers not required to give same rate to forwarding agents as to owners of car load freight. Lundquist *v.* Grand Trunk W. Ry. Co., 121 Fed. 915; Delaware, L. & W. R. Co. *v.* Int. Com. Com., 166 Fed. 499. *Contra* under English and Canadian Act. Packed Parcels Case. Great W. R. W. Co. *v.* Sutton L. R., 4 H. L. 226, MacMurchy & Denison's Canadian Ry. Law 496. Can not discriminate in favor of government in rates to its soldiers. United States *v.* Chicago & N. W. Ry. Co., 127 Fed. 785, 62 C. C. A. 465. A carrier may in good faith buy a commodity and trans-

port it at less than the regular rate. Int. Com. Com. *v.* Chesapeake & O. Ry. Co., 128 Fed. 59. Affirmed same case, but this proposition disapproved, 200 U. S. 361, 50 L. Ed. 515, 26 Sup. Ct. 272. Classification must be without discrimination. Int. Com. Com. *v.* Cincinnati, H. & D. Ry. Co., 146 Fed. 559. Affirmed. Cincinnati, H. & D. Ry. Co. *v.* Int. Com. Com., 206 U. S. 142, 51 L. Ed. 995, 27 Sup. Ct. 648. Reconsignment rate is violation of section. St. Louis Hay & Grain Co. *v.* So. Ry. Co., 149 Fed. 609. Affirmed. So. Ry. Co. *v.* St. Louis Hay & Grain Co., 153 Fed. 728. C. C. A. Reversed, 214 U. S. 297, 53 L. Ed. 1004, 29 Sup. Ct. 678. "Discrimination" defined. United States *v.* Wells Fargo Ex. Co., 161 Fed. 606. Discrimination illegal at common law. Atchison, T. & S. F. R. Co. *v.* Denver & N. O. R. Co., 110 U. S. 667, 28 L. Ed. 291, 4 Sup. Ct. 185. Service for local haul not the same as for through haul covering the local as well as additional haul. Union Pacific Ry. Co. *v.* United States, 117 U. S. 355, 29 L. Ed. 920, 6 Sup. Ct. 772. The discrimination must be unjust, undue or unreasonable, though a rate reasonable under section one may violate sections two and three. Int. Com. Com. *v.* Baltimore & O. R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844, affirming 43 Fed. 37. Carriers not released from liability to innocent parties to a bill of lading because a rebate is allowed. Merchants Cotton Compress and Storage Co. *v.* Ins. Co. of North America, 151 U. S. 368, 38 L. Ed. 195, 206, 14 Sup. Ct. 367. Ocean competition may make a different circumstance. Section discussed. Statement made that it was modeled on section 90, English Act of 1845, and English cases cited. Tex. & Pac. R. Co. *v.* Int. Com. Com., 162 U. S. 197, 213, 219, 222, 224, 225, 40 L. Ed. 940, 945, 947, 948, 949, 16 Sup. Ct. 666. Reversing 57 Fed. 948, 6 C. C. A. 653, 20 U. S. App. 1, 4 I. C. R. 408. Prior to the act to regulate commerce recovery could not be had for discrimination unless the charge was unreasonable. Parsons *v.* Chicago & N. W. R. Co., 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. 887. Allowance of cartage to one and not to all violates section. Wight *v.* United States, 167 U. S. 512, 42 L. Ed. 258, 17 Sup. Ct. 822. "Under substantially similar circumstances and conditions" refers to matter of carriage and does not include competition. id. While this is true of section two, it is not true of section four. Int. Com. Com. *v.* Alabama M. Ry. Co., 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45; East Tenn., Va. & Ga. Ry. Co. *v.* Int. Com. Com., 181 U. S. 1,

45 L. Ed. 719, 21 Sup. Ct. 516; Int. Com. Com. *v.* Clyde S. S. Co., 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512. See as to effect of free cartage on section four. Int. Com. Com. *v.* Detroit, etc., R. Co., 167 U. S. 633, 42 L. Ed. 306, 11 Sup. Ct. 986. Carrier cannot escape from provisions of section by electing to be a dealer in commodities shipped. New York, N. H. & H. R. Co. *v.* Int. Com. Com., 200 U. S. 361, 391, 392, 50 L. Ed. 515, 521, 26 Sup. Ct. 272. Commission has power to order carriers to cease from violating act by discriminating between persons or localities. Cincinnati, H. & D. Ry. Co. *v.* Int. Com. Com., 206 U. S. 142, 51 L. Ed. 995, 27 Sup. Ct. 648.

Notes of Decisions Rendered Since 1909.

May not discriminate in favor of school children. Commutation Tickets to School Children, 17 I. C. C. 144, but see Int. Ry. Co. *v.* Mass., 207 U. S. 79, 52 L. Ed. 111, 28 Sup. Ct. 26. No different rate on returned shipment except where shipment refused by consignee. Reduced Rates on Returned Shipments, 19 I. C. C. 409, 416. Not violated by contract with only one auction company. Southwestern Produce Distributor *v.* W. R. R. Co., 20 I. C. C. 458. Ownership not a reason for different application of rates. California Commercial Ass'n *v.* Wells, Fargo & Co., 21 I. C. C. 300 citing cases. Section directed against "preferential charges." Commutation Rate case, 21 I. C. C. 428, 431. Cited in discussing demurrage charges. Demurrage Charges in State of California, 25 I. C. C. 314, 323. Section applies to shipment "over the same line, the same distance, under the same circumstances of carriage." Import Rates on Manganese Ore, 25 I. C. C. 663, 668 citing Int. Com. Com. *v.* B. & O. R. Co., 225 U. S. 326, 56 L. Ed. 1107, 32 Sup. Ct. 742; Wight *v.* U. S., 167 U. S. 512, 518, 42 L. Ed. 258, 17 Sup. Ct. 822. Discrimination not made by the defendant carrier but by other carrier. Coke Producers Ass'n *v.* B. & O. R. R. Co., 27 I. C. C. 125, 144, citing Ashland Fire Brick Co. *v.* S. Ry. Co., 22 I. C. C. 115, 120; Indiana Steel & Wire Co. *v.* C. R. I. & P. Ry. Co., 16 I. C. C. 155, Railroad Com. of Tenn. *v.* A. A. R. R. Co., 17 I. C. C. 418. Section discussed and "like" construed. Board of Trade of Chicago *v.* C. & A. R. R. Co., 27 I. C. C. 530, 534. Difference in switching charges, traffic moving from same point of origin violates section. Richmond Chamber of Commerce *v.* S. A. L. Ry. Co., 30 I. C. C. 552. Section does not limit Elkins Act, Hocking Val-

ley Ry. Co. *v.* U. S., 210 Fed. 735, 127 C. C. A. 285 affirming. U. S. *v.* Hocking Valley Ry. Co., 194 Fed. 234, and same question Sunday Creek Co. *v.* United States, 210 Fed. 747, 127 C. C. A. —. Violator to pay bonus for erecting plant at particular place. U. S. *v.* Union Stock & Transit Co., 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83, modifying same styles case, 192 Fed. 330, Opin. Com. Ct. No. 15, p. 189. Allowance "for transfer" does not violate. American Sugar Refining Co. *v.* Delaware, L. & W. R. Co., 207 Fed. 733, 125 C. C. A. 251, reversing same styled case, 200 Fed. 652. Rebate from published tariff for haul from mine violates. Mitchell Coal & Coke Co. *v.* Penn. R. Co., 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916, modifying judgment in same styled case, 183 Fed. 908. Forwarding agent a person within meaning of Section. Int. Com. Com. *v.* D. L. & W. Ry. Co., 220 U. S. 235, 55 L. Ed. 448, 31 Sup. Ct. 392. Section referred to in its application to the long and short haul clause. U. S. *v.* A. T. & S. F. Ry. Co., Inter-mountain case, 234 U. S. 476, 58 L. Ed. 1408, 34 Sup. Ct. 986, reversing the Com. Ct. in A. T. & S. F. Ry. Co. *v.* U. S., 191 Fed. 856, Opin. Com. Courts Nos. 50, 51, p. 229 and sustaining the Commission in Railroad Com. of Nevada *v.* So. Pac. Co., 21 I. C. C. 329, Spokane *v.* N. Pac. Ry. Co., 21 I. C. C. 400. Section 2 and 3 contrasted. Curry & Whyte *v.* D. & I. R. R. Co., 32 I. C. C. 162, 168. Section not violated by exacting same rate on cotton packed to a different density. American Round Bale Press Co. *v.* A. T. & S. F. R. Co., 32 I. C. C. 458, 462.

§ 346. **Undue and Unreasonable Preference Prohibited.** —That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

First paragraph of section 3 of the original act.

This provision substantially follows language in section two of English Traffic Act of 1854, and section eleven of the act of 1873. The English act provides:

Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all

reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company, and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf.

Browne & Theobald's Railway Laws, 405, Halsbury's Laws of England, Vol. 4, p. 76.

Religious teachers in view of section 2 of act may receive special reduced rates. Re Religious Teachers, 1 I. C. C. 21. Discount may not be given large shippers. Providence Coal Co. *v.* Providence, etc., R. Co., 1 I. C. C. 107, 1 I. C. R. 316, 363. A carrier operating parallel lines should furnish corresponding advantages to each line. Boards of Trade Union *v.* Chicago, etc., R. Co., 1 I. C. C. 215, 1 I. C. R. 608. Undue preference illegal although not wholly voluntary. Raymond *v.* Chicago, M. & St. P. R. Co., 1 I. C. C. 230, 1 I. C. R. 627. Unreasonable preference illegal whether accomplished by device or directly. Scofield *v.* Lake, etc., R. Co., 2 I. C. C. 90, 1 I. C. R. 593, 2 id. 67. Subscriptions to build a railroad no legal reason to affect rates favorably to subscribing territory. Lincoln Board of Trade *v.* U. P. R. Co., 2 I. C. C. 147, 2 I. C. R. 95. Uniform rate on milk

from all stations within two hundred miles of New York not unjust discrimination. Howell *v.* New York, etc., R. Co., 2 I. C. C. 272, 2 I. C. R. 162. Rule discussed for making rates between communities in accord with section. Detroit Board of Trade *v.* Grand Trunk Ry., 2 I. C. C. 315, 2 I. C. R. 199. Rates should be known and announced publicly as to all places and persons. Re Tariffs Transcontinental Lines, 2 I. C. C. 324, 2 I. C. R. 203. Rate per ton mile may vary with distance. New Orleans Cotton Exchange *v.* Cincinnati, etc., R. Co., 2 I. C. C. 375, 2 I. C. R. 289; Same *v.* Ill. Cent. R. Co., 3 I. C. C. 534, 2 I. C. R. 777. Circumstances may be so different as to justify deviations from rule of equal mileage on different branches of the same road, but burden to show such circumstances on the carrier. Logan *v.* Chicago & N. W. R. Co., 2 I. C. C. 604, 2 I. C. R. 431. Through rates not required to be made on a mileage basis. McMorran *v.* Grand Trunk R. Co., 3 I. C. C. 252, 2 I. C. R. 604. Separation of races legal but accommodations must be equal. Heard *v.* Ga. R. Co., 3 I. C. C. 111, 2 I. C. R. 508; see same case, 1 I. C. C. 428, 1 I. C. R. 719; Cozartt *v.* So. Ry. Co., 16 I. C. C. 226; Gaines *v.* Seaboard A. L. Ry., 16 I. C. C. 471. May make a reasonable difference between C. L. and L. C. L. shipments. Car load ratings should be equal, whether one or more consignors or consignees. Thurber *v.* New York, etc., R. Co., 3 I. C. C. 473, 2 I. C. R. 742. Special tariffs for emigrants only illegal. Elvey *v.* Ill. Cent. R. Co., 3 I. C. C. 652, 2 I. C. R. 804. Should be no distinction between the rates and allowances on oil shipped in tank cars and in barrels. Rice *v.* Western N. Y. etc., R. Co., 4 I. C. C. 131, 3 I. C. R. 162; see also 5 I. C. C. 193, 3 I. C. R. 841, 6 I. C. C. 455. Discrimination is not legalized because large investments have been made under it. Board of Trade of Chicago *v.* Chicago & Alton R. Co., 4 I. C. C. 158, 3 I. C. R. 233. Mere quantity, other than a recognized unit of carriage, no reason for difference in rate. Harvard *v.* Penn. Co., 4 I. C. C. 212, 3 I. C. R. 257. A differential between wheat and wheat flour long maintained may be continued. Kauffman *v.* Mo. Pac. R. Co., 4 I. C. C. 417, 3 I. C. R. 400. Rates should be relatively just both as to localities and different kinds of traffic. Squire *v.* Mich. Cent. R. Co., 4 I. C. C. 611, 3 I. C. R. 515. Water competition when freight can move over the longer distance point justifies a less rate for the longer than the shorter haul. James & Mayer Buggy Co. *v.* Cincinnati, etc., R.

Co., 4 I. C. C. 744, 3 I. C. R. 682. Order not enforced. Int. Com. Co. *v.* Cincinnati, etc., R. Co., 56 Fed. 925. Circuit court reversed. 13 U. S. App. 720, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700. Section compared with English act. Railroad Com. of Ga. Trammel et al. *v.* Clyde S. S. Co., 5 I. C. C. 324, 4 I. C. R. 120, 140. Order not enforced. Int. Com. Com. *v.* Western & A. R. Co., 88 Fed. 186, 93 Fed. 83, 35 C. C. A. 226, 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512. Rates on similar commodities should not greatly differ. Michigan Box Co. *v.* Flint, etc., R. Co., 6 I. C. C. 335. "Unreasonable," "unjust" and similar terms used in section defined. Daniels *v.* Chicago etc., R. Co., 6 I. C. C. 458. Excess of manufacturing cost at one point over another should not affect the relative rates. Colorado Fuel & Iron Co. *v.* So. Pac. Co., 6 I. C. C. 488. Order not enforced. So. Pac. Co. *v.* Fuel Co., 101 Fed. 779, 42 C. C. A. 12. Terms used in section discussed and held to imply comparison. Page *v.* Deleware, etc., R. Co., 6 I. C. C. 548; see 6 I. C. C. 148, 4 I. C. R. 425; Int. Com. Com. *v.* Deleware, etc., R. Co., 64 Fed. 723. Rates from Texas common points to Wichita higher than to Kansas City illegal. Johnston-Larimer Dry Goods Co. *v.* A. T. & S. F. R. Co., 6 I. C. C. 568; see also 10 I. C. C. 460, 12 I. C. C. 47, 188. Should not disregard distances and natural advantages. Commercial Club of Omaha *v.* Chicago & R. I. R. Co., 6 I. C. C. 647. Blanket rate to New York on milk from towns of different distances held violative on this section though group rates based on groups reasonably arranged legal. Milk Producers Protective Asso. *v.* Delaware, etc., R. Co., 7 I. C. C. 92, 164 and cases cited. "A city is entitled to the benefit of its location." Freight Bureau of Cincinnati *v.* C. N. O. & T. P. R. Co., 7 I. C. C. 180, 189. The law permits railroads to meet, not to extinguish, water competition. Brewer *v.* L. & N. R. Co., 7 I. C. C. 224. Order not enforced. 84 Fed. 258. Undue preference means preference that is appreciable and certain. Contract for rates not enforced. Commercial Club of Omaha *v.* Chicago & N. W. R. Co., 7 I. C. C. 386; see also Rhinelander Paper Co. *v.* N. Pac. R. Co., 13 I. C. C. 633. Higher rates from New Orleans to La Grange than to points similar in size and beyond La Grange illegal. Callaway *v.* L. & N. R. Co., 7 I. C. C. 431. Order enforced by Circuit Court, 102 Fed. 709. Reversed in Supreme Court. Int. Com. Com. *v.* L. & N. R. Co. (La Grange Case) 190 U. S. 273,

42 L. Ed. 1047, 23 Sup. Ct. 687. Differential held illegal. Chamber of Commerce of Milwaukee *v.* Chicago, M. & St. P. R. Co., 7 I. C. C. 481, 511. Terminal charges constituting a violation of section. Cattle Raisers' Asso. *v.* Ft. W. & D. City R. Co., 7 I. C. C. 555-a. Order not enforced. 98 Fed. 173, 103 Fed. 249, 43 C. C. A. 209, 186 U. S. 320, 46 L. Ed. 1182, 22 Sup. Ct. 824. Differentials to Baltimore and Philadelphia under New York legal. New York Produce Ex. *v.* B. & O. R. Co., 7 I. C. C. 612, 658, 661, 667. Whether or not competition is such as to relieve carriers from restraints of section a question of fact. Phillips, Bailey & Co. *v.* L. & N. R. Co., 8 I. C. C. 93. Discrimination held to violate section. Re Alleged Violations by St. L. & S. F. Ry. Co., 8 I. C. C. 290. May be a differential between corn and wheat and their products but must be reasonable. Board of R. R. Comr's. of Kansas *v.* A. T. & S. F. Ry. Co., 8 I. C. C. 304; Mayor, etc., of Wichita *v.* Mo. Pac. R. Co., 10 I. C. C. 35, and cases there cited. A station in Chicago, a shorter distance point should not have a higher rate than the union depot in Chicago. Chicago Fire Proof, etc., Co. *v.* Chicago & N. W. R. Co., 8 I. C. C. 316. Carriers have no right to create new markets at expense of old ones. Savannah Bureau etc. *v.* L. & N. R. Co., 8 I. C. C. 377. Order enforced. Int. Com. Com. *v.* L. & N. R. Co., 118 Fed. 613. Relative rates between Danville and Lynchburg illegal. Danville *v.* So. Ry. Co., 8 I. C. C. 409. Order not enforced. Int. Com. Com. *v.* So. Ry. Co., 117 Fed. 741, 122 Fed. 800, 60 C. C. A. 540. Rates must not destroy competition between cities. Board of Trade of Hampton *v.* N. C. & St. L. R. Co., 8 I. C. C. 503. Order not enforced. Int. Com. Com. *v.* N. C. & St. L. R. Co., 120 Fed. 934. Unjust discrimination illegal although no direct injury. Kindel *v.* A. T. & S. F. Ry. Co., 8 I. C. C. 608, 9 I. C. C. 606. Remedy for unlawful rates inadequate. McGrew *v.* M. P. R. Co., 8 I. C. C. 630. Rates violative of section. Hilton Lumber Co. *v.* Wilmington, etc., R. Co., 9 I. C. C. 17. Carriers may recognize natural, but ordinarily must not create artificial advantages. Holdzkom *v.* Mich. Cent. Ry. Co., 9 I. C. C. 42, 54. Preference to be illegal must be the result of action of carriers. Wilmington Tariff Asso. *v.* Cincinnati, Portsmouth, etc., R. Co., 9 I. C. C. 118, 157. Order not enforced. 124 Fed. 624. Illegal discrimination in failure to publish through rates. Johnson *v.* Chicago, Saint Paul, etc., R. Co., 9 I. C. C. 221. Milling in

transit a privilege that the carriers can not be forced to give. Diamond Mills Co. *v.* Boston & M. R. Co., 9 I. C. C. 311. Differentials between C. L. and L. C. L. must be reasonable. Business Men's League of St. Louis *v.* A. T. & S. F. R. Co., 9 I. C. C. 318, 359. Facts constituting discrimination. Mayor, etc., of Wichita *v.* A. T. & S. F. R. Co., 9 I. C. C. 534; Same *v.* Chicago & R. I. R. Co., 9 I. C. C. 569. Rates unduly discriminatory. Marten *v.* L. & N. R. Co., 9 I. C. C. 581; Kindel *v.* A. T. & S. F. R. Co., 9 I. C. C. 606. Higher charge on coal because of method of loading illegal. Glade Coal Co. *v.* B. & O. R. Co., 10 I. C. C. 226. Circumstances justifying different charges. Aberdeen Group Commercial Asso. *v.* M. & O. R. Co., 10 I. C. C. 289. Should not make a different rate per hundred on cattle in car lots and in ten car lots. New Orleans Live Stock Ex. *v.* T. & P. Ry. Co., 10 I. C. C. 327. Difference in rate greater than competitive conditions justified. Gardner *v.* So. Ry. Co., 10 I. C. C. 342. No reasons to charge more on live stock than on live stock products. Chicago Live Stock Ex. *v.* Chicago Great W. R. Co., 10 I. C. C. 428. Circuit court *contra.* Int. Com. Com. *v.* Chicago Great W. R. Co., 141 Fed. 1003, 209 U. S. 108, 52 L. Ed. 705, 28 Sup. Ct. Differentials between two cities should not be affected by point of origin. Mershon *v.* Cent. R. R. of N. J., 10 I. C. C. 456. Higher rate to Wichita than the longer distance to Kansas City justified, but differentials too great. Lehman-Higginson Grocery Co. *v.* A. T. & S. F. R. Co., 10 I. C. C. 460. Should be no higher rates on shingles than lumber. Duluth Shingle Co. *v.* Duluth, etc., R. Co., 10 I. C. C. 489. Refusal to grant divisions to "tap lines" east of the Mississippi River not illegal because granted by other carries west of the river. Central Yellow Pine Asso. *v.* Ill. Cent. R. Co., 10 I. C. C. 505. Order enforced. Ill. Cent. R. Co. *v.* Int. Com. Com., 206 U. S. 441, 51 L. Ed. 1128, 27 Sup. Ct. 700. Combination rate should not be less than the straight rate. Cannon Falls, etc., Elevator Co. *v.* Chicago Great W. R. Co., 10 I. C. C. 650. Reasonable differentials between Baltimore, Philadelphia and New York. Re Differential Freight Rates to and from North Atlantic Ports, 11 I. C. C. 13. Carrier not liable for discrimination caused by state commission. Re Freight Rates Between Memphis and Points in Arkansas. 11 I. C. C. 180. Differentials between corn and corn products fixed. Re Rates on Corn and Corn Products, 11 I. C. C. 212, 220, 227.

Unjust discrimination. City Gas Co. of Norfolk *v.* B. & O. R. Co., 11 I. C. C. 371. Rates not unduly prejudicial. Griffin Grocery Co. *v.* So. Ry. Co., 11 I. C. C. 522. Flour in barrels and in sacks should have a uniformly just rate relation. Cannon *v.* M. & O. R. Co., 11 I. C. C. 537. Junk should not be rated as high as machinery. National Machinery & Wrecking Co. *v.* Pittsburg, etc., R. Co., 11 I. C. C. 581. Different rates in reverse directions not necessarily unreasonable. Weil *v.* Penn. R. Co., 11 I. C. C. 627. Duncan *v.* A. T. & S. F. R. Co., 6 I. C. C. 85, 4 I. C. R. 385; MacLoon *v.* Boston & M. R. Co., 9 I. C. C. 642; Hewins *v.* New York, N. H. & H. R. Co., 10 I. C. C. 221; Phillips *v.* Grand Trunk W. R. Co., 11 I. C. C. 659; see also decision by Judge Speer, Int. Com. Com. *v.* L. & N. R. Co., 118 Fed. 613, 623. Adjustment of rates held unreasonable. Davenport *v.* So. Ry. Co., 11 I. C. C. 650. Difference in cost of manufacture no ground in itself for adjustment of rates. Phillips *v.* Grand Trunk W. Ry. Co., 11 I. C. C. 659. Not undue discrimination. Village of Goodhue *v.* Chicago Great W. Ry. Co., 11 I. C. C. 683, 687. A different charge by a carrier for transportating freight originating on its own line than for that received from connecting lines illegal. Blackwell Milling & Elevator Co. *v.* M. K. & T. R. Co., 12 I. C. C. 23; Ponca City Milling Co. *v.* M. K. & T. R. Co., id. 26. Differential between Wichita and Kansas City from Galveston too great. Johnston-Larimer Dry Goods Co. *v.* A. T. & S. F. R. Co., 12 I. C. C. 47, 188; see similar cases id, 51, 58. Carriers can not arbitrarily fix market competition. Texas Cement Plaster Co. *v.* St. L. & S. F. R. Co., 12 I. C. C. 68. May make cheaper rates to Pacific Coast from New England mills than from southeastern mills. Enterprise Mfg. Co. *v.* Ga. R. Co., 12 I. C. C. 130, 451; China & Japan Trading Co. *v.* Georgia R. Co., 12 I. C. C. 236. Rate discrimination. Tomlin-Harris Machine Co. *v.* L. & N. R. Co., 12 I. C. C. 133; Southern Grocery Co. *v.* Ga. N. R. Co., 12 I. C. C. 229. Different minimum car load on same commodity illegal. Waxelbaum *v.* Atlantic C. L. R. Co., 12 I. C. C. 178. Adjustment illegal. Nobles Bros. Grocery Co. *v.* F. W. & D. C. R. Co., 12 I. C. C. 242. Relation in rates between grain and its products long established should not be changed without good reason. Howard Mills Co. *v.* Mo. Pac. R. Co., 12 I. C. C. 258; see also Traffic Bureau *v.* Mo. Pac. R. Co., 13 I. C. C. 11. Augusta, Ga., Suburbs entitled to same rate

as Augusta. Quimby *v.* Clyde S. S. Co., 12 I. C. C. 392. Discrimination. Banner Milling Co. *v.* New York Cent., etc., R. Co., 13 I. C. C. 31. Must be no unjust discrimination in distributing cars. Powhattan Coal & Coke Co. *v.* Norfolk & W. R. Co., 13 I. C. C. 69; Royal C. & C. Co. *v.* So. Ry. Co., 13 I. C. C. 440; Traer *v.* Chicago & A. R. Co., 13 I. C. C. 451. Right to use private cars not prohibited but such use must not cause discrimination. Ruttle *v.* Pere Marquette R. Co., 13 I. C. C. 179. Must not discriminate in through routes and joint rates. Merchants Freight Bureau of Little Rock *v.* Midland Valley, etc., R. Co., 13 I. C. C. 243. Freight tariffs should not be obscure. Hydraulic Press Brick Co. *v.* St. L. & S. F. R. Co., 13 I. C. C. 342. Little reference can be given to the value of property in fixing express rates. Kindel *v.* Adams Exp. Co., 13 I. C. C. 475. Party rates must be open to all. Koch Secret Service *v.* L. & N. R. Co., 13 I. C. C. 523. Reasonable and just rates may be fixed regardless of contracts between express and railroad companies. Reynolds *v.* So. Ex. Co., 13 I. C. C. 536. Rate not violation of section. Randolph Lumber Co. *v.* Seaboard A. L. R. Co., 13 I. C. C. 601. Rates may be different on hard and soft wood timber. Burgess *v.* Transcontinental Freight Bureau, 13 I. C. C. 668. Terminal companies may not discriminate in facilities granted shippers. Eichenberg *v.* So. Pac. Co., 14 I. C. C. 250. Order not enjoined. Southern Pac. Ter. Co. *v.* Int. Com. Com., 166 Fed. 134. Not unjust discrimination to refuse to transport liquors C. O. D. Royal Brewing Co. *v.* Adams Exp. Co., 15 I. C. C. R. 255, 258. Shippers have a right to reach a common market without discrimination. Black Mountain Coal Land Co. *v.* So. Ry. Co., 15 I. C. C. 286. Competition by water may justify different car load minimum. City of Spokane *v.* N. Pac. R. Co., 15 I. C. C. 376. Furnishing two cars at the minimum of one when one large one can not be furnished, known as the "two for one" rule, must be without discrimination. Indianapolis Freight Bureau *v.* Cleveland, C. C. & St. L. Ry. Co., 15 I. C. C. 504, 516. Carrier can not discriminate in favor of products on its own line. Standard Lime & Stone Co. *v.* Cumberland Val. R. Co., 15 I. C. C. 620, 624. At common law discrimination by common carriers was illegal. Hays *v.* Penn. Co., 12 Fed. 309; Kinsley *v.* Buffalo, N. Y. & P. R. Co., 37 Fed. 181; Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561. Section two relates to unjust discrimina-

tion in rates, section three is broader and prohibits discrimination "in any respect whatever." United States *v.* Delaware, L. & W. R. Co., 40 Fed. 101, 103. Our section taken from English Traffic Acts and English cases cited showing the construction placed upon the statutes from which this section is taken. Int. Com. Com. *v.* B. & O. R. Co., 43 Fed. 37, 3 I. C. R. 192. Affirmed. 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844. Federal courts have jurisdiction under this section regardless of diversity of citizenship. Little Rock & M. R. Co. *v.* East Tenn., Va. & Ga. R. Co., 47 Fed. 771. Appeal dismissed. 159 U. S. 698, 40 L. Ed. 311, 16 Sup. Ct. 189. Does not require one road to receive cars of another when it has cars of its own in which the freight may be transported. Oregon Short Line and U. N. Ry. Co. *v.* N. Pac. R. Co., 51 Fed. 465. Affirmed. 61 Fed. 158, 9 C. C. A. 409. Only unjust discrimination prohibited. Int. Com. Com. *v.* Tex. & Pac. Ry. Co., 52 Fed. 187, citing Nicholson *v.* Great W. Ry. Co., 5 C. B. (N. S.) 366. Affirmed. 57 Fed. 948, 6 C. C. A. 653, 20 U. S. App. 1, 4 I. C. R. 408. Reversed on other grounds, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666. Clause indefinite and uncertain and as whether or not undue preference exists must be left to a jury, a violation not punishable as a crime. Tozer *v.* United States, 52 Fed. 917; see opinion and charge of lower court United States *v.* Tozer, 37 Fed. 635, 2 L. R. A. 444, 39 Fed. 369, 39 Fed. 904. Not illegal to guarantee that an opera troupe shall arrive at its destination at a given time. Foster *v.* Cleveland, C., C. & St. L. Ry. Co., 56 Fed. 434. Carrier not required to permit a competitor to land at its wharf. Ilwaco Ry. & Nav. Co. *v.* Ore. Short L. and U. N. Ry. Co., 57 Fed. 673, 6 C. C. A. 495; Weems Steamboat Company *v.* People's Steamboat Co., 214 U. S. 345, 53 L. Ed. 1024, 29 Sup. Ct. 661. Carrier may permit use of its track to one to the exclusion of other carriers. Little Rock & M. R. Co. *v.* St. L., I. M. & S. Ry. Co., 59 Fed. 400. Affirmed, 63 Fed. 775, 11 C. C. A. 417, 26 L. R. A. 192. Can not make a different charge because of origin of commodity. Bigbee, etc., Packet Co. *v.* Mobile & O. R. Co., 60 Fed. 545. Joint through tariff not basis for local tariff. Parsons *v.* Chicago & N. W. Ry. Co., 63 Fed. 903, 11 C. C. A. 489. Affirmed. 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. 887, holding that a shipper can not recover a penalty for discrimination if his rate is reasonable. Giving free pass violates section. Re Charge to Grand Jury. 66 Fed. 146. If pass is

used. Re Huntington, 68 Fed. 881. No defense to charge of discrimination that carrier may at will withdraw the favor to plaintiff's competitor. Butchers', etc., Stock Yards Co. *v.* L. & N. R. Co., 67 Fed. 35, 14 C. C. A. 290. Attention called to the fact that the words "under substantially similar circumstances and conditions" are not in this section. Int. Com. Com. *v.* Alabama M. Ry. Co., 69 Fed. 227, 231. Affirmed. 74 Fed. 715, 21 C. C. A. 51, 41 U. S. App. 453, 1 I. C. R. 685, holding that what is undue and unreasonable preference a question of fact and not of law. Affirmed. 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45, holding that a determination by the Interstate Commerce Commission that a rate violates section three is subject to review by the courts. Second and third sections compared. Int. Com. Com. *v.* L. & N. R. Co., 73 Fed. 409. The collection as well as the delivery of goods is subject to the rule of equal treatment. Detroit, G. H. & M. Ry. Co. *v.* Int. Com. Com., 74 Fed. 803, 812, 21 C. C. A. 103, 43 U. S. App. 308, reversing 57 Fed. 1005, 4 I. C R. 722. Affirmed. 167 U. S. 633, 42 L. Ed. 306, 17 Sup. Ct. 986. The ultimate power of determining whether or not there is discrimination is in the courts. Int. Com. Com. *v.* East Tenn., Va. & Ga. Ry. Co., 85 Fed. 107, 117. Affirmed. 99 Fed. 52, 39 C. C. A. 413. Reversed. East Tenn., Va. & Ga. Ry. Co. *v.* Int. Com. Com., 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516. There might be a violation of section three without a violation of section four, but the facts here do not make such a case. Int. Com. Com. *v.* Western & A. R. Co., 88 Fed. 186, 194. Affirmed. 93 Fed. 83, 35 C. C. A. 217. Modified so that the Commission could make an original investigation in accord with the rules of law announced. Int. Com. Com. *v.* Clyde S. S. Co. and Same *v.* Western & A. R. Co., 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512. Length of time will not made discrimination legal, and the courts are not concluded by the determination of carriers. Discrimination produced by an effective restraint of trade will not make such a different state of circumstances as to justify discriminative rates. East Tenn., Va. & Ga. Ry. Co. *v.* Int. Com. Com., 99 Fed. 52, 39 C. C. A. 413. Reversed because the commissioners and the courts did not consider all the legal principles that should have been applied. Cause dismissed without prejudice to the rights of the Commission to make further investigation according to the law as announced. East Tenn., Va. & Ga. Ry. Co. *v.* Int. Com. Com., 181 U. S. 1, 45 L. Ed. 719, 21 Sup.

Ct. 516. Section applies to switch connections and equity may enjoin discrimination. Interstate Stock Yards Co. *v.* Indianapolis U. Ry. Co., 99 Fed. 472. Must be actual not threatened discrimination. Lehigh V. R. Co. *v.* Rainey, 112 Fed. 487. The same evidence that will relieve from section four will disprove undue preference under section three. Int. Com. Com. *v.* Nashville, C. & St. L. Ry. Co., 120 Fed. 934. Carriers may meet competition without violating section. Int. Com. Com. *v.* Cincinnati, P. & V. R. Co., 124 Fed. 624. Whether a preference is "undue" or "unreasonable" must be determined by the circumstances of each case. The act to regulate commerce was designed to promote and not to obstruct competition. An able and comprehensive discussion of the subject of rates. Int. Com. Com. *v.* Chicago G. W. Ry. Co., 141 Fed. 1003. Affirmed, same style case, 209 U. S. 108, 52 L. Ed. 705, 28 Sup. Ct. 493, holding that competition negatives any unlawful intent on the part of the carrier. This section requires that carriers shall not discriminate in furnishing cars to shippers. United States *v.* Norfolk & W. Ry. Co., 143 Fed. 266, 74 C. C. A. 386, 404, reversing 138 Fed. 849. A carrier may legally make a contract to build up and develop a particular traffic. Delaware, L. & W. R. Co. *v.* Kutter, 147 Fed. 51, 77 C. C. A. 315. Petition for certiorari denied. 203 U. S. 588, 51 L. Ed. 330. A charge in excess of the cost of loading hay from warehouses illegal. St. Louis Hay & Grain Co. *v.* Southern Ry. Co., 149 Fed. 609. Affirmed. So. Ry. Co. *v.* St. Louis Hay & Grain Co., 153 Fed. 728, holding that charges on through business not a basis for charges on local business. Reversed. So. Ry. Co. *v.* St. Louis Hay and Grain Co., 214 U. S. 297, 53 L. Ed. 100, 4 Sup. Ct. 678, holding that the carrier was entitled to a reasonable profit in excess of the actual cost. Section sufficiently broad to cover demurrage charges. Michie *v.* New York, N. H. & H. R. Co., 151 Fed. 694. Rule as to distribution of cars to coal companies. United States *v.* B. & O. R. Co., 154 Fed. 108. Reversed. 165 Fed. 113; Logan Coal Co. *v.* Penn. R. Co., 154 Fed. 497; Majestic Coal & Coke Co. *v.* Ill. Cent. R. Co., 162 Fed. 810. A carrier may grant to one the right to erect an elevator on its right-of-way and refuse such right to another. United States *v.* Oregon R. & Nav. Co., 159 Fed. 975. Express companies can not transport free the property of its officers or employees. United States *v.* Wells Fargo Ex. Co., 161 Fed. 606. Affirmed. Wells Fargo Ex. Co. *v.* United States, 212 U. S. 522,

53 L. Ed. 635, 29 Sup. Ct. 315. Congress in adopting this section is presumed to have adopted the construction placed on a similar English statute by the courts of England. Int. Com. Com. *v.* B. & O. R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844. Statute does not define what preference is due or undue, reasonable or unreasonable and such questions are questions not of law but of fact. Tex. & Pac. R. Co. *v.* Int. Com. Com., 162 U. S. 197, 219, 220, 40 L. Ed. 940, 947, 948, 16 Sup. Ct. 666.

Notes of Decisions Rendered Since 1909.

Water competition to the extent of its forces may be regarded. Planters Gin & Compress Co. *v.* Y. & M. V. R. R. Co., 16 I. C. C. 131, 133 citing cases. May be violated in allowances to shippers under Sec. 15, Sec. 404 *post*. Merchants Cotton Press & Storage Co. *v.* I. C. R. R. Co., 17 I. C. C. 98, 105. No shipper can enjoy advantages not conceded to all in like situation. Brook-Rauch Mill & Elevator Co. *v.* M. P. Ry. Co., 17 I. C. C. 158, 164. Proportioned rates limited to one line violates. Bascom Co. *v.* A. T. & S. F. Ry. Co., 17 I. C. C. 354, 357. May not discriminate because of a contract with a particular place. Loch-Lynn Construction Co. *v.* B. & O. R. Co., 17 I. C. C. 396. Competition favored but undue discrimination prohibited. R. R. Com. of Tenn. *v.* A. A. R. Co., 17 I. C. C. 418, 421. In distribution of cars. Hillsdale Coal & Coke Co. *v.* P. R. R. Co., 19 I. C. C. 356 and cases cited. No different rate because of differences in marking packages. Algert Co. *v.* D. & R. G. R. Co., 20 I. C. C. 93. No different rate because of different use. Re Restricted Rates, 20 I. C. C. 426. Between subscribers for telephones. Shoemaker *v.* C. & P. Tel. Co., 20 I. C. C. 614. Meaning of undue and unreasonable discussed. R. R. Com. of Nevada, 21 I. C. C. 329, 336. Switching allowance limited to cases where the rate exceeds 50 cents a ton violates. Buffalo Union Furnace Co. *v.* L. S. & M. S. Ry. Co., 21 I. C. C. 620, 629. Section applies when the discriminating rate is intrastate. Railroad Com. of La. *v.* St. L. S. W. Ry. Co., Shreveport case, 23 I. C. C. 31, order sustained. Texas & Pac. Ry. Co. *v.* U. S., 205 Fed. 380, Opin. Com. Ct. No. 68, p. 655. Houston E. & W. T. Ry. Co. *v.* United States, 205 Fed. 391, Opin. Com. Ct. No. 67, p. 653; Com. Ct. affirmed. Houston E. & W. Ry. Co. *v.* United States, 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833. Carrier may grant exclusive right to one company to solicit baggage

transfers. Cosby *v.* Richmond Trans. Co., 23 I. C. C. 72. Commission can not compel an advance in rates to remove discrimination. Transportation Fresh Meats, 23 I. C. C. 652, 655. Basing-point System, Boston, Ga. *v.* A. C. L. R. Co., 24 I. C. C. 50. Board of Trade of Carollton *v.* C. of G. R. Co., 28 I. C. C. 154. Having undertaken a switching service this section requires equality. Flour City S. S. Co. *v.* L. V. R. R. Co., 24 I. C. C. 179, 189. Elevator allowances, Gund & Co. *v.* C. B. & Q. R. Co., 25 I. C. C. 326. Through routes must be maintained without discrimination. Wichita Falls System Joint Coal Rates, 26 I. C. C. 215, 223.

Distinguished from Sec. 2, Sec. 345 *supra*. Board of Trade of Chicago *v.* C. & A. R. R. Co., 27 I. C. C. 530, 534. Effect of competitive conditions discussed. Richmond Chamber of Commerce *v.* S. A. L. Ry. Co., 30 I. C. C. 552. Limits Sec. 15, *post* Sec. 400, Pacific Nav. Co. *v.* So. Pac. Co., 31 I. C. C. 472. Applies to lease of premises to shippers. Cleveland, C. C. & St. L. Ry. Co. *v.* Hirsch, 204 Fed. 849, 123 C. C. A. 145. May make an allowance for transfer without violating statute. Am. Sugar Refining Co. *v.* Delaware, L. & W. R. Co., 207 Fed. 733, 125 C. C. A. 251, reversing same styled case, 200 Fed. 652. Discrimination in the distribution of cars for determination by Commission. Morrisdale Coal & Coke Co. *v.* P. R. R. Co., 230 U. S. 304, 57 L. Ed. 1494, 33 Sup. Ct. 938, affirming same styled case 183 Fed. 929, 106 C. C. A. 269. Discrimination in use of Wharves for export business. So. Pac. Terminal Co. *v.* Int. Com. Com., 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279. Elevator allowance conditioned on reshipping in ten days legal. Int. Com. Com. *v.* Diffenbaugh, 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22, modifying, Peavey *v.* N. Pac. R. Co., 176 Fed. 409. For the Commission's decisions involved see, 176 Fed. 410. The distribution of cars within provision. Int. Com. Com. *v.* Ill. C. R. R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. 155, reversing, Chicago & A. R. Co. *v.* Int. Com. Com., 173 Fed. 930 and sustaining the Commission in Traer *v.* Chicago & A. R. Co., 13 I. C. C. 451. See also Railroad Com. of Ohio *v.* H. V. Ry. Co., 12 I. C. C. 398. Special expedited service not open to all illegal. C. & A. R. Co. *v.* Kirby, 225 U. S. 155, 56 L. Ed. 1033, 32 Sup. Ct. 648, reversing, Kirby *v.* C. & A. R. Co., 241 Ill. 418, 90 N. E. 252. Conditions impossible of performance because of rule of carrier can not be imposed on the payment of elevator allowances. Union P. R. Co. *v.* Updike Grain Co., 222 U. S. 215, 56

L. Ed. 171, 32 Sup. Ct. 39, affirming same styled case, 178 Fed. 223, 101 C. C. A. 583. Ownership of goods can not be considered. Int. Com. Com. *v.* D. L. & W. R. Co., 220 U. S. 235, 55 L. Ed. 448, 31 Sup. Ct. 392, reversing same styled case 166 Fed. 499. State made rates, see Shreveport case *supra.* Construed with Fourth Section U. S. *v.* A. T. & S. F. Ry. Co., Inter-mountain case 234 U. S. 476, 58 L. Ed. 1408, 34 Sup. Ct. 986, reversing, 191 Fed. 856, Op. Com. Ct. Nos. 50, 51, p. 229. "Tap lines" not illegal. Tap line cases, 234 U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 741, 31 I. C. C. 490, 34 I. C. C. 116, 35 I. C. C. 458, Industrial Railways case 29 I. C. C. 212. Second Industrial Railways case 34 I. C. C. 596. Cars must be forwarded without discrimination. Vulcan Coal & Mining Co. *v.* I. C. R. Co., 33 I. C. C. 52. A railroad not directly serving a locality nor a party to joint or through rates thereto can not be guilty of unjust discrimination against such locality. St. Louis I. M. & S. Ry. Co. *v.* United States, 217 Fed. 80, enjoining the order of the Commission in Metropolis Commercial Club *v.* Ill. C. R. Co., 30 I. C. C. 40. See also, So. Ry. Co. *v.* United States, 205 Fed. 465. "A just equality of opportunity for shipper and locality is required by law." Kaufman Commercial Club *v.* T. & N. O. R. Co., 31 I. C. C. 167, 171. Different proportional rates dependent on point of origin are not necessarily unlawful. Export Rates on Grain and Grain Products, 31 I. C. C. 616, and cases cited. Compare, Auguta S. R. Co. *v.* Wrightsville & T. R. Co., 74 Fed. 522 and New Orleans Board of Trade *v.* Ill. C. R. Co., 23 I. C. C. 465. Blanket rates not necessarily illegal, but are under some circumstances and upon a sufficiently comprehensive investigation the Yellow Pine Blanket might be changed. Wisconsin and Arkansas Lumber Co. *v.* St. L. I. M. & S. Ry. Co., 33 I. C. C. 33.

§ 347. **Carriers Shall Accord Reasonable and Equal Facilities for Interchange of Traffic.**—Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

Paragraph two of section three as originally enacted.

A private stock car company is not a connecting line within meaning of section. Burton Stock Car Co. *v.* Chicago & Burlington R. Co., 1 I. C. C. 132, 1 I. C. R. 329. Commission may not compel agents of one road to sell tickets over another. Chicago & Alton R. Co. *v.* Penn. R. Co., 1 I. C. C. 86, 1 I. C. R. 357. A bridge company having the powers of a common carrier bound by section. Kentucky, etc., Bridge Co. *v.* L. & N. R. Co., 2 I. C. C. 162, 2 I. C. R. 102. Order not enforced. 37 Fed. 567. Carriers may make through routes and joint rates with some river boats and refuse to do so with others. Capehart *v.* L. & N. R. Co., 4 I. C. C. 265, 3 I. C. R. 278. A carrier can not refuse to interchange traffic with another carrier because that other is interested in a competing line. New York & N. Ry. Co. *v.* New York & N. E. R. Co., 4 I. C. C. 702, 3 I. C. R. 542. Suit to enforce order not dismissed. 50 Fed. 867. Section construed and held not to give Commission power to order loaded cars delivered to a connecting carrier. R. R. Com. of Ky. *v.* L. & N. R. Co., 10 I. C. C. 173, 187. To enforce through routes and joint rates on behalf of connecting carriers is not to take the use of terminal facilities. Cardiff Coal Co. *v.* Chicago, M. & St. P. R. Co., 13 I. C. C. 460. This statute a shippers provision and indicates the "open gateway policy" of the act. Rahway Valley R. Co. *v.* Delaware, L. & W. R. Co., 14 I. C. C. 191, 194. Sections quoted. Enterprise Fuel Co. *v.* Penn. R. Co., 16 I. C. C. 218, 221. Does not require the forming of new connections or establishment of new stations. Kentucky & I. Bridge Co. *v.* L. & N. R. Co., 37 Fed. 567, 621, 630. Courts can not compel a through route and joint rate. Little Rock, etc., R. Co. *v.* St. Louis, etc., R. Co., 41 Fed. 559. A carrier may prefer its own line to that of a rival. Little Rock, etc., R. Co. *v.* East Tenn., Va. & Ga. R. Co., 47 Fed. 771. Must not only receive freight from a connection but must also grant reasonable and equal facilities for such connection. New York & N. Ry. Co. *v.* New York & N. E. R. Co., 50 Fed. 867, 870. A railroad is not required to take a connecting carrier's cars when it can transport the freight in its own cars. Oregon Short Line, etc., Ry. Co. *v.* N. Pac. R. Co., 51 Fed. 465. Affirmed. 61 Fed. 158, 9 C. C. A. 409. May enjoin a conspiracy to refuse to make connections. Toledo, etc., R. Co. *v.* Penn. Co., 54 Fed. 730, 746, 19 L. R. A. 387, 5 I. C. R. 545, 22 U. S. App. 561; Ex parte Lennon, 64 Fed. 320, 22 U. S. App. 561,

166 U. S. 548, 41 L. Ed. 1110, 17 Sup. Ct. 658. Not required to permit boats of a competitor to land at wharf. Ilwaco Ry. Co. & Nav. Co. *v.* Oregon Short Line, etc., Ry. Co., 57 Fed. 673, 6 C. C. A. 495, reversing 51 Fed. 611. Nor to permit use of its own tracks. Little Rock, etc., R. Co. *v.* St. Louis, I. M. & S. Ry. Co., 59 Fed. 400. Affirmed. 63 Fed. 775, 11 C. C. A. 417, 26 L. R. A. 192. Common carrier may make an exclusive contract with a drayage company. St. Louis Drayage Co. *v.* L. & N. R. Co., 65 Fed. 39. Or with another carrier. Prescott & A. C. R. Co. *v.* A. T. & S. F. R. Co., 73 Fed. 438. Can not charge more to transmit freight received from one carrier than from another. Augusta S. R. Co. *v.* Wrightsville & T. R. Co., 74 Fed. 522. Carrier may demand prepayment of freight from one connecting carrier and not from another. Gulf, etc., R. Co. *v.* Miami S. S. Co., 86 Fed. 407, 30 C. C. A. 142; Southern Ind. Exp. Co. *v.* United States Exp. Co., 88 Fed. 659. It is the duty of a common carrier to furnish reasonable facilities for unloading and caring for live stock, to do this by contracting with one person to the exclusion of others does not violate this section. Central Stock Yards Co. *v.* L. & N. R. Co., 118 Fed. 113, 117, 118, 55 C. C. A. 63, citing A. T. & S. F. R. Co. *v.* Denver & N. O. R. Co., 110 U. S. 667, 28 L. Ed. 291, 4 Sup. Ct. 185; Express Cases, Memphis & L. R. R. Co. *v.* So. Express Co., 117 U. S. 1, 29 L. Ed. 791, 6 Sup. Ct. 542; Pullman Palace Car Co. *v.* Mo. Pac. R. Co., 115 U. S. 587, 29 L. Ed. 499, 6 Sup. Ct. 194; N. Pac. R. Co. *v.* Washington ex rel. Dustin, 142 U. S. 492, 35 L. Ed. 1092, 12 Sup. Ct. 283. The case and the doctrine of Central Stock Yards Co. *v.* L. & N. R. Co., 118 Fed. 113, 55 C. C. A. 63, affirmed. Same case, 192 U. S. 568, 48 L. Ed. 565, 24 Sup. Ct. 339. Also assuming, without deciding, that injunction the proper remedy against discrimination, at p. 570. Duties of carrier to furnish facilities to shipper discussed at length with reference to furnishing cars to ship coal. United States *v.* B. & O. R. Co., 165 Fed. 113.

Notes of Decisions Rendered Since 1909.

Purpose of this and cognate sections is that every shipping point shall be connected with every other shipping point. Enterprise Fuel Co. *v.* P. R. R. Co., 16 I. C. C. 219, 221. "Give the use of tracks and terminal facilities" discussed. Merchants & Manufacturers Ass'n *v.* P. R. R. Co., 23 I. C. C. 474, 476. Construed with Section 1, Ante Section 338 and Sec. 15 *post* 400. Flour City S. S. Co. *v.* L. V. R. R. Co., 24 I. C. C. 179, 185;

Railroad Com. of Ark. *v.* St. L. I. M. & S. Ry. Co., 24 I. C. C. 293, 295; St. L. S. & P. R. R. Co. *v.* P. & P. U. R. Co., 26 I. C. C. 226, 234. Effect given by Commission to words "Give the use of tracks," etc. Morris Iron Co. *v.* B. & O. R. R. Co., 26 I. C. C. 240, 244; B. R. & P. Ry. Co. *v.* P. R. Co., 29 I. C. C. 114, 118; Seattle Chamber of Commerce *v.* G. N. Ry. Co., 30 I. C. C. 683, 690; Pacific Nav. Co. *v.* So. Pac. Co., 31 I. C. C. 472, 480. When a carrier switches to one connecting carrier to require like switching to another connecting carrier does not take the use of tracks contrary to the provisions of the Section. Penn. Co. *v.* U. S., 236 U. S. 351, 59 L. Ed. —, 35 Sup. Ct. 370.

§ 348. **Rule as to Long and Short Hauls.**—That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance.

Section 4 of the act as amended by the act of June 18, 1910. The section as originally passed and as it remained until the amendment of 1910 read: That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: Provided, however, That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated

common carrier may be relieved from the operation of this section of this act.

Notes to old section.

The English Railway and Traffic Act of 1888, section 27, gave the commissioners power to direct that no greater charge should be made for a shorter than a longer haul when the circumstances demanded such direction. Halsbury's Laws of England, vol. 4, p. 81.

"Under substantially similar circumstances" defined and circumstances that relieve from the section discussed. Re Southern Ry. & Steamship Co. and Petition of L. & N. R. Co., 1 I. C. C. 15, 17, 31, 76, 278, 1 I. C. R. 31. Section not to be construed without a formal petition. Re So. Pac. R. Co., 1 I. C. R. 16. Where several roads join in a tariff for the longer, and a less number in that for the shorter haul, the act applies. Boston & A. R. Co. *v.* Boston & L. R. Co., 1 I. C. C. 158, 1 I. C. R. 400, 408, 500, 571. Carrier competition may be met even though the longer through haul is less than the charge over the shorter haul. Allen *v.* Louisville, New Albany, etc., R. Co., 1 I. C. C. 199, 1 I. C. R. 621. Must be actual competition of controlling force. Harwell *v.* Columbus & W. R. Co., 1 I. C. C. 236, 1 I. C. R. 631; San Bernardino Board of Trade *v.* A. T. & S. F. R. Co., 4 I. C. C. 104, 3 I. C. R. 138. Order not enforced. Int. Com. Com. *v.* A. T. & S. F. R. Co., 50 Fed. 295. May violate section by a different classification for shorter haul. Martin *v.* So. Pac. Co., 2 I. C. C. 1, 2 I. C. R. 1. Burden on carrier to show different circumstances. Spartanburg Board of Trade *v.* Richmond & D. R. Co., 2 I. C. C. 304, 2 I. C. R. 193. Validity of the charge determined not by proportions but by the rate as an entirety. Imperial Coal Co. *v.* Pittsburg & L. E. R. Co., 2 I. C. C. 618, 2 I. C. R. 436. Principles given showing application of section to tariffs and classification in southern states. Re Atlanta & W. P. R. Co., 3 I. C. C. 19, 46, 2 I. C. R. 461. Free cartage at the longer and not at the shorter may constitute a violation of section. Stone *v.* Detroit, etc., R. Co., 3 I. C. C. 613, 3 I. C. R. 60. Blanket rate legal when forced by competition. Rice *v.* A. T. & S. F. R. Co., 4 I. C. C. 228, 3 I. C. R. 263. Rate legal because of competition. King *v.* New York, N. H. & H. R. Co., 4 I. C. C. 251, 3 I. C. R. 272. Basing point rate plus the local not approved. Hamilton & Brown *v.* Chattanooga, R. & C. R. Co., 4 I. C. C. 686, 3 I. C. R. 482. Local carrier participating in in-

terstate haul cannot escape the provisions of this section. James & Mayer Buggy Co. *v.* Cincinnati, N. O. & T. P. R. Co., 4 I. C. C. 744, 3 I. C. R. 682. Order not enforced by circuit court. Int. Com. Com. *v.* C. N. O. & T. P. R. Co., 56 Fed. 925. Circuit court reversed, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700. No reason for greater charge for shorter haul. Perry *v.* Florida Cent. & P. R. Co., 5 I. C. C. 97, 3 I. C. R. 740. Section intended to maintain not destroy advantages of location. Raworth *v.* N. Pac. R. Co., 5 I. C. C. 234, 3 I. C. R. 857. Carriers may not determine for themselves whether or not the circumstances justify a greater charge for a short haul, except on their own line; where there is a joint line, must before making the charge obtain order of Commission. Trammel, etc., R. R. Comr's. of Ga. *v.* Clyde Steamship Co., 5 I. C. C. 324, 4 I. C. R. 120. Order not enforced. Int. Com. Com. *v.* W. & A. A. Co., 88 Fed. 186, 93 Fed. 83, 35 C. C. A. 226, 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512. Rates to Pacific Coast Terminals may be lower than to Spokane. Merchants Union of Spokane Falls *v.* N. P. R. Co., 5 I. C. C. 478, 4 I. C. R. 183. Order not enforced. Farmers L. & T. Co. *v.* N. Pac. R. Co., 83 Fed. 249. Greater charge to Chattanooga than through Chattanooga to Nashville illegal. Board of Trade of Chattanooga *v.* E. T., V. & G. R. Co., 5 I. C. C. 546, 4 I. C. R. 213. Order enforced. 85 Fed. 107, 99 Fed. 52, 39 C. C. A. 413. Reversed in Supreme Court. East Tenn., Va. & Ga. R. Co. *v.* Int. Com. Com., 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516. When difference justifies, it must be reasonable. Competition for the longer haul between carriers subject to the act not a dissimilar circumstance. Gerke Brewing Co. *v.* L. & N. R. Co., 5 I. C. C. 596, 4 I. C. R. 267. The fact that one city is larger than another, no such dissimilar condition as the statute requires. Board of Trade of Troy *v.* Ala. Midland R. Co., 6 I. C. C. 1. Order not enforced. Int. Com. Com. *v.* Ala. M. R. Co., 69 Fed. 227, 74 Fed. 715, 21 C. C. A. 51, 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45. Competition of markets and carriers not justify carriers in first instance to charge more for a longer than a shorter haul, but the carrier must obtain permission of the Interstate Com. Com. Behlmer *v.* Memphis & C. R. Co., 6 I. C. C. 257, 4 I. C. R. 520. Order not enforced. 71 Fed. 835. Circuit court reversed. 83 Fed. 898. Circuit court of appeals reversed. L. & N. R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209. Shortage of grain

crop sufficient to justify temporary order to charge less for a longer than for a shorter haul. Re Application of Freemont, Elkhorn & Mo. Valley R. Co. et al., 6 I. C. C. 293. Each case must be determined on its special facts. Re Petition of Cincinnati, H. & D. R. Co., for Relief Under Section 4, 6 I. C. C. 323. World's Fair sufficient reason for relief under proviso. Re Petition of Cincinnati, H. & D. R. Co., for Relief Under Section 4. 6 I. C. C. 323. Re Application of Rome, Watertown, etc., R. Co., 6 I. C. C. 328. That there is a shorter line to the same point does not justify relief. Hill & Bro. *v.* Nashville, C. & St. L. R. Co., 6 I. C. C. 343. "Line" means a physical line, not a mere business arrangement. Daniels *v.* Chicago, R. I. & P. R. Co., 6 I. C. C. 458, 476. To Kansas City the longer distance, a less rate should not be given than to Wichita the shorter. Johnston-Larimer Dry Goods Co. *v.* A. T. & S. F. R. Co., 6 I. C. C. 568, 12 I. C. C. 47, 188. Violation of section a form of unjust discrimination. McClelen *v.* So. Ry. Co., 6 I. C. C. 588. Order not enforced. Int. Com. Com. *v.* So. Ry. Co., 105 Fed. 703. Dissimilarity of the carrier's own making not justify deviation from rule. Jerome Hill Cotton Co. *v.* M. K. & T. Ry. Co., 6 I. C. C. 601. Competition at the longer distance point by carriers subject to act not justify less rate for longer haul unless by permission of Commission. Board of Trade of Lynchburg *v.* Old Dominion Steamship Co., 6 I. C. C. 632. Re Alleged Violation of Fourth Section, 7 I. C. C. 61. Section not violated by charging the same rate for the shorter as for the longer distance. Milk Producers' Protective Asso. *v.* Delaware, L. & W. R. Co., 7 I. C. C. 93, 163. Carriers may meet but not extinguish water competition. Brewer *v.* L. & N. R. Co., 7 I. C. C. 224, 235; Railroad Comrs. of Ky. *v.* Cincinnati, N. O. & T. P. R. Co., 7 I. C. C. 380. Order not enforced. Brewer *v.* Central of Ga. R. Co., 84 Fed. 258. Competition of markets not sufficient to relieve from statute. Fewell *v.* Richmond & D. R. Co., 7 I. C. C. 354. Higher rates from New Orleans to La Grange the shorter distance than to Atlanta illegal. Callaway *v.* L. & N. R. Co., 7 I. C. C. 431. Order enforced. 102 Fed. 709. Circuit court reversed. Int. Com. Com. *v.* L. & N. R. Co., 190 U. S. 273, 47 L. Ed. 1047, 23 Sup. Ct. 687. Water competition justifies a less charge for the longer haul. Savannah Bureau of Freight & Transportation *v.* Charleston & S. R. Co., 7 I. C. C. 458; Dallas Freight Bureau *v.* Tex. & Pac. Ry. Co., 8 I. C. C. 33. Competi-

tion with a foreign carrier not subject to the law justifies an order of the Commission relieving from section. Re Application of A. T. & S. F. Ry. Co., 7 I. C. C. 593. Re Alleged Disturbance of Passenger Rates by Canadian Pacific R. Co., 8 I. C. C. 71. Mere fact of competition not of itself justify relief from section. Phillips, Bailey & Co. *v.* L. & N. R. Co., 8 I. C. C. 93, citing decisions of Supreme Court. May make lower rate on goods exported than on those consumed at the port. Kemble *v.* Boston & A. R. Co., 8 I. C. C. 110. Section violated. Re Alleged Violation of Act by St. L. & S. F. Ry. Co., 8 I. C. C. 290. Railroad Comr's of Kansas *v.* A. T. & S. F. Ry. Co., 8 I. C. C. 304; Chicago Fire Proof, etc., Co. *v.* Chicago & N. W. Ry. Co., 8 I. C. C. 316. Kindel *v.* A. T. & S. F. Ry. Co., 8 I. C. C. 608, 9 I. C. C. 606. Rail competition may be considered, the effect of such competition being a question of fact in each case. Tileston Milling Co. *v.* N. Pac. Ry. Co., 8 I. C. C. 346, citing and following Int. Com. Com. *v.* Alabama M. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45. Dissimilar conditions. Gustin *v.* Burlington & M. R. R. Co., 8 I. C. C. 481; Marten *v.* L. & N. R. Co., 9 I. C. C. 581. Facts not authorizing the difference existing between the long and short haul rates. Board of Trade of Hampton *v.* N. C. & St. L. Ry. Co., 8 I. C. C. 503. Order not enforced. Int. Com. Com. *v.* N. C. & St. L. Ry. Co., 120 Fed. 934. Demurrage charges not within section. Penn. Millers' State Asso. *v.* Philadelphia & R. Ry. Co., 8 I. C. C. 531. All forms of competition must be considered, but in each case it is a question of fact as to the effect to be given such competition. Holdzkom *v.* Mich. Cent. Ry. Co., 9 I. C. C. 42; Dallas Freight Bureau *v.* Austin & N. W. R. Co., 9 I. C. C. 68. Carrier may meet competition of shorter line. Ulrick *v.* Lake Shore, etc., Ry. Co., 9 I. C. C. 495. Competitive conditions at Kansas City entitle her to a lower rate to Texas ports than Wichita. Mayor, etc., of Wichita *v.* A. T. & S. F. Ry. Co., 9 I. C. C. 534, 558, citing Supreme Court decisions since the case of Johnston, etc., Dry Goods Co. *v.* A. T. & S. F. Ry. Co., 6 I. C. C. 568; see also same plaintiff *v.* New York & Tex. S. S. Co., 12 I. C. C. 58. Higher rate to Chattanooga than to Nashville the longer distance not illegal under the circumstances. Chamber of Commerce of Chattanooga *v.* So. Ry. Co., 10 I. C. C. 111, citing and following previous holding of Supreme Court in same case, 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512. Same holding as to cities in Alabama

and Mississippi. Aberdeen Group Commercial Asso. *v.* M. & O. R. Co., 10 I. C. C. 289. As to cities in Florida. Rock Hill Buggy Co. *v.* So. Ry. Co., 11 I. C. C. 229. Difference greater than section justified. Gardner & Clark *v.* So. Ry. Co., 10 I. C. C. 342; Lehman-Higginson Grocery Co. *v.* A. T. & S. F. R. Co., 10 I. C. C. 460. Burden on carrier to show circumstances justifying greater change for shorter haul. Geo. M. Speigle Co. *v.* Chesapeake & O. Ry. Co., 11 I. C. C. 367. Section not violated. Dewey Bros. Co. *v.* B. & O. R. Co., 11 I. C. C. 475; Griffin Grocery Co. *v.* So. Ry. Co., 11 I. C. C. 522; Farrar *v.* So. Ry. Co., 11 I. C. C. 632; Hastings Malting Co. *v.* Chicago, M. & St. P. Ry. Co., 11 I. C. C. 675; Village of Goodhue *v.* Chicago G. W. Ry. Co., 11 I. C. C. 683; Durham *v.* Ill. Cent. R. Co., 12 I. C. C. 37; Pecos Mercantile Co. *v.* A. T. & S. F. Ry. Co., 13 I. C. C. 173; R. R. Com. of Ky. *v.* L. & N. R. Co., 13 I. C. C. 300; Topeka Banana Dealers' Asso. *v.* St. L. & S. F. R. Co., 13 I. C. C. 620; Phillips-Trawick-James Co. *v.* So. Pac. Co., 13 I. C. C. 644. A mere theoretical or paper rate not sufficient to show violation. Mo. & Kan. Shippers Asso. *v.* M. K. & T. Ry. Co., 12 I. C. C. 483. The different circumstances must not only be clearly shown, but must also clearly exercise a potent or controlling influence. Bovaird Supply Co. *v.* A. T. & S. F. Ry. Co., 13 I. C. C. 56. Facts that entitle the carrier to charge more for the shorter than the longer haul. Gump. *v.* B. & O. R. Co., 14 I. C. C. 98; Chicago Sash & Door Asso. *v.* Norfolk & W. R. Co., 14 I. C. C. 594. Section violated. Greater Des Moines Com. *v.* Chicago G. W. Ry. Co., 14 I. C. C. 294. Section referred to and held not violated. MacGillis & Gibbs Co. *v.* Chicago, M. & St. P. Ry. Co., 15 I. C. C. 329. Section not affected by amendment of June 29, 1906. City of Spokane *v.* N. Pac. R. Co., 15 I. C. C. 376, 388. Competition is a fact that justifies a less charge for a longer than a shorter haul. Ex parte Koehler, 31 Fed. 315, 12 Sawy. 446; Int. Com. Com. *v.* Cincinnati, N. O. & T. P. Ry. Co., 56 Fed. 951. Reversed. 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700. Where circumstances and conditions are not similar, the law does not apply. When there is doubt as to whether or not there is a difference, application for relief should be made to the Commission. Mo. Pac. Ry. Co. *v.* Tex. & Pac. Ry. Co., 31 Fed. 862. That the rate for the longer haul was a joint rate will not relieve from section. Junod *v.* Chicago & N. W. Ry. Co., 47 Fed. 290; Osborne *v.* Chicago & N. W. Ry. Co.,

48 Fed. 49. Reversed on this point. Chicago & N. W. *v.* Osborne, 52 Fed. 912, 3 C. C. A. 347. Followed, United States *v.* Mellen, 53 Fed. 229; Parsons *v.* Chicago & N. W. Ry. Co., 63 Fed. 903, 11 C. C. A. 489, 37 U. S. App. 389. Affirmed. 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. 887; Int. Com. Com. *v.* Alabama M. Ry. Co., 69 Fed. 227. Affirmed. 74 Fed. 715, 21 C. C. A. 51, 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45. The carrier may act under the proviso without first applying to the Commission, though the Commission has the right to revise this action. Int. Com. Com. *v.* A. T. & S. F. R. Co., 50 Fed. 295, 300; Detroit, G. H. & M. Ry. Co. *v.* Int. Com. Com., 74 Fed. 803, 819, 21 C. C. A. 103, 43 U. S. App. 308, reversing 57 Fed. 1005, 4 I. C. R. 722. Affirmed. 167 U. S. 633, 42 L. Ed. 306, 17 Sup. Ct. 986. Where the more distant point can be reached by rail and water and the less distant by only one rail carrier, the circumstances are not similar. Behlmer *v.* L. & N. R. Co., 71 Fed. 835. Reversed. 83 Fed. 898, 28 C. C. A. 229. Decree of circuit court of appeals reversed. L. & N. R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209. This section does not prevent common carriers from making special rates to meet competition and increase their business. Int. Com. Com. *v.* Alabama M. R. Co., 74 Fed. 715, 723, 724, 21 C. C. A. 51, 41 U. S. App. 453, 5 I. C. R. 685. Charges for delivery, storage, etc., are included within meaning of section. Detroit, G. H. & M. Ry. Co. *v.* Int. Com. Com., 74 Fed. 803. Competition to justify a greater charge for the shorter haul must be of that kind which could carry the freight to the longer distance point if the carrier making such charge did not. Behlmer *v.* L. & N. R. Co., 83 Fed. 898, 906. Reversed. L. & N. R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209. Competition between rival rail carriers must be considered in determining whether or not dissimilar conditions exist. Brewer *v.* Central of Ga. Ry. Co., 84 Fed. 258. Mere dissimilarity insufficient, must be sufficient to justify the difference in the charge. Int. Com. Com. *v.* East Tenn., Va. & Ga. Ry. Co., 85 Fed. 107. Affirmed, 99 Fed. 52, 39 C. C. A. 413. Reversed. East Tenn., Va. & Ga. Ry. Co. *v.* Int. Com. Com., 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516. What facts constitute dissimilar conditions. Int. Com. Com. *v.* Western & A. R. Co., 88 Fed. 186. Affirmed. 93 Fed. 83, 35 C. C. A. 217, 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512. Discrimination can not be justified where the dissimilar condi-

tions are created by roads strifling competition. East Tenn., Va. & Ga. Ry. Co. *v.* Int. Com. Com., 99 Fed. 52, 62, 63, 39 C. C. A. 413. Reversed by Supreme Court. 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516. Commission finding that the rate for the shorter haul illegal will not be set aside unless error clearly appears. Int. Com. Com. *v.* L. & N. R. Co., 102 Fed. 709. Reversed. 108 Fed. 988, 46 C. C. A. 685, 190 U. S. 273, 47 L. Ed. 1047, 23 Sup. Ct. 687. The Commission must consider the evidence showing all kinds of competition. Int. Com. Com. *v.* So. Ry. Co., 105 Fed. 705. Evidence showing no violation of this section will show that there is no violation of section three. Int. Com. Com. *v.* Nashville, C. & St. L. Ry. Co., 120 Fed. 934. The question of whether or not circumstances are or are not dissimilar is one of fact peculiarly within the province of the Commission to determine. Cincinnati, N. O. & T. P. R. Co. *v.* Int. Com. Com., 162 U. S. 184, 194, 40 L. Ed. 935, 938, 16 Sup. Ct. 700. Section relates only to transportation by rail and charges therefor and not to cartage. Int. Com. Com. *v.* Detroit, G. H. & M. R. Co., 167 U. S. 633, 644, 42 L. Ed. 306, 309, 17 Sup. Ct. 986. All competition will not justify the greater charge for the shorter haul. Carrier need not first apply to the Commission before acting on dissimilar conditions. Int. Com. Com. *v.* Alabama M. R. Co., 168 U. S. 144, 167, 169, 42 L. Ed. 414, 423, 424, 18 Sup. Ct. 45. This case as said by Mr. Justice Harlan, dissenting goes a long ways to make the Commission a useless body. Market competition, and competition of carriers subject to act must be considered by the Commission L. N. R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209; East Tenn., Va. & Ga. Ry. Co. *v.* Int. Com. Com., 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516; Int. Com. Com. *v.* Clyde S. S. Co., 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512. Possibility of competition at the shorter distance point not material. Int. Com. Com. *v.* L. & N. R. Co., 190 U. S. 273, 47 L. Ed. 1047, 23 Sup. Ct. 687. In fixing rates carriers may take into consideration genuine competition with other carriers. Int. Com. Com. *v.* Chicago G. W. R. Co., 209 U. S. 108, 119, 52 L. Ed. 705, 712, 28 Sup. Ct. 493.

Section proposes an equitable rule. Morse Bros. Co. *v.* C. R. I. P. Ry. Co., 16 I. C. C. 550, 552.

Section applied—Hewitt & Conno *v.* C. & N. W. R. Co., 16 I. C. C. 431, 434; Heileman Brewing Co. *v.* C. M. & St. P. Ry.

Co., 16 I. C. C. 386. Burden on carrier to show different "circumstances and conditions." Castens Packing Co. *v.* O. S. L. R. R. Co., 17 I. C. C. 324, 326.

Notes to Section as Amended.

Old and new sections copied and amended section applied. Railroad Commission of Nevada *v.* S. P. Co., 21 I. C. C. 329; City of Spokane *v.* N. P. Ry. Co., 21 I. C. C. 400. In each of these cases applications for relief made under the fourth section were considered and determined. These cases have been designated in the courts as the Intermountain cases. Orders of the Commission held invalid. A. T. & S. F. Ry. Co. *v.* United States, 191 Fed. 856, Op. Com. Ct. 50, 51, p. 229. The section as amended held valid, the Commerce Court reversed and the Commission sustained. U. S. *v.* A. T. & S. F. Ry. Co., 234 U. S. 476, 58 L. Ed. 1408, 34 Sup. Ct. 986, in the opinions see citation of cases under old statute. Competition between different railways not sufficient to authorize relief under section. Transportation of lime in carloads, 21 I. C. C. 170, 172. No violation of Section shown. Wright Wire Co. *v.* P. & L. E. R. R. Co., 21 I. C. C. 64; Merchants Freight Bureau *v.* M. P. Ry. Co., 21 I. C. C. 573. May determine complaint under Section 3 although application for relief under Sec. 4 is pending. Mayor, etc., of Boston, Ga. *v.* A. C. L. R. Co., 24 I. C. C. 50. Fifteen per cent excess mileage constitutes a circuitous route justifying the granting of relief under section,—. Application for Relief under Fourth Section in Regard to Rates on Salt, 24 I. C. C. 192, 195. Bowling Green Bus. Men's Ass'n *v.* L. & N. R. Co., 24 I. C. C. 228; Edwards & Bradford Lumber Co. *v.* C. B. & Q. R. R. Co., 25 I. C. C. 93; Alton Board of Trade *v.* C. & A. R. R. Co., 25 I. C. C. 589; Standard Oil Co. *v.* P. Co., 29 I. C. C. 524; Fort Scott Industrial Ass'n *v.* St. L. & S. F. R. R. Co., 29 I. C. C. 629; Rates on Tropical Fruits from Gulf Ports, 30 I. C. C. 621. Section Violated. Kellogg Toasted Corn Flakes Co. *v.* M. C. R. R. Co., 24 I. C. C. 604, and stating that over 5,000 applications for relief had been filed. No award of damages for violation of Section, prior to date of order denying application, Appalachia Lumber Co. *v.* L. & N. R. R. Co., 25 I. C. C. 193, 197; Janesville Clothing Co. *v.* C. & N. W. Ry. Co., 26 I. C. C. 628, 630. Burden placed on carriers to show they were entitled

to relief. Commercial Club of Duluth *v.* B. & O. R. R. Co., 27 I. C. C. 639, 660. Section violated and relief therefrom denied Maier & Co. *v.* S. P. Co., 29 I. C. C. 103. Fourth Section violation should not extend beyond the real necessity of the competitive or other controlling influences. Emlenton Petroleum Rates, 29 I. C. C. 519, 521. Southeastern situation discussed and rules prescribed. Fourth Section Violations in the Southeast, 30 I. C. C. 153-336. Water competition considered. Rates on Sugar, 31 I. C. C. 495; Fourth Section Violation in Rates on Sugar, 31 I. C. C. 511. The burden is on the carrier to show special circumstances entitling it to relief. Louisville & N. R. Co. *v.* United States, 225 Fed. 511. Substance and not mere form considered. U. S. *v.* L. & N. R. R. Co., 235 U. S. 314, 59 L. Ed. —, 35 Sup. Ct. 113; Duncan *v.* N. C. & St. L. R. Co., 35 I. C. C. 477.

§ 349. **Relief from Long and Short Haul Clause.**—*Provided, however,* That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section.

Added by amendment of June 18, 1910. For annotations see next preceding section.

§ 350. **Section Not to Apply for Six Months.**—*Provided further,* That no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.

Added by amendment of June 18, 1910. Section quoted, Colorado Coal Traffic Ass'n *v.* C. & S. R. Co., 19 I. C. C. 478.

§ 351. **Rates Reduced by Competition with Water Routes—Not Increased When.**—Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it

shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

Suspension of lake navigation during winter not an "elimination of water competition." Am. Insulated Wire & Cable Co. *v.* C. & N. W. Ry. Co., 26 I. C. C. 415, 416. Not determined whether or not Section applies to rates reduced before date of amendment, although in quoting the Section the word "shall" is italicized. Pig Iron Rates from Va. to Pa., 27 I. C. C. 343, 345.

§ 352. **Pooling of Freights and Division of Earnings Prohibited.**—That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

Section five of original act.

The Canadian Act, Canadian Railway Law by MacMurchy & Denison, 501, is as follows:

"No company shall, except in accordance with the provisions of this act, directly or indirectly, pool its freights or tolls with the freights or tolls of any other railway company or common carrier, nor divide its earnings or any portion thereof with any other railway company or common carrier, nor enter into any contract, arrangement, agreement, or combination to effect, or which may effect, any such result, without leave therefor having been obtained from the board."

In the same volume, p. 502, referring to this act, it is stated:

"Railroad pools are not contrary to public policy in England or in Canada. Section 284 of the Railway Act, which is similar in its terms to section 87 of the Railway Clauses Act, 1845, permits working or traffic agreements: See Hare *v.* L. & N. W. R. Co., 2 J. & H. 480, 30 L. J. Ch. 817. Two companies having the same termini, may, in order to avoid competition, come to an agreement with reference to traffic along existing routes on their lines, with a view to distribute such traffic, and the revenue derived from it, between the two companies. This case was followed in Great Western R. Co. *v.* Grand Trunk

R. W. Co., 25 U. C. R. 37, and Campbell *v.* Northern R. W. Co., 26 Gr. 522."

Pooling between a rail carrier subject to the act and a pipe line not subject not within prohibition of section. Independent Refiners' Asso. *v.* Western New York & Penn. R. Co., 5 I. C. C 415, 4 I. C. R. 162. Fines of carriers for violating an agreement to divide traffic within section. Freight Bureau of Cincinnati *v.* Cincinnati, N. O. & T. P. R. Co., 6 I. C. C. 195, 4 I. C. R. 592. Order not enforced. Int. Com. Com. *v.* Cincinnati, N. O. & T. R. Co., 76 Fed. 183, 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896. A pool may be formed by agreements as to routing. Consolidated Forwarding Co. *v.* So. Pac. Co., 9 I. C. C. 182, 206-a. Order enforced. Int. Com. Com. *v.* So. Pac. Co., 132 Fed. 829. Reversed. So. Pac. Co. *v.* Int. Com. Com., 200 U. S. 536, 50 L. Ed. 585, 26 Sup. Ct. 330; Consolidated Forwarding Co. *v.* So. Pac. Co., 10 I. C. C. 590. Doubtful whether a pool of passenger earnings from immigrant traffic in violation of section. Re Transportation of Immigrants, 10 I. C. C. 13. Purpose of section to prevent restriction of competition. Tift *v.* So. Ry. Co., 10 I. C. C. 548, 580. Order enforced. 138 Fed. 753; So. Ry. Co. *v.* Tift, 148 Fed. 1021, 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. 709. Pooling by water carriers not within section. Cosmopolitan Shipping Co. *v.* Hamburg-American P. Co., 13 I. C. C. 266, 274. It was not the intention of the interstate commerce act to include carriers within the Sherman Anti-Trust Act. United States *v.* Trans-Missouri Freight Asso., 53 Fed. 440, 1 Fed. Anti-Trust Dec. 80. Affirmed, holding that combinations in restraint of trade must be unreasonable to be illegal. United States *v.* Trans-Missouri Freight Asso., 58 Fed. 58, 73, 7 C. C. A. 15, 97, 24 L. R. A. 73, 1 Fed. Anti-Trust Dec. 186. Reversed, holding that the Sherman Anti-Trust Act applies to carriers, that all contracts in restraint of trade, whether or not such restraint is unreasonable, are illegal. United States *v.* Trans-Missouri Freight Asso., 166 U. S. 290, 41 L. Ed. 1007, 17 Sup. Ct. 540, 1 Fed. Anti-Trust Dec. 648. A contract between thirty-two carriers to maintain rates is not violative of section. United States *v.* Joint Traffic Asso., 76 Fed. 895, 1 Fed. Anti-Trust Dec. 615. Affirmed, 89 Fed. 1020, 32 C. C. A. 491, 45 U. S. App. 726, 1 Fed. Anti-Trust Dec. 869. Reversed, holding that any contract restricting competition in interstate trade is illegal. United States *v.* Joint

Traffic Asso., 171 U. S. 505, 43 L. Ed. 259, 19 Sup. Ct. 25, 1 Fed. Anti-Trust Dec. 869. Any arrangement, oral or otherwise, resulting in the division of earnings of competing carriers is illegal and violates section. Re Pooling Freights, 115 Fed. 588. Followed Int. Com. Com. *v.* So. Pac. Co., 132 Fed. 529, 839. Tonnage pool effective by initial carrier routing freight illegal. Int. Com. Com. *v.* So. Pac. Co., 123 Fed. 597, 602, 132 Fed. 829, 137 Fed. 606. Reversed, holding that practice did not constitute a pooling agreement. So. Pac. Co. *v.* Int. Com. Com., 200 U. S. 536, 50 L. Ed. 585, 26 Sup. Ct. 330. Effect on rates of a combination to fix rates. Tift *v.* So. Ry. Co., 138 Fed. 753, 760, 761, 762, 763. Affirmed. So. Ry. Co. *v.* Tift, 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. 709.

Notes of Decision Since 1909.

Section not violated. Ritter *v.* O. S. L. R. R. Co., 19 I. C. C. 443, 447.

§ 353. **Rail Carrier Not to Own Competing Water Carriers.**—From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stock holders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

Added by amendment of August 24, 1912. Known as Panama Canal Act.

§ 354. **Whether or Not Competition Exists to Be Determined by the Commission.**—Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation

of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The Commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final.

Added by amendment of Aug. 24, 1912. On April 14, 1914 the Commission issued the following conference ruling:

461. Water carriers controlled by other common carriers.—Section 5 of the act as amended by the Panama Canal Act prohibits common carriers subject to the act to have, after July 1, 1914, any interest, directly or indirectly, in any common carrier by water, or any vessel carrying freight or passengers, with which said carrier does or may compete for traffic.

The manifest purpose of this law is to bring about discontinuance of common ownership or control of water carriers except in those instances in which, after investigation and hearing, it is found that such operation is in the interest of the public or of advantage to the convenience and commerce of the people, and neither excludes, prevents, nor reduces competition on the route by water. The act does not in specific words authorize the continuance of such common ownership or control beyond July 1, 1914, pending the decision of the Commission on application relative thereto; but it is provided that any application filed before July 1, 1914, may be considered and granted thereafter. It is not conceivable that the Congress intended that the service should be withdrawn from the public on July 1, 1914, if for good and sufficient reasons it had been impossible for the Commission to determine the questions presented in the application before that date. Although the language employed is different, it seems that the legislative intent was similar to that expressed in the amended fourth section of the act and in the safety appliance acts.

The Commission therefore interprets the amendment to section 5 of the act as contemplating and authorizing a continuance of any existing common ownership or control after July 1, 1914, between rail and other carriers and water carriers not travers-

ing the Panama Canal until such time as the Commission has passed upon the application relative thereto, provided such application is filed with the Commission prior to July 1, 1914.

"May compete for traffic," "existing specified service by water," "through the Panama Canal," defined and statute discussed. Application S. P. Co., 32 I. C. C. 690. Continued ownership not shown to be "in the interest of the public," S. P. Co.—Ownership of Schooner Pasadena, 33 I. C. C. 476. "The purpose of the Panama Canal act was to preserve to the common interest of the people, free and unfettered the 'water road bed' via the Panama Canal." Lake Line Application Under Panama Canal Act, 33 I. C. C. 699. Though all rail lines and joint rates make competition within meaning of act. Application Penn. Co., 34 I. C. C. 47. Ferry boat included in meaning of act. Application Grand Trunk Railway Co., 34 I. C. C. 49. B. R. & P. Ry. Co., Operation of Car Ferry, 34 I. C. C. 52; G. T. W. Ry. Co., Operation Car Ferry, 34 I. C. C. 54.

"A rail carrier does not necessarily have to reach a point in order to compete with water carriers that operate directly to that point, but that such competition may exist by the rail carrier's participation in joint rates." S. P. Co. Ownership of Oil Steamer, 34 I. C. C. 77; A. A. R. R. Co., Operation Car Ferry Boats, 34 I. C. C. 83; P. M. & B. L. E. R. R. Co., Operation of Car Ferry Boats, 34 I. C. C. 86. Competition found not to exist. S. P. Co., Steamboats Sacramento River, 34 I. C. C. 174. Steamer Lines on Chesapeake Bay, 35 I. C. C. 692 applying the section. For other applications acted on see Application of Duluth South Shore & A. R. Co., et al., 33 I. C. C. 229; Application of Spokane P. & S. R. Co., 34 I. C. C. 462; Application of S. P. Co., 34 I. C. C. 648.

§ 355. **Commission May Relieve from Provision.**—If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen.

Added by amendment of Aug. 24, 1912. See preceding section for annotations.

§ 356. **Water Carriers to File Tariffs.**—In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: *Provided,* Any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not heard and disposed of before said date, may be considered and granted thereafter.

Added by amendment of Aug. 24, 1912.

§ 357. **Violators of Sherman Anti-Trust Act Not to Use Panama Canal.**—No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through said canal if such ship is owned, chartered, operated, or controlled by any person or company which is doing business in violation of the provisions of the act of Congress approved July second, eighteen hundred and ninety, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," or the provisions of sections seventy-three to seventy-seven, both inclusive, of an act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," or the provisions of any other act of Congress amending or supplementing the said act of July second, eighteen hundred and ninety, commonly known as the Sherman Anti-Trust Act, and amendments thereto, or said sections of the act of August twenty-seventh, eighteen hundred and ninety-four. The question of fact may be determined by the judgment of any court of the United States of competent jurisdiction in any cause pending before it to which the owners or operators of such ship are parties. Suit may be brought by any shipper or by the Attorney General of the United States.

Added by amendment of Aug. 24, 1912.

§ 358. **Carriers Shall File, Print and Keep Public Schedules of Rates.**—That every common carrier subject to the provisions of this act shall file with the Commission created by this

act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep, open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation and facilities defined in this act.

Paragraph one, section six, of the act as amended June 29, 1906. For the original act and the act of March 2, 1889, see *post*, § 364.

See Tariff Circular 18-A. for regulations with reference to filing tariffs.

One member of a traffic association may file tariffs for all. Re Filing Copies of Joint Tariffs by Traffic Combinations, 1 I. C. R. 76. Form of type to be used. Re Rate Sheets, 1 I. C. R. 316. Must publish tariffs of mileage tickets. Larrison *v.* Chicago & G. T. R. Co., 1 I. C. C. 147, 1 I. C. R. 369. Re Publication of Joint Tariffs, 1 I. C. R. 598. Local tariffs part of a through tariff and export tariffs should be filed. Re Filing of Joint Tariffs, 1 I. C. C. 657, 2 I. C. R. 9. All tariffs should be publicly announced. Re Tariffs of the Transcontinental

Lines, 2 I. C. C. 324, 2 I. C. R. 203. Reduction of rate without filing tariff showing such reduction illegal. Re Passenger Tariffs and Rate Wars, 2 I. C. C. 513, 2 I. C. R. 340. Methods generally adopted in substantial compliance with law sufficient. Re Passenger Tariffs, 2 I. C. C. 649, 2 I. C. R. 445. Purpose of section. Re Atlanta & W. P. R. Co., 3 I. C. C. 75, 2 I. C. R. 480. Foreign carriers engaged in transportation from the United States to an adjacent country must comply with section. Re Investigation of Grand Trunk Railway, 3 I. C. C. 89, 2 I. C. R. 496. On shipments intended to be exported by sea, the tariff should show rate to place of export. New York Produce Ex. *v.* New York C. & H. R. R. Co., 3 I. C. C. 137, 2 I. C. R. 553. Passenger excursion rates must be published. Pittsburg, etc., R. Co. *v.* Baltimore & O. R. Co., 3 I. C. C. 465, 2 I. C. R. 729. Order not enforced because of error on another point. Int. Com. Com. *v.* B. & O. R. Co., 43 Fed. 37, 3 I. C. R. 192, 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844. Filing of schedules raises no presumption as to the legality of rates set out therein. San Bernardino Board of Trade *v.* A. T. & S. F. R. Co., 4 I. C. C. 104, 3 I. C. R. 138. Tariffs on imported goods should be posted at the port of entry and point of destination. New York Board of Trade & Transportation *v.* The Penn. R. Co., 4 I. C. C. 447, 3 I. C. R. 417. Order enforced. Int. Com. Com. *v.* Tex. Pac. R. Co., 52 Fed. 187, 57 Fed. 948, 6 C. C. A. 653, 20 U. S. App. 1, 4 I. C. R. 408. Reversed on another ground. Tex. & Pac. R. Co. *v.* Int. Com. Com., 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666. Must post rates whether commodity exported or not. New Orleans Cotton Exp. *v.* Louisville, N. O. & Tex. R. Co., 4 I. C. C. 694, 3 I. C. R. 523. A joint tariff must show on its face what roads concur therein. Lehman-Higginson & Co. *v.* Tex. Pac. R. Co., 5 I. C. C. 44, 3 I. C. R. 706. Two rates on the same commodity should not be retained in the tariff when the lower rate, ostensibly is for a particular class, though actually open to all. Duncan *v.* A. T. & S. F. R. Co., 6 I. C. C. 85, 4 I. C. R. 385. Section and its construction discussed. Re Form and Contents of Rate Schedules, 6 I. C. C. 267, 4 I. C. R. 698. Mere designation in a circular of means of arriving at a rate not sufficient. Colorado Fuel & Iron Co. *v.* So. Pac. Co., 6 I. C. C. 488, 518. Order not enforced. So. Pac. Co. *v.* Colorado F. & I. Co., 101 Fed. 779, 42 C. C. A. 12. To use a corporation owned by a carrier

to transport freight at other than the published rate violates section. Re Alleged Unlawful Rates and Practices, 7 I. C. C. 33. Posting notice that tariffs may be obtained from agent not sufficient. Rea *v.* M. & O. R. Co., 7 I. C. C. 43; Johnson *v.* Chicago, St. P., etc., R. Co., 9 I. C. C. 221, 237. Rules and regulations affecting aggregate of rates must be shown in tariff. Suffern, Hunt & Co. *v.* Indiana, etc., R. Co., 7 I. C. C. 255, 272, 278, 279; American Warehousemen's Asso. *v.* Ill. Cent. R. Co., 7 I. C. C. 556. Section construed with reference to joint rates. New York, N. H. & H. *v.* Platt, 7 I. C. C. 323, 331. Consolidated Forwarding Co. *v.* So. Pac. Co., 9 I. C. C. 182. Order enforced. Int. Com. Com. *v.* So. Pac. Co., 132 Fed. 829. Reversed. So. Pac. Co. *v.* Int. Com. Com., 200 U. S. 536, 50 L. Ed. 585, 26 Sup. Ct. 330. Through export rates to foreign countries need not be shown, it is sufficient if the carrier to the port shows its proportion. Kemble *v.* Boston & A. R. Co., 8 I. C. C. 110, 119. But where the through rate is made by joint arrangement between the rail and water carrier it must be published. Re Exports and Domestic Rates on Grain, 8 I. C. C. 214, 276. Re Tariffs on Export and Import Traffic, 10 I. C. C. 55, 63. A local state rate part of a through rate must be published. Re Export Rates from Points East and West of Mississippi River, 8 I. C. C. 185, 213. Rules and regulations relating to storage should be stated. Penn. Millers State Asso. *v.* Philadelphia & R. R. Co., 8 I. C. C. 531, 560. When rate is per crate, the weight or dimensions should be prescribed. Re Alleged Unlawful Charges for Transportation of Vegetables, 8 I. C. C. 585. Rates referring to regulations of and charges for private cars must be published. Carr *v.* N. Pac. R. Co., 9 I. C. C. 1, 15. Tariff should show division to tap line and privilege of milling in transit. Central Yellow Pine Asso. *v.* Vicksburg, etc., R. Co., 10 I. C. C. 193. Charges for refrigeration must be shown. Re Charges for Transportation and Refrigeration of Fruit, 10 I. C. C. 360, 11 I. C. C. 129. Section violated. Re Alleged Unlawful Rates and Practices in Transportation of Coal, 10 I. C. C. 473, 484. Tariffs should be simple enough to be understood by persons of ordinary comprehension. Pitts *v.* St. L. & S. F. Ry. Co., 10 I. C. C. 684. Tariffs can not be given a retroactive effect. Re Through Routes and Through Rates, 12 I. C. C. 163. Privilege of stopping in traffic to sort, etc., must be stated. Shiel & Co. *v.* Ill. Cent. R.

Co., 12 I. C. C. 210. A toll charge not paid should not be stated in tariff. Pacific Coast Jobbers & Mfgrs. Asso. *v.* So. Pac. Co., 12 I. C. C. 319. Mistake of agent in stating rate will not relieve from tariff rates. Poor *v.* Chicago, B. & Q. Ry. Co., 12 I. C. C. 418, 469, citing and following Texas & Pac. R. Co. *v.* Mugg, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. 628. Gulf C. & S. F. R. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 Sup. Ct. 802. See recommendation of Int. Com. Com. in annual report for 1908. Carrier making delivery at its cost should so state in tariff. Schawager & Nettleton *v.* Great N. R. Co., 12 I. C. C. 521. Misleading, unreasonable or impossible conditions should not be stated in tariffs. Re Released Rates, 13 I. C. C. 556. No allowance not specified in tariffs can be allowed. La Salle, etc., R. Co. *v.* Chicago & N. W. R. Co., 13 I. C. C. 610. Tariff filed with commission binding though not posted. Pueblo Transportation Asso. *v.* So. Pac. Co., 14 I. C. C. 82. Allowance made to shippers for cost of car door boards must be stated. Victor Fuel Co. *v.* A. T. & S. F. R. Co., 14 I. C. C. 119. So must reconsignment, storage and all other privileges. Folmer & Co. *v.* Great N. Ry. Co., 15 I. C. C. 33, 36. Transportation by a railroad of employees of express companies engaged along the line of the railroad need not show in tariffs. Re Contracts for Free Transportation, 16 I. C. C. 246, 249. Tariffs are to be construed by their language and not by traffic officials. Newton Gum Co. *v.* Chicago, B. & Q. R. Co., 16 I. C. C. 341, 346. Section requires the filing of schedules, and when such schedules are filed, they show the only legal rates. Kinnavey *v.* Terminal R. Asso. of St. Louis, 81 Fed. 802. A receiver of a railroad is not bound by a tariff filed before his appointment and which he has not ratified. United States *v.* De Coursey, 82 Fed. 302. When a higher rate is charged than the rate given the shipper, because of misrouting, the shipper can recover the difference between the rate given him and the one he was compelled to pay. Pond-Decker Lumber Co. *v.* Spencer, 86 Fed. 846, 849, 30 C. C. A. 430, reversing 81 Fed. 277. Section discussed. United States *v.* Wood, 142 Fed. 405, 408, 409. The purpose of publication is that the shipper may know not only what he but also what his competitor must pay. United States *v.* Chicago & A. R. Co., 148 Fed. 646, 648. Assumed, without a definite discussion, that icing charges may be stated separately in schedules. Knudsen-Ferguson Fruit Co. *v.* Mich. Cent. R. Co., 148 Fed. 968, 971. Shipment of goods on

through bill of lading from United States to a foreign country subject to the requirements of the section. Armour Packing Co. *v.* United States, 153 Fed. 1, 10, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400. Affirmed. 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. 428. Can not evade section when tariffs show a through route by transporting property over another route. United States *v.* Vacuum Oil Co., 153 Fed. 598. A provision in a passenger ticket not shown in the schedule is unlawful and void. Baltimore & O. R. Co. *v.* Hamburger, 155 Fed. 849. When a schedule of rates includes a charge over private tracks, such charge must be collected. Chicago & A. Ry. Co. *v.* United States, 156 Fed. 558, 84 C. C. A. 324, affirming 148 Fed. 646. So also with reference to an elevator charge and no defense that such payment had to be made to get the business. Chicago, St. P., M. & O. Ry. Co. *v.* United States, 162 Fed. 835, affirming United States *v.* Chicago, St. P., M. & O. Ry. Co., 151 Fed. 84. The legality of a terminal charge separately stated must be determined by itself and without reference to the total charge for the through movement. Stickney *v.* Int. Com. Com., 164 Fed. 638. Affirmed. Int. Com. Com. *v.* Stickney, 215 U. S. 98, 54 L. Ed. 112, 30 Sup. Ct. 66. A mistake in quoting a published rate does not justify a deviation therefrom. Gulf, Col. & S. F. Ry. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 Sup. Ct. 802; Texas & Pac. Ry. Co. *v.* Mugg, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. 628; Texas & Pac. Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 444, 51 L. Ed. 553, 560, 561, 27 Sup. Ct. 350. Free cartage furnished openly and notoriously for a quarter of a century need not be stated prior to act June 29, 1906, in absence of a requirement of the commission therefor. Int. Com. Com. *v.* Detroit, G. H. & M. Ry. Co., 167 U. S. 633, 42 L. Ed. 306, 17 Sup. Ct. 986. May under this section make a distinct charge for the terminal road when separately stated in tariffs. Int. Com. Com. *v.* Chicago, B. & Q. R. Co., 186 U. S. 320, 46 L. Ed. 1182, 22 Sup. Ct. 824. Nothing in section prevents the initial carrier from retaining the right to route freight. So. Pac. Co. *v.* Int. Com. Com., 200 U. S. 536, 50 L. Ed. 585, 26 Sup. Ct. 330. Rates are established when filed with Interstate Commerce Commission though not posted. Tex. & Pac. Ry. Co. *v.* Cisco Oil Mill, 204 U. S. 449, 51 L. Ed. 562, 27 Sup. Ct. 358.

Notes of Decisions Rendered Since 1909.

The purpose of this section is to secure to the public knowledge of the rates to be charged. Schultz-Hansen Co. *v.* S. P.

Co., 18 I. C. C. 234, 237. Damages awarded for failure "plainly" to state tariff application. Larson Lumber Co. *v.* G. N. Ry. Co., 21 I. C. C. 474. Holding itself out as a common carrier may be assumed to be such. Interstate Remedy Co. *v.* Am. Ex. Co., 16 I. C. C. 436; Crescent Coal & Mining Co. *v.* C. & E. I. R. R. Co., 24 I. C. C. 149, 156, 158. Regulations governing baggage required to be stated since amendment to Sec. 1 by Act June 18, 1910. Regulations Restricting the Dimensions of Baggage, 26 I. C. C. 292. Posting not a condition precedent to making schedules operative. Buren *v.* S. P. Co., 26 I. C. C. 332. Texas & Pacific Ry. Co. *v.* Cisco Oil Mill, 204 U. S. 449, 51 L. Ed. 562, 27 Sup. Ct. 358; Kansas City So. Ry. Co. *v.* Albers Com. Co., 223 U. S. 573, 594, 56 L. Ed. 556, —Sup. Ct. 316; United States *v.* Miller, 223 U. S. 599, 56 L. Ed. 568, 32 Sup. Ct. 323. Commission's power to modify provisions as to posting stated. Franke Grain Co. *v.* I. C. R. R. Co., 27 I. C. C. 625, 629, modifying, Kiel Woodenware Co. *v.* C. M. & St. P. Ry. Co., 18 I. C. C. 242. "Integrity of through rate" defined in its application to Section. Fabrication-in-Transit Charges, 29 I. C. C. 70, 87. A shipper has a continued right in rates filed. Am. Sugar Refining Co. *v.* D. L. & W. R. Co., 207 Fed. 733, 125 C. C. A. 251, reversing same styled case, 200 Fed. 652. Failure to post tariffs no ground for recovery of damages. Ill. C. R. R. Co. *v.* Henderson Elevator Co., 226 U. S. 441, 57 L. Ed. 290, 33 Sup. Ct. 176. Stock Yards Transit Co. must file tariffs. U. S. *v.* Union Stock Yard & Transit Co., 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; modifying same styled case, 192 Fed. 330, Op. Com. Ct. No. 15 p. 189. Special arrangement for transporting men employed by Construction Co. legal. Santa Fe P. & P. R. Co. *v.* Grant Bros. Construction Co., 228 U. S. 177, 57 L. Ed. 787, 33 Sup. Ct. 474; reversing same styled case 13 Ariz. 186, 108 Pac. 467. Elkins law requires tariff to be observed. Hocking Valley Ry. Co. *v.* United States, 210 Fed. 735, 127 C. C. A. 285, affirming same styled case 194 Fed. 234; Sunday Creek Co. *v.* U. S., 210 Fed. 747. Applies to demurrage charges. U. S. *v.* Erie R. Co., 209 Fed. 283. Expedited service illegal when privilege not shown in tariff. Englemon *v.* Chicago, St. P., M. & O. Ry. Co., 210 Fed. 896; Chicago & A. R. Co. *v.* Kirby, 225 U. S. 155, 56 L. Ed. 1033, 32 Sup. Ct. 648. "In connection with" defined. Kansas City, So. Ry. Co. *v.* C. H. Albers Commission Co., 223 U. S. 573, 56 L. Ed. 556, 32 Sup. Ct. 316. Charges must be paid in

money. Louisville & N. R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671; Chicago I. & L. R. Co. *v.* United States, 219 U. S. 486, 55 L. Ed. 305, 31 Sup. Ct. 272. See notes 31 L. R. A. (N. S.) 657, 38 L. R. A. (N. S.) 357, 55 L. Ed., U. S. 305. Separate statement of terminal charges. Int. Com. Com. *v.* Stickney, 215 U. S. 98, 54 L. Ed. 112, 30 Sup. Ct. 66.

Limitation of value in the tariff controls. Boston & M. R. Co. *v.* Hooker, 233 U. S. 97, 58 L. Ed. 868, 34 Sup. Ct. 526. Purpose of Section discussed. Hamlen & Sons Co. *v.* Ill. C. R. Co., 212 Fed. 324, citing Clegg *v.* St. L. & S. F. R. Co., 203 Fed. 971, 122 Cleveland C. C. A. 273; C. C. & St. L. R. R. Co. *v.* Hirsch, 204 Fed. 849, 123 C. C. A. 145, to the effect that any contract imposing a more burdensome liability than that stated in the tariffs is void. Points from and to which rates apply must be stated. Rates on Slag, 34 I. C. C. 337.

§ 359. **Regulations as to Printing and Posting Schedules of Rates for Freight Moving through Foreign Countries from and to Any Place in the United States.**—Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

Paragraph two of section six. Paragraph as originally enacted. For annotations see next preceding section.

Posting for public inspection is not essential to make effective tariff duly filed with the Commission. Berwind-White Coal Mining Co. *v.* C. & E. R. Co., 235 U. S. 371, 59 L. Ed. —, 35 Sup. Ct. 131. Tariffs relating to import traffic. United States *v.* Grand T. R. Co., 225 Fed. 283.

§ 360. **No Change of Schedules of Rates Shall be Made without Notice.**—No change shall be made in the rates, fares,

and charges, or joint rates, fares, and charges, which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: Provided, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting and filing tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

Paragraph three of section six as amended by act June 29, 1906. For the original act of March 2, 1889 see *post,* § 519.

For administrative rulings, see tariff circulars 18-A. Time to be computed from day that notice reaches the office of Commission. Circular March 23, 1889, 2 I. C. C. 656. Export rates can not be varied from day to day to meet fluctuation. New York Produce Ex. *v.* New York C. & H. R. R. Co., 3 I. C. C. 137, 2 I. C. R. 553.

Notes of Decisions Rendered Since 1909.

Section stated as to power of the Commission to modify the requirements. Franke Grain Co. *v.* I. C. R., 27 I. C. C. 625, 629.

§ 361. **Names of All Carriers Parties to Schedules Must Be Specified.**—The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

New paragraph of section six added by act June 29, 1906.

Evidence of an agreement to a joint tariff should be a matter of record. Re Form and Contents of Rate Schedules. 6 I. C. C. 267, 279, 4 I. C. R. 698, 702. Joint rate can only be made by

concurrence or assent. New York, N. H. & H. R. Co. *v.* Platt, 7 I. C. C. 323, 333.

§ 362. **Carriers Shall File Contracts Relating to Traffic Arrangements.**—Every common carrier subject to this act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party.

Paragraph five of section six substantially as in original act, the words "subject to this act" being added by act June 29, 1906.

Contracts and agreements for joint rates must be filed. Tariff circular 18-A. So must carriers' contracts for telephone and telegraph service. Id. Express companies must file contracts for joint rates.

§ 363. **Commission May Prescribe Form of Schedules.**—The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

Paragraph six, section six, of present act, added March 2, 1889.

Tariff schedule 18-A is issued by the Interstate Commerce Commission under authority of this paragraph. Charges should be clearly and definitely stated so that the public can easily determine the rate. Colorado Fuel and Iron Co. *v.* So. Pac. Co., 6 I. C. C. 488, 518.

§ 364. **No Carrier Shall Participate in Interstate Commerce Unless the Charges Therefor Are Published, and No Such Carrier Shall Deviate from the Published Schedules.**—No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any

device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: Provided, That wherever the word "carrier" occurs in this act it shall be held to mean "common carrier."

Paragraph seven of section six, being amended by acts of June 29, 1906 and March 2, 1889.

Section six of the original act read:

"That every common carrier subject to the provisions of this act shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad, as defined by the first section of this act. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried and shall contain the classification of freight in force upon such railroad, and shall also state separately the terminal charges and any rules or regulations which in any wise change, effect or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, of at least the size of ordinary pica, and copies for the use of the public shall be kept in every depot or station upon any such railroad, in such places and in such form that they can be conveniently inspected.

"Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep for public inspection, at every depot where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States, the through rate on which shall not have been made public as required by this act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production; and any law in conflict with this section is hereby repealed.

"No advance shall be made in the rates, fares and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept for public inspection. Reductions in such published rates, fares, or charges may be made without previous notice; but whenever any such reduction is made, notice of the same shall immediately be publicly posted and the changes made shall immediately be plainly indicated upon the schedules at the time in force and kept for public inspection.

"And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any service in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

"Every common carrier subject to the provisions of this act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same. Every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment

of the Commission, be deemed practicable; and said Commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem practicable for such common carriers to publish, and the places in which they shall be published; but no common carrier party to any such joint tariff shall be liable for the failure of any other common carrier party thereto to observe and adhere to the rates, fares, or charges thus made and published.

"If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares, and charges as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any circuit court of the United States in the judicial district wherein the principal office of said common carrier is situated or wherein such offense may be committed, and if such common carrier be a foreign corporation, in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the commissioners appointed under the provisions of this act; and failure to comply with its requirements shall be punishable as and for a contempt; and the said commissioners, as complainants, may also apply, in any such circuit court of the United States, for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several states and territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several states and territories of the United States, as mentioned in the first section of this act, until such common carrier shall have complied with the aforesaid provisions of this section of this act."

Section six of the act of March 2, 1889, read:

"That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall

plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected.

"Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States, the through rate on which shall not have been made public as required by this act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production; and any law in conflict with this section is hereby repealed:

"No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. Reductions in such published rates, fares or charges shall only be made after three days' previous public notice, to be given in the same manner that notice of an advance in rates must be given.

"And when any such common carrier shall have established

and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

"Every common carrier subject to the provisions of this act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same. Every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission, be deemed practicable; and said Commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem practicable for such common carrier to publish, and the places in which they shall be published.

"No advance shall be made in joint rates, fares, and charges, shown upon joint tariffs, except after ten days' notice to the Commission, which shall plainly state the changes proposed to be made in the schedules then in force, and the time when the increased rates, fares, or charges will go into effect. No reduction shall be made in joint rates, fares, and charges, except after three days' notice, to be given to the Commission as is above provided in the case of an advance of joint rates. The Commission may make public such proposed advances, or such reductions, in such manner as may, in its judgment, be deemed practical, and may prescribe from time to time the measure of

publicity which common carriers shall give to advances or reductions in joint tariffs.

"It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon, than is specified in the schedule filed with the Commission in force at the time.

"The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be found expedient.

"If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares, and charges as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any circuit court of the United States in the judicial district wherein the principal office of said common carrier is situated, or wherein such offense may be committed, and if such common carrier be a foreign corporation in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the commissioners appointed under the provisions of this act; and the failure to comply with its requirements shall be punishable as and for a contempt; and the said commissioners, as complainants, may also apply, in any such circuit court of the United States, for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several states and territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several states and territories of the United States, as mentioned in the first section of this act, until such common carrier shall have complied with the aforesaid provisions of this section of this act."

See annotations, *supra,* under other paragraphs of section six of the Act to Regulate Commerce.

Reductions in passenger rates should not be made without a

change showing such reductions in the tariffs. Re Passenger Tariffs and Rate Wars, 2 I. C. C. 513, 2 I. C. R. 340. When no joint rates are published, the combination of the locals is the legal rate. Re Passenger Tariffs, 2 I. C. C. 649, 2 I. C. R. 445; Lehman, Higginson & Co. *v.* Tex. & Pac. R. Co., 5 I. C. C. 44, 3 I. C. R. 706. A carrier must collect its local rate unless it has joined in a joint tariff. New York, N. H. & H. R. Co. *v.* Platt, 7 I. C. C. 323. All rules and regulations affecting rates should show on the tariffs. Spillers & Co. *v.* L. & N. R. Co., 8 I. C. C. 364. Tariffs can not be given a retroactive effect. Re Through Routes and Through Rates, 12 I. C. C. 163. Mistake of agent in giving rate will not justify deviation from tariff rate. Poor Grain Co. *v.* C., B. & Q. Ry. Co., 12 I. C. C. 418, 421 and 469, citing Gulf, C. & S. F. Ry. Co. *v.* Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 Sup. Ct. 802; Tex. & Pac. Ry. Co. *v.* Mugg, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. 628. The through rate shown by the tariff is the lawful rate for a through shipment, although the combination of locals is less. Morgan *v.* M. K. & T. Ry. Co., 12 I. C. C. 525. Section construed and statement made of what an indictment for its violation should contain. United States *v.* Penn. R. Co., 153 Fed. 625; United States *v.* New York C. & H. R. R. Co., 153 Fed. 630. Act not unconstitutional because published rate fixed as legal rate. United States *v.* Standard Oil Co., of Indiana, 155 Fed. 305. Reversed on other grounds. Standard Oil Co. of Indiana *v.* United States, 164 Fed. 376; see also United States *v.* Vacuum Oil Co., 158 Fed. 536.

Notes of Decisions Rendered Since 1909.

A published rate is the legal rate, although it may not be lawful. See distinction. Arkansas Fuel Co. *v.* C. M. & St. P. Ry. Co., 16 I. C. C. 95, 97. A rate is the legal rate even though not "posted." U. S. *v.* Miller, 223 U. S. 599, 56 L. Ed. 568, 32 Sup. Ct. 323, reversing, U. S. *v.* Miller, 187 Fed. 369 and 375.

§ 365. **Preference and Precedence May Be Given Military Traffic in Time of War.**—That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given, over all other traffic, to the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic.

A new paragraph, paragraph eight, added to section six by Act June 29, 1906.

§ 366. **The Commission May Reject Schedules.**—The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Commission shall be void and its use shall be unlawful.

A new provision added to Sec 6 by act of June 18, 1910.

§ 367. **Penalty for Failure to Comply with Orders Under Section Six.**—In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with the terms of any regulation adopted and promulgated or any order made by the Commission under the provisions of this section, such carrier, receiver, or trustee shall be liable to a penalty of five hundred dollars for each such offense, and twenty-five dollars for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

A new provision added to Sec. 6 by Act of June 18, 1910.

§ 368. **Penalty for Misstating or Failure to State Rate.**—If any common carrier subject to the provisions of this act, after written request made upon the agent of such carrier hereinafter in this section referred to, by any person or company for a written statement of the rate or charge applicable to a described shipment between stated places under the schedules or tariffs to which such carrier is a party, shall refuse or omit to give such written statement within a reasonable time, or shall misstate in writing the applicable rate, and if the person or company making such request suffers damage in consequence of such refusal or omission or in consequence of the misstatement of the rate, either through making the shipment over a line or route for which the proper rate is higher than the rate over another available line or route, or through entering into any sale or other contract whereunder such person or company obligates himself or itself to make such shipment of freight at his or its cost, then the said carrier shall be liable to a penalty of two hundred and fifty dollars, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

A new provision added by Act June 18, 1910.

§ 369. **Must Post Name of Agent.**—It shall be the duty of every carrier by railroad to keep at all times conspicuously posted

in every station where freight is received for transportation the name of an agent resident in the city, village, or town where such station is located, to whom application may be made for the information by this section required to be furnished on written request; and in case any carrier shall fail at any time to have such name so posted in any station, it shall be sufficient to address such request in substantially the following form: "The Station Agent of the ——— Company at ——— Station," together with the name of the proper post office, inserting the name of the carrier company and of the station in the blanks, and to serve the same by depositing the request so addressed, with postage thereon prepaid, in any post office.

A new provision added to Section 6 by Act June 18, 1910.

§ 370. **Corporations Violating the Act to Regulate Commerce Guilty as Individuals and Punishment Prescribed.** —That anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts or under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts or by this act with reference to such persons, except as such penalties are herein changed. The wilful failure upon the part of any carrier subject to said acts to file and publish the tariffs of rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense.

First part of section one, Act February 19, 1903, known as the "Elkins Act."

Prior to this act only the agents of the corporations could be guilty of criminal offenses against the act to regulate commerce. United States *v.* Milwaukee Refrigerator Transit Co., 142 Fed. 247, 249. A carrier and its agents may be prosecuted under the same indictment. United States *v.* New York C. & H. R. R. Co., 146 Fed. 298. Affirming by the Supreme Court, holding that the act was not unconstitutional in imputing to a corporation a crim-

inal offense. New York C. & H. R. R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed. 613, 29 Sup. Ct. 304.

Notes of Decisions Rendered Since 1909.

Failure to observe the tariff rate by carrying a less or different rate than stated therein is punishable. Hocking Valley Ry. Co. *v.* U. S., 210 Fed. 735, 127 C. C. A. 285, affirming U. S. *v.* Hocking Valley Ry. Co., 194 Fed. 234. The violation of the tariff in this case was the extension of credit to shippers for freight due.

§ 371. **Rebate. Punishment for Offering, Granting, Soliciting or Accepting.**—And it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect (to) the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory (thereof) whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory (thereof,) or whereby any other advantage is given or discrimination is practiced. Every person or corporation (whether carrier or shipper) who shall, (knowingly), offer, grant, or give, or solicit, accept, or receive any such rebates, concessions or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: (Provided, That any person, or any officer or director of any corporation subject to the provisions of this act, or the act to regulate commerce and the acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.) Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt

with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

Second part of section one of Act February 19, 1903, substantially as enacted, the amendments of June 29, 1906, being inclosed in brackets. The part of the original act stricken by the amended act was as follows:

"In all convictions occurring after the passage of this act for offenses under said acts to regulate commerce, whether committed before or after the passage of this act, or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished."

Before the passage of the Elkins law it was held that as the question of whether or not the facts and circumstances constituted unjust or illegal discrimination must be left to a jury there could be no certainty as to whether or not a particular act was criminal, and, therefore, there could be no criminal punishment for violating section three of the act. Tozer *v.* United States, 52 Fed. 917. But a conviction against an agent of a carrier could be had under section ten for transporting for less than the published rate. United States *v.* Mich. Cent. R. Co., 43 Fed. 26. No conviction for receiving a rebate from a joint rate not filed and published. United States *v.* Wood, 145 Ala. 405. A consignee may be guilty as well as a consignor. The Hepburn law did not affect offenses committed prior to its passage. United States *v.* Standard Oil Co., 148 Fed. 719, 155 Fed. 305. Reversed on other grounds. Standard Oil Co. *v.* United States, 164 Fed. 376, 90 C. C. A. 364. See also that offenses not affected by section ten of the Hepburn Act. United States *v.* Chicago, St. P., M. & O. Ry. Co., 151 Fed. 84; United States *v.* New York C. & H. R. R. Co., 153 Fed. 630. Offenses hereunder may be prosecuted by information. United States *v.* Camden Iron Works, 150 Fed. 214. Reversed, 158 Fed. 561, 85 C. C. A. 585, because the initial carrier which paid the rebate had filed no through schedule of rates with the Commission. A shipment from one point to another in New York state but passing through another state is interstate commerce and subject to this law. Also holding that section ten of Hepburn law did not affect prosecution for offenses committed prior thereto. United States *v.* Delaware, L. & W. R. Co., 152 Fed. 269. Death before the

fine is paid abates the judgment. United States *v.* Pomeroy, 152 Fed. 279. Reversed, because the circuit court had no power to act, an appeal having been taken. United States *v.* New York C. & H. R. R. Co., 164 Fed. 324, 90 C. C. A. 256. Act constitutional. Crime may be punished in any district through which the transportation is conducted. Contract to maintain established rates ineffective after a higher rate has been filed and published. Armour Packing Co. *v.* United States, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400. Affirmed. 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. 428. See note to law edition. Section not restricted to departures from tariff rates, but act applies to all illegal discriminations. United States *v.* Vacuum Oil Co., 153 Fed. 598. Defective indictments for discrimination. United States *v.* B. & O. R. Co., 153 Fed. 997. The extent stated to which section one of Elkins act was repealed by Hepburn law. Great Northern Ry. Co. *v.* United States, 155 Fed. 945. Affirmed, holding that the right to prosecute for an offense committed prior to the Hepburn law was not taken away by that law. Great N. R. Co. *v.* United States, 208 U. S. 452, 52 L. Ed. 567, 28 Sup. Ct. 313. Same effect and holding act not unconstitutional. United States *v.* Great N. R. Co., 157 Fed. 288. Where tariff filed by another no crime. United States *v.* New York C. & H. R. R. Co., 157 Fed. 293. Act not unconstitutional and applies to a carrier wholly within a state when it joins in the published through rate. United States *v.* Vacuum Oil Co., 158 Fed. 536. Act applies to express companies. The failure to use the word "unjust" before "discrimination" in new act does not broaden effect of act as amended. United States *v.* Wells Fargo Ex. Co., 161 Fed. 606. Applies to refunding elevator charges when no provision in tariff therefor. Chicago, St. P., M. & O. Ry. Co. *v.* United States, 162 Fed. 835. No defense that rebate granted in compromise of claims for loss of property in transit. United States *v.* A. T. & S. F. Ry. Co., 163 Fed. 111. Each shipment upon which a rebate is actually paid, regardless of its size, is a separate offense. No crime unless and until payment is made. Standard Oil Co. of Indiana *v.* United States, 164 Fed. 376, 90 C. C. A. 364. Each rebate payment, regardless of number of shipments, constitutes a separate offense; not decided whether or not each separate agreement to pay a rebate would constitute an offense. United States *v.* Stearns Salt & Lumber Co., 165 Fed. 735. Each payment, although covering

more than one shipment, constitutes one and only one offense. United States *v.* Bunch, 165 Fed. 736. Prosecution for failure to file schedules must be at Washington, D. C. "Rates in force" defined. New York C. & H. R. R. Co. *v.* United States, 166 Fed. 267, 92 C. C. A. 331, reversing 153 Fed. 630. The device by which a rebate is granted is illegal even though not secret or fraudulent. Violations may be tried in any district through which the transportation is had. Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. 428; Chicago, B. & Q. R. Co. *v.* United States, 209 U. S. 90, 52 L. Ed. 698, 28 Sup. Ct. 439. Where full rate is paid and rebate granted at intervals, upon claims being filed therefor, each rebate payment constitutes a separate offense. New York C. & H. R. R. Co. *v.* United States, 212 U. S. 481, 498, 53 L. Ed. 613, 29 Sup. Ct. 304. Same style case, 212 U. S. 500, 53 L. Ed. 624, 29 Sup. Ct. 304. A party to a joint rate, though not filed and published by it, may be guilty. United States *v.* New York C. & H. R. R. Co., 212 U. S. 509, 53 L. Ed. 629, 29 Sup. Ct. 313. Where the shipper pays the legal rate and at intervals receives a rebate, each payment thereof is a separate offense. New York C. & H. R. R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed.—, 29 Sup. Ct. 304.

Rate collected under contract made before tariff filed and different from tariff rate illegal. Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. 428.

Notes of Decisions Rendered Since 1909.

"Rebate" defined. Am. Sugar Refining Co. *v.* Delaware, L. & W. R. Co., 207 Fed. 733, 125 C. C. A. 251. Reversing same styled case, 200 Fed. 652. Extending credit to shippers illegal. Hocking Valley Ry. Co. *v.* U. S., 210 Fed. 735, affirming, U. S. *v.* Hocking Valley Ry. Co., 194 Fed. 234; Sunday Creek Co. *v.* U. S., 210 Fed. 747, affirming U. S. *v.* Sunday Creek Co., 194 Fed. 752. Whether a particular payment is legal must be determined as of the date of the service. Elwood Grain Co. *v.* St. Joseph & G. I. Ry. Co., 202 Fed. 845, 121 C. C. A. 153. Violation of transit rules and form of indictment discussed. Grand Rapids & I. Ry. Co. *v.* U. S., 212 Fed. 577. Contract for expedited service not provided for in tariff illegal. Chicago & A. R. Co. *v.* Kirby, 225 U. S. 155, 56 L. Ed. 1033, 32 Sup. Ct. 648. When two lumber manufacturing companies use the same railroad, owned by one of them, the one not owning the

railroad can not participate in divisions allowed such carrier. Fourche River Lumber Co. *v.* Bryant Lumber Co., 230 U. S. 816, 57 L. Ed. 1498, 33 Sup. Ct. 887, reversing Bryant Lumber Co. *v.* Fourche River Lumber Co., 97 Ark. 623, 135 S. W. 796.

A shipper can not be convicted of accepting a rate less than the published rate when the true rate is unknown, a fine of $29,240,000 set aside. Standard Oil Co. of Ind. *v.* U. S., 164 Fed. 376, 90 C. C. A. 364, reversing U. S. *v.* Standard Oil Co., 155 Fed. 305. Refund of elevator charges. Wisconsin C. Ry. Co. *v.* U. S., 169 Fed. 76, 94 C. C. A. 444.

Intent of the carrier is the essence of the offense. A. T. & S. F. Ry. Co. *v.* U. S., 170 Fed. 250, 95 C. C. A. 446, reversing U. S. *v.* A. T. & S. F. Ry. Co., 163 Fed. 111.

Each payment of freight one offense. U. S. *v.* Standard Oil Co., 170 Fed. 988. Case distinguished and each shipment held the unit. U. S. *v.* Standard Oil Co. of N. Y., 192 Fed. 438. The question is discussed and the conclusion reached that each shipment is a separate offense. Grand Rapids & I. Ry. Co. *v.* U. S., 212 Fed. 577, 587, 129 C. C. A. 113. Allegations in indictment sufficient. Standard Oil Co. of N. Y. *v.* U. S., 179 Fed. 614, 103 C. C. A. 172. No violation of the statute under the facts are shown. U. S. *v.* Standard Oil Co. of Ind., 183 Fed. 223. Whether a rebate or a settlement of a valid claim a question for the jury. Lehigh Valley R. Co. *v.* U. S., 188 Fed. 879, 110 C. C. A. 513, affirming U. S. *v.* P. & R. Ry. Co., 184 Fed. 543; U. S. *v.* Bethlehem Steele Co., 184 Fed. 546; U. S. *v.* Lehigh Valley R. Co., 184 Fed. 546. Posting necessary. U. S *v.* Miller, 187 Fed. 375, reversed holding *contra* U. S. *v.* Miller, 223 U. S. 599, 56 L. Ed. 568, 32 Sup. Ct. 323. That a rate not intended to apply no defense. Merchants & Miners Transportation Co. *v.* U. S., 199 Fed. 902. Indictment for fraudulently obtaining transportation at an illegal rate. U. S. *v.* Sterling Salt Co., 200 Fed. 593. No variance under the facts here. Grand Rapids & I. R. Co. *v.* U. S., 212 Fed. 577 and 589. Nichols & Cox Lumber Co. *v.* U. S., 212 Fed. 588. A common carrier may not grant special favors. Johnson *v.* N. Y., N. H. & H. R. Co., 111 Me. 263, 88 Atl. 988. Not a rebate to compensate a shipper for services rendered or instrumentalities furnished. U. S. *v.* B. & O. R. Co., 231 U. S. 274, 58 L. Ed. 218, 34 Sup. Ct. 75. The filed tariffs must be taken notice of by shippers and must be adhered to. A. T. & S. F. Ry. Co. *v.* Robinson, 233 U.

S. 173, 58 L. Ed. 901, 34 Sup. Ct. 556. Great No. Ry. Co. *v.* O'Connor, 232 U. S. 508, 58 L. Ed. 703, 34 Sup. Ct. 380. Payment to freight forwarder a rebate. Waters-Pierce Oil Co. *v.* United States, 222 Fed. 69, — C. C. A. —. May be rebate although part of through movement in Canada. United States *v.* Grand Trunk R. Co., 225 Fed. 283.

§ 372. **Act of Officer or Agent, When Binding.**—In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person.

Second paragraph of section one of the original Elkins Act, except the act of June 29, 1906, added the words "or shipper" after "carrier" where it occurs.

Because the act of the agent is the act of the corporation, both may be included in one indictment. New York C. & H. R. R. Co. *v.* United States, 212 U. S. 481, 53 L. Ed. 613, 29 Sup. Ct. 304.

§ 373. **Carrier Filing or Participating in Rate Bound Thereby.**—Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act.

Part of second paragraph of section one Elkins Act, as originally exacted, except "thereof" was substituted for "thereto," in the act of June 29, 1906.

Section applied in a prosecution for rebating. U. S. *v.* New York C. & H. R. Co., 212 U. S. 509, 53 L. Ed. 629, 29 Sup. Ct. 313.

§ 374. **Forfeiture for Rebating in Addition to Penalties. Limitation of Six Years Fixed.**—Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this act, or for whom, as consignor or consignee, any such carrier shall trans-

port property from one state, territory, or the District of Columbia, to any other state, territory or the District of Columbia; or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this act, shall in addition to any penalties provided by this act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney-General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

New provision added to section one, Elkins Act, by act June 29, 1906.

§ 375. **Jurisdiction Over Water Carriers.**—When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single state, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

Part of Panama Canal Act, Act Aug. 24, 1912. Through route with water carrier established and section discussed. Augusta &

Savannah Steamboat Co. *v.* O. S. S. Co., 26 I. C. C. 380. Power of the Commission under the section stated. Wharfage Facilities at Pensacola, Fla., 27 I. C. C. 252, 257. Boat lines upon meeting all reasonable requirements are entitled to the establishment of through routes and joint rates. Truckers' Transfer Co. *v.* C. & W. C. Ry. Co., 27 I. C. C. 275. "Any proper development that will open our water ways to the use of the public should be encouraged." *Lumber Rates, Oregon and Washington to Eastern Points,* 29 I. C. C. 609, 619. Through routes and joint rates established with water carriers. Tampa Board of Trade *v.* L. & N. R. Co., 30 I. C. C. 377; Decatur Navigation Co. *v.* L. & N. R. Co., 31 I. C. C. 281; Bowling Green Protective Ass'n *v.* E. & B. G. P. Co., 31 I. C. C. 301, 306. Through routes and joint rates established with rail carrier, although such carrier had rails the whole length of the route, the Commission saying, "The spirit of the act to regulate commerce is to maintain the freedom of our ports and to allow boat lines to engage in traffic upon equal terms." Pacific Navigation Co. *v.* S. P. Co., 31 I. C. C. 472; Transcontinental Commodity Rates, 31 I. C. C. 449; Tampa Board of Trade *v.* A. & V. R. Co., 33 I. C. C. 457; Federal Sugar Refining Co. *v.* C. of N. J. R. Co., 35 I. C. C. 488.

§ 376. **Physical Connection between Rail Lines and Dock of Water Carriers.**—To establish physical connection between the lines of the rail carrier and the dock of the water carrier by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of its right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a spur track or tracks to the dock. This provision shall only apply where such connection is reasonably practicable, can be made with safety to the public, and where the amount of business to be handled is sufficient to justify the outlay.

The Commission shall have full authority to determine the terms and conditions upon which these connecting tracks, when constructed, shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier. The provisions of this paragraph shall extend to cases where the dock is owned by other parties than the carrier involved.

Paragraphs 2 and 3 of Panama Canal Act, amending Sec. 6 of original act.

§ 377. **Through Routes and Joint Rates between Rail and Water Carriers.**—To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

Paragraph 4 of Panama Canal Act amending Sec. 6 of original Act.

§ 378. **Proportional Rates to and from Ports.**—To establish maximum proportional rates by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. . By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

Paragraph 5 of the Panama Canal Act amending Sec. 6 of original Act.

§ 379. **Through Rates via Panama Canal.**—If any rail carrier subject to the act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railways to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

Paragraph 6 of Panama Canal Act amending Sec. 6 of original Act.

§ 380. **Conditions under Which Through Routes and Joint Rates with Water Carriers May Be Operated to Be Prescribed by the Commission.**—The orders of the Interstate Commerce Commission relating to this section shall only be made upon formal complaint or in proceedings instituted by the Commission of its own motion and after full hearing. The orders provided for in the two amendments to the act to regulate commerce enacted in this section shall be served in the same manner and enforced by the same penalties and proceedings as are the orders of the Commission made under the provisions of

section fifteen of the act to regulate commerce, as amended June eighteenth, nineteen hundred and ten, and they may be conditioned for the payment of any sum or the giving of security for the payment of any sum or the discharge of any obligation which may be required by the terms of said order.

Paragraph 7 of Panama Canal Act amending Sec. 6 of original Act. For annotation see 375 *supra*.

§ 381. **Contracts and Combinations to Prevent Continuous Carriage of Freight Prohibited.**—That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

Section seven of the original act to regulate commerce.

An injunction may be granted to prevent a carrier and its employees from refusing to receive passengers and commodities from a connecting line. Toledo, A. A. & N. M. Ry. Co. *v.* Penn. Co., 54 Fed. 730, 746, 19 L. R. A. 387, 5 I. C. C. 545, 22 U. S. App. 561.

Notes of Decisions Rendered Since 1909.

Stopping oil in pipe lines at state lines held under the facts to violate section. Re Pipe Lines, 24 I. C. C. 1, 7. For history of this case see Prairie Oil & Gas Co. *v.* U. S., Pipe Line case, 204 Fed. 798, Op. Com. Ct. Nos. 75-80, p. 545; U. S. *v.* Ohio Oil Co., 234 U. S. 548, 58 L. Ed. 1394, 34 Sup. Ct. 956. Carload freight should not be required to be unloaded at points of connection between different carriers. St. L. S. & P. R. Co. *v.* P. & P. N. Ry. Co., 26 I. C. C. 226, 234; Louisville Board of Trade *v.* L. C. & S. T. Co., 27 I. C. C. 499, 506.

§ 382. **Damages and Attorneys Fees Allowed for Violations.**—That in case any common carrier subject to the pro-

visions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section eight of original act. For annotations see next succeeding section.

§ 383. **Where to Sue for Damages, Compulsory Attendance of Witnesses and Production of Papers.**—That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Section nine of the original act.

Sections eight and nine are so related that the annotations herein apply to each. There are many cases, formal and informal, awarding reparation without announcing any rule or principle. These are not sufficiently important to be cited. The commission can not award damages for failure to furnish cars, an action therefor must be brought in a case at common law. Heck

v. East Tenn., Va. & Ga. Ry. Co., 1 I. C. C. 495, 1 I. C. R. 755; Riddle *v.* New York, L. E. & W. R. Co., 1 I. C. C. 594, 1 I. C. R. 787. These cases were decided before the amendment to section sixteen by act March 2, 1889, and since said amendment are not followed. Rawson *v.* Newport N. & M. V. R. Co., 3 I. C. C. 6, 2 I. C. R. 626; MacLoon *v.* Chicago & N. W. R. Co., 5 I. C. C. 84, 3 I. C. R. 711.

When a shipper gives instructions as to how his freight shall be routed, a violation of said instructions to his injury authorizes a recovery of the damage sustained. Pankey *v.* Richmond & D. R. Co., 3 I. C. C. 658, 3 I. C. R. 33; Rea *v.* M. & O. R. Co., 7 I. C. C. 43. But if no instructions are given, carrier may route. Dewey Bros. Co. *v.* B. & O. R. Co., 11 I. C. C. 481. But carrier must forward shipments with due regard to rights of shipper, and upon failure to do so, reparation allowed. Hennepin Paper Co. *v.* N. Pac. Ry. Co., 12 I. C. C. 535. These sections with reference to reparation show an intention upon the part of Congress to give the Commission power to fix rates. Perry *v.* Florida C. & P. R. Co., 5 I. C. C. 97, 3 I. C. R. 740, 746, citing a large number of cases in which the Commission had fixed reasonable rates. A money order for reparation may issue against a receiver of a carrier. Loud *v.* South Carolina R. Co., 5 I. C. C. 529, 4 I. C. R. 205. Rate reduced, but, under the circumstances of the case, reparation denied. James & Abbott *v.* Canadian Pac. R. Co., 5 I. C. C. 612, 4 I. C. R. 274, 283. Remedy for damages caused by delay, rotting, or other deterioration, or damage, not caused by a violation of the act is in the courts. Duncan *v.* A. T. & S. F. R. Co., 6 I. C. C. 85, 4 I. C. R. 385. Each carrier participating in an overcharge is liable for the amount thereof, and when an association complains against a rate, each of its members at the time of the hearing is entitled to reparation. Independent Refiners' Asso. *v.* Western New York & Penn. R. Co., 6 I. C. C. 378, 384. Order not enforced. Western New York & Penn. R. Co. *v.* Penn. Refining Co., 137 Fed. 343. A supplemental petition praying reparation filed two and a half years after an order declaring a rate illegal, dismissed. Rice, etc. *v.* Western N. Y. & Penn. R. Co., 6 I. C. C. 455. A discriminatory rate, though itself reasonable, justifies an order of reparation. Board of Trade of Lynchburg *v.* Old Dominion S. S. Co., 6 I. C. C. 632, 645. Order of reparation must be based on evidence that rate was unreasonable when paid. Grain Ship-

pers' Asso. *v.* Ill. Cent. R. Co., 8 I. C. C. 158. Remedy by way of damages for unlawful rate is entirely inadequate and inconsistent. McGrew *v.* Mo. Pac. Ry. Co., 8 I. C. C. 630, 642. Rates reduced but reparation denied. Johnson *v.* Chicago, St. P. M. & O. R. Co., 9 I. C. C. 221, 244. Shipments owned by several parties may be made under one bill of lading in the name of one consignor to one consignee at car load rates. Buckeye Buggy Co. *v.* Cleveland, etc., Ry. Co., 9 I. C. C. 626; California Com. Asso. *v.* Wells Fargo Ex. Co., 14 I. C. C. 422; Export Shipping Co. *v.* Wabash R. Co., 14 I. C. C. 437. Sections constitutional, as trial by jury may be had when order of Commissions sued on. Cattle Raisers' Asso. *v.* Chicago, Burlington & Q. R. Co., 10 I. C. C. 83. The measure of damages is the difference between what should have been paid and what was exacted. Where a shipper pays less than he should with the consent of the carrier, the carrier can not recover the balance of the lawful rate. Gardner *v.* So. Ry. Co., 10 I. C. C. 342, 350, 351. When complainants refused to buy ties because of a failure of a carrier to furnish cars, they could recover the profit they would have made had they bought the ties and been enabled to ship them. Paxton Tie Co. *v.* Detroit S. R. Co., 10 I. C. C. 422, 426. Such failure to furnish cars must constitute discrimination and the proof of damages must be clear. Richmond Elevator Co. *v.* Pere Marquette R. Co., 10 I. C. C. 629, 636. When a combination of locals was less than the through rate and a carrier refused to let a shipper ship so as to use the two locals, the shipper could recover reparation on all local shipments. Hope Cotton Oil Co. *v.* Tex. & Pac. Ry. Co., 10 I. C. C. 696. Right not barred by pending suit in state court, otherwise if suit was pending in a federal court. Gallogly *v.* Cincinnati, H. & D. Ry. Co., 11 I. C. C 1, 9. After decision as to rate retained for further proceedings as to reparation. Cattle Raisers' Asso. *v.* Chicago, B. & Q. R. Co., 11 I. C. C. 277. Profits may be recovered for discrimination, but reparation is not measured by the probability of profit. Eaton *v.* Cincinnati, H. & D. Ry. Co., 11 I. C. C. 619, 626. Reparation allowed only from date complainant wrote a letter to Commission complaining of rate. Texas Cement Plaster Co. *v.* St. L. & S. F. R. Co., 12 I. C. C. 68, 73. Reparation for breach of contract for a privilege not in the tariff can not be allowed. Shiel & Co. *v.* Ill. Cent. R. Co., 12 I. C. C. 210. Claim for reparation should be made in original complaint. Dal-

las Freight Bureau *v.* Gulf, C. & S. F. Ry. Co., 12 I. C. C. 223. For detriment to business directly and proximately resulting from discrimination, reparation may be awarded. Rogers & Co. *v.* Philadelphia & R. R. Co., 12 I. C. C. 308. Can not recover because a rate less than the tariff rate is quoted and relied upon. Poor *v.* Chicago, B. & Q. R. Co., 12 I. C. C. 418, 423, 469. Reparation does not follow reduction of rate as a matter of course. Farmers' Warehouse Co. *v.* L. & N. R. Co., 12 I. C. C. 457. Paper rate not a basis for reparation. Mo. & Kans. Shippers' Assn. *v.* M. K. & T. Ry. Co., 12 I. C. C. 483. The mere fact that a charge is discontinued or a rate reduced will not require the granting of reparation. Leonard *v.* Chicago, M. & St. P. Ry. Co., 12 I. C. C. 492. Reparation not allowed when a through rate in excess of the locals is paid on a through shipment. Morgan *v.* M. K. & T. Ry. Co., 12 I. C. C. 525. Shippers by reshipping may take advantage of the locals less than the through rate. Laning-Harris Coal & Grain Co. *v.* Mo. Pac. Ry. Co., 13 I. C. C. 154. When shippers designate the route, they are not entitled to reparation because there was a cheaper route. Stedman *v.* Chicago & N. W. Ry. Co., 13 I. C. C. 167; William Larsen Canning Co. *v.* Chicago, & N. W. Ry. Co., 13 I. C. C. 286. Though a shipper must pay the rates legally established, he may recover the excess over a reasonable rate. Coomes *v.* Chicago, M. & St. P. Ry. Co., 13 I. C. C. 192. Protest when paying freight unnecessary. Baer Bros. Mercantile Co. *v.* Mo. Pac. Ry. Co., 13 I. C. C. 329; So. Pine Lumber Co. *v.* So. Ry. Co., 14 I. C. C. 195; Nicola, Stone & Myers Co. *v.* L. & N. R. Co., 14 I. C. C. 199. Complaint in name of an association not naming persons in whose behalf it is filed and not stating with reasonable particularity the shipments on which reparation is sought not sufficient to stop limitation. Missouri & Kansas Shippers' Asso. *v.* A. T. & S. F. Ry. Co., 13 I. C. C. 411. Informal written presentation of claim stops limitation. Venus *v.* St. L., I. M. & S. Ry. Co., 15 I. C. C. 136. Reparation allowed only from date of filing supplemental petition. Cattle Raisers' Asso. *v.* M. K. & T. Ry. Co., 13 I. C. C. 418. Where reduced rates have been received because of irregularities, correction of such no ground for reparation. Bannon *v.* So. Ex. Co., 13 I. C. C. 516. Reparation awarded for refusing party rate ticket to one when granted to others. Koch Secret Service *v.* L. & N. R. Co., 13 I. C. C. 523. Reparation awarded for advancing a rate put in at the request of a shipper who had ad-

justed his business to the lower rate. New Albany Furniture Co. *v.* Mobile, etc. R. Co., 13 I. C. C. 594. Commission has no jurisdiction to award damages for breach of contract. La Salle, etc., R Co. *v.* Chicago & N. W. R. Co., 13 I. C. C. 610. Excess rate paid may be recovered though shipper not damaged. Burgess *v.* Transcontinental Freight Bureau, 13 I. C. C. 668. Reparation allowed only from date of filing complaint. id. Voluntary reduction of rate not conclusive of right to reparation for paying the higher rate. Ottumwa Bridge Co. *v.* Chicago, M. & St. P. Ry. Co., 14 I. C. C. 121. The true owner paying the excessive charge can alone recover. Manufacturers selling F. O. B. their mills can not recover. Nicola, Stone & Meyers Co. *v.* L. & N. R. Co., 14 I. C. C. 199. Mistake in quoting rate not relieve shipper from paying full tariff rate. Foster Bros. Co. *v.* Duluth, etc., Ry. Co., 14 I. C. C. 232, 236. Misrouting at the highest rate entitles shipper to reparation. McCaull-Dinsmore Co. *v.* Chicago G. W. Ry. Co., 14 I. C. C. 527; Cedar Hill Coal & Coke Co. *v.* Col. So. Ry. Co., 14 I. C. C. 606; Gus. Momsen & Co. *v.* Gila Valley, etc., Ry. Co., 14 I. C. C. 614. Reparation allowed because through rate exceeded sum of locals. Minneapolis Threshing Mch. Co. *v.* Chicago, M. & St. P. Ry. Co., 14 I. C. C. 536; Sylvester *v.* Penn. R. Co., 14 I. C. C. 573; Hardenberg, D. & G. *v.* N. Pac. Ry. Co., 14 I. C. C. 579. In allowing reparation Commission takes no account of fact that less than tariff rate was paid and must assume that full rate was paid. Wilson *v.* Chicago, M. & St. P. Ry. Co., 14 I. C. C. 549, 550. When a car of particular capacity is ordered and one of higher capacity furnished, rate should be based on capacity of car ordered. Am. Lumber & Mfg. Co. *v.* So. Pac. Co., 14 I. C. C. 561. Commission no authority to adjudicate a claim against a shipper. Laning-Harris Coal & Grain Co. *v.* St. Louis & S. F. R. Co., 15 I. C. C. 37. Reparation not awarded in this case where carrier voluntarily reduced rate. Menefee Lumber Co. *v.* Tex. & Pac. Ry. Co., 15 I. C. C. 49. Can not award reparation for failure to make prompt delivery. Blume & Co. *v.* Wells Fargo & Co., 15 I. C. C. 53, 55. Commission has jurisdiction regardless of amount in controversy, but does not award costs or attorney's fees. Washer Grain Co. *v.* Mo. Pac. Ry. Co., 15 I. C. C. 147, 151, 152. Jurisdiction to award damages for diverted shipments. Woodward & Dickerson *v.* L. & N. R. Co., 15 I. C. C. 170. Commission may authorize a compromise of a claim for repara-

tion. Joice & Co. *v.* Ill. Cent. R. Co., 15 I. C. C. 239; Goff-Kirby Coal Co. *v.* Bessemer & Lake E. R. Co., 15 I. C. C. 553. No jurisdiction in Commission to require a shipper to make good an undercharge. Falls & Co. *v.* Chicago, R. I. & P. Ry. Co., 15 I. C. C. 269. Should claim reparation in original complaint and not wait until after a determination of the question of the validity of a rate. Morse Produce Co. *v.* Chicago, M. & St. P. Ry. Co., 15 I. C. C. 334. Scope of sections eight and nine discussed, holding reparation may be awarded on past shipments. Arkansas Fuel Co. *v.* Chicago, M. & St. P. Ry. Co., 16 I. C. C. 95, 98. Damages for loss of employment to speculative. Allender *v.* Chicago, B. & Q. R. Co., 16 I. C. C. 103. An association may maintain a complaint for damages to its members. California Com. Asso. *v.* Wells Fargo Ex. Co., 16 I. C. C. 458, 463. In a suit for damages for violating the fourth section brought in the United States circuit court, the measure of damages is the difference between the amount paid for the shorter haul and the charge for the longer haul; the jury may allow interest, but such interest dates from last payment. Junod *v.* Chicago & N. W. Ry. Co., 47 Fed. 290; Osborne *v.* Chicago & N. W. Ry. Co., 48 Fed. 49. Reversed on other points. Chicago & N. W. Ry. Co. *v.* Osborne, and same *v.* Junod, 52 Fed. 912, 3 C. C. A. 347. Writ of certiorari refused by Supreme Court. 146 U. S. 364, 36 L. Ed. 1002; see also Parsons *v.* Chicago & N. W. R. Co., 167 U. S. 447, 453, 42 L. Ed. 231, 234. Common law remedies for extortion are superceded by a statute creating a Commission to determine the question. Winsor Coal Co. *v.* Chicago & A. R. Co., 52 Fed. 716, referring to a state statute. Right for damages to exist for unlawfully refusing to interchange traffic. Toledo, A. A. & N. M. Ry. Co. *v.* Penn. Co., 54 Fed. 730, 740, 19 L. R. A. 387, 5 I. C. R. 545, 22 U. S. App. 561. Can not recover for a violation of the interstate commerce act in a state court; there is no common law of the United States. Swift *v.* Philadelphia & R. R. Co., 58 Fed. 858. Same doctrine as to common law announced same case. 64 Fed. 59. *Contra.* Murray *v.* Chicago & N. Y. Ry. Co., 62 Fed. 24. Affirmed. 92 Fed. 868, 35 C. C. A. 62, and Kinnavey *v.* Terminal R. Asso., 81 Fed. 802, 804. See as to common law, Western Union Telegraph Co. *v.* Call Publishing Co., 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561, where Mr. Justice Brewer says:

"There is no body of federal common law separate and dis-

tinct from the common law existing in the several states, in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress. * * * the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment."

A joint through rate is not the basis for a local rate in a suit for discrimination. Parsons *v.* Chicago & N. W. Ry. Co., 63 Fed. 903. Affirmed. 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. 887. The federal courts have exclusive jurisdiction of suits brought under sections eight and nine. Van Patten *v.* Chicago, M. & St. P. R. Co., 74 Fed. 981. And suits may be brought in any district in which the defendant resides. See also Connor *v.* Vicksburg, etc., R. Co., 36 Fed. 273, 1 L. R. A. 331. The rates filed and published according to the interstate commerce law are the only legal rates, and the fact that such rates are published is a defense in a court to a suit for damages alleging that such rates are unreasonable. Van Patten *v.* Chicago, M. & St. P. Ry. Co., 81 Fed. 545. Rights under the section are assignable. Edmunds *v.* Ill. Cent. R. Co., 80 Fed. 78. What a petition under the sections for violating section two should show and disagreeing with the Swift case, *supra,* on the question of a common law of the United States. Kinnavey *v.* Terminal R. Asso., 81 Fed. 802. There must be an active, not merely a threatened, discrimination as a basis for a suit for damages. Lehigh V. R. Co. *v.* Rainey, 112 Fed. 487. The remedy provided by these sections is exclusive and an injunction will not be granted to compel obedience to section three. Central Stock Yards Co. *v.* L. & N. R. Co., 112 Fed. 823. No limitation being fixed by the act, the law of the state where suit is brought will govern in that particular. Ratican *v.* Terminal R. Asso., 114 Fed. 666. *Contra.* Carter *v.* New Orleans & N. E. R. Co., 143 Fed. 99, 74 C. C. A. 293, holding that R. S. U. S. § 1047 applies. That the state law governs seems to be the law. Chattanooga Foundry & Pipe Works *v.* Atlanta, 203 U. S. 390, 51 L. Ed. 241, 27 Sup. Ct. 65. Opinion of Commission inadmissible in a suit to enforce its order, valid-

ity of its order rests upon the existing facts, whether disclosed to the Commission or not, the election to proceed before the Commission bars a suit before the courts, no appeal is allowed from an order of the Commission granting or refusing reparation. Effect of the order when suit brought thereon. Western N. Y. & Penn. R. Co. *v.* Penn. Refining Co., 137 Fed. 343, 70 C. C. A. 23. Affirmed, without discussing above proposition. Penn. Refining Co. *v.* Western N. Y. & P. R. Co., 208 U. S. 208, 52 L. Ed. 456, 28 Sup. Ct. 268.

What a plaintiff must show in order to recover. Knudsen-Ferguson Fruit Co. *v.* Mich. Cent. R. Co., 148 Fed. 968, 974. Petition for writ of certiorari denied. Must be protest before recovery when rate duly published. Knudsen-Ferguson Fruit Co. *v.* Chicago, St. P., M. & O. Ry. Co., 149 Fed. 973, 79 C. C. A. 483. Petition for writ of certiorari denied. 204 U. S. 670, 51 L. Ed. 672. Carrier may be compelled to produce books on the trial of a case hereunder. International Coal Mining Co. *v.* Penn. R. Co., 152 Fed. 557. When trial before the court, the report of the Commission upon which the action is based may be received in evidence, Commission's finding *prima facie* true. So. Ry. Co. *v.* St. Louis Hay & Grain Co., 153 Fed. 728, affirming 149 Fed. 609. Reversed because the Commission erred in the law applied by it and remanded to send the matter back to the Commission. 214 U. S. 297, 53 L. Ed. 1004, 29 Sup. Ct. 678. A suit for damages for discrimination not alleging that the charges are not in accordance with the published schedules is not one arising under the interstate commerce law. Clement *v.* L. & N. R. Co., 153 Fed. 979. Can recover in court when full tariff rate is paid and a less rate charged plaintiffs competitors, but can not recover when only the tariff rate is collected, although such rate is fixed by combination, without first applying to the Commission. American Union Coal Co. *v.* Penn. R. Co., 159 Fed. 278. When a bond is given to dissolve an injunction against a rate subsequently declared unlawful, persons paying the illegal rate may intervene and participate in the proceeds to be collected upon the bond. Tift *v.* So. Ry. Co., 159 Fed. 555. In a suit for damages in a circuit court, the printed and published rates are legal unless declared by the Commission to be illegal. Meeker *v.* Lehigh V. R. Co., 162 Fed. 354. Remedy by suit or complaint under there sections inadequate. Macon Grocery Co.

v. Atlantic C. L. R. Co., 163 Fed. 738. Reversed. Atlantic C. L. R. Co. *v.* Macon Grocery Co., 166 Fed. 206, 92 C. C. A. 114. Shipper can not in the absence of a statute recover for discrimination if he has paid no more than a reasonable rate, and when suit is brought under the statute, it is the nature of a suit for a penalty and plaintiff must clearly and distinctly show a violation. Can not recover for failure to publish a tariff without showing that advantage would have been taken of the tariff if it had been published. Parsons *v.* Chicago & N. W. R. Co., 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. 887. The first proposition above quoted appears inconsistent with the opinion in Western Union Tel. Co. *v.* Call Printing Co., 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561, *supra*. A shipper can not recover in a state court for having paid an unreasonable rate prior to a determination by the Interstate Commerce Commission that the rate paid is unreasonable. Tex. & Pac. Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350. The court, however, is not because of this rule required to say that a suit in equity to prevent an illegal advance is also forbidden. So. Ry. Co. *v.* Tift, 206 U. S. 428, 51 L. Ed. 1125, 27 Sup. Ct. 709. Commission's order set aside and the facts held not to constitute illegal discrimination. Penn. Refining Co. *v.* Western N. Y. & P. R. Co., 208 U. S. 208, 52 L. Ed. 456, 28 Sup. Ct. 268. Suit for damages for a violation of the interstate commerce act can not be maintained in a state court. Fitzgerald *v.* Fitzgerald, etc., Construction Co., 41 Neb. 374, 51 N. W. 838; Copp *v.* L. & N. R. Co., 43 L. Ann. 511, 9 So. 441, 3 I. C. R. 625, 46 Am. & Eng. R. cases 634; Gulf C. & S. F. R. Ry. Co. *v.* Moore, 98 Tex. 302, 83 S. W. 363; Wabash R. Co. *v.* Sloop, 200 Mo. 198, 98 S. W. 607. But may maintain a suit on the common law right to have transportation at reasonable rates. Holliday Milling Co. *v.* Louisiana & N. W. R. Co., 80 Ark. 536, 98 S. W. 374. Overcharges on an interstate shipment paid prior to the act not recoverable in a state court. Catton *v.* Chicago, M. & St. P. Ry. Co., 95 Iowa 112, 63 N. W. 589, 28 L. R. A. 556, 5 I. C. R. 474. A judgment for an unjust rate voluntarily paid can not be recovered. Strough *v.* New York C. & H. R. R. Co., 87 N. Y. Sup. 30, 92 App. Div. 584. Affirmed. 181 N. Y. 533, 73 N. E. 1133. May sue in federal court for damages caused by a violation of section 2 without prior action by the Commission. Lyne *v.* Delaware, L. & W. R. Co., 170 Fed. 847.

Notes of Decisions Rendered Since 1909.

The Commission may award damages. Arkansas Fuel Co. *v.* C. M. & St. P. Ry. Co., 16 I. C. C. 95, 98 citing cases. Discussion of section and cases cited. Hillsdale Coal & Coke Co. *v.* P. R. Co., 19 I. C. C. 356, 373. The Commission Sustained. P. R. Co. *v.* Int., Com. Com., 193 Fed. 81, Op. Com. Ct. No. 31, p. 275. Damages awarded on subsequent hearing for discrimination. Hillsdale Coal & Coke Co. *v.* P. R. Co., 23 I. C. C. 186. This proceeding involved as complainants other than the Hillsdale Coal Co. See also, as to measure of damages, Hillsdale Coal & Coke Co. *v.* P. R. Co., 229 Penn. 61, 78 Atl. 28. Statement of items of damage stands like a bill of particulars in a suit at law. Mountain Ice Co. *v.* D. L. & W. R. R. Co., 21 I. C. C. 45, 49. Voluntary reduction of a rate not always followed by an allowance of reparation. Anadarko Cotton Oil Co. *v.* A. T. & S. F. Ry. Co., 20 I. C. C. 43, 24 I. C. C. 327. Reparation awarded on the basis of another proceeding. Victor Mfg. Co. *v.* S. Ry. Co., 27 I. C. C. 661. Damages awarded for violation of Sec. 6. Larson Lumber Co. *v.* G. N. R. Co., 21 I. C. C. 474. The *fact* of damage as well as the amount must be established. New Orleans Board of Trade *v.* Ill. C. R. R. Co., 29 I. C. C. 32, discussing the general question and citing authorities. Reparation does not always follow the reduction of a rate by the Commission. Maier & Co. *v.* S. P. Co., 29 I. C. C. 103, 105, and Curry & Whyte Co. *v.* D. & I. R. R., 30 I. C. C. 1, 14, and cases cited. Form stated for preparing statement of damages when reparation allowed. Wallingford *v.* A. T. & S. F. Ry. Co., 30 I. C. C. 19, 21. Mere fact of payment of discriminating charges not sufficient to authorize an award of damages. Greenbaum *v.* L. & N. R. Co., 30 I. C. C. 699. Adding freight to price does not alone show damage to purchaser. Phœnix Printing Co. *v.* M. K. & T. Ry. Co., 31 I. C. C. 289. Violation of Fourth Section not alone a sufficient basis for an award of damages. Nix & Co. *v.* S. Ry. Co., 31 I. C. C. 145, 150. Damages awarded for discrimination. Worn *v.* B. & L. R. R. Co., 32 I. C. C. 58. No damages awarded for failure to furnish instrumentalities to heat car. Best Co. *v.* G. N. R. Co., 33 I. C. C. 1. Damages awarded for failure to grant reconsignment. Rayner & Parker *v.* L. & N. R. Co., 33 I. C. C. 595. Damages for breach of contract not within jurisdiction of the Commission. McArthur Bros. Co. *v.* E. P. & S. W. Co., 34 I. C. C. 30. Dam-

ages for failure to accord transit. Brenner Lumber Co. *v.* M. L. & T. R. Co., 34 I. C. C. 630. Through rate exceeding aggregate of intermediate rate, damages awarded. McCaull-Dinsmore Co. *v.* M. P. Ry. Co., 35 I. C. C. 69. Reparation limited to pecuniary loss. Penn. R. Co. *v.* International Coal Mining Co., 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893, reversing same styled case, 173 Fed. 1, 97 C. C. A. 383 and discussing the question at some length. Must be prior action by the Commission, when question of unjust discrimination is for determination. United States *v.* Pacific & A. Ry. & Nav. Co., 228 U. S. 87, 57 L. Ed. 742, 33 Sup. Ct. 443; Mitchell Coal & Coke Co. *v.* P. R. Co., 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916; modifying same styled case, 183 Fed. 908. Robinson *v.* B. & O. R. Co., 222 U. S. 506, 56 L. Ed. 288, 32 Sup. Ct. 114. But such action is not necessary where the discrimination is the result of a violation of a legal tariff. P. R. Co. *v.* International Coal Mining Co., 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893; American Tie and Timber Co. *v.* K. C. Ry. Co., 175 Fed. 28, defining "lumber" as a general term. Reparation may be ordered by the Commission without fixing a rate for the future. Baer Bros. Mercantile Co. *v.* Denver & R. G. R. Co., 233 U. S. 479, 58 L. Ed. 1055, 34 Sup. Ct. 641, reversing Circuit Court of Appeals in Denver & R. G. R. Co. *v.* Baer Bros. Mercantile Co., 187 Fed. 485, 109 C. C. A. 337, and sustaining the order of the Commission in Baer Bros. Mer. Co. *v.* M. P. Ry. Co., 17 I. C. C. 225. Where the fact that a tariff is discriminating has been determined and the extent of the discrimination found by the Commission the courts have jurisdiction of a suit for damages for such discrimination although the particular plaintiff was not before the Commission. National Pole Co. *v.* C. & M. O. Ry. Co., 211 Fed. 65, reversing same styled case, 200 Fed. 185. Suit on an order of reparation may be brought in the district of the residence of the beneficiary thereunder. St. L. S. W. Ry. Co. *v.* Samuels & Co., 211 Fed. 588. See order of Commission, Samuels & Co. *v.* St. L. S. W. Ry. Co., 20 I. C. C. 646. For an extended discussion of the subject of suits on reparation orders see Lehigh V. R. Co. *v.* Clark, 207 Fed. 717, 125 C. C. A. 235, denying the right to recover in a suit on the order of the Commission in Naylor & Co. *v.* L. V. R. Co., 15 I. C. C. 9, Unrep. Opin. 168, 18 I. C. C. 624.

Order of the Commission awarding damages *prima facie* correct. Limitation statutes discussed. Meeker *v.* Lehigh Valley R.

Co., 236 U. S. 412, 434, 59 L. Ed. —, 35 Sup. Ct. 328, 337, reversing Lehigh Valley R. Co. *v.* Meeker, 211 Fed. 785. In these cases the right to an award was based in part on a discrimination charge. One not a party to a proceeding before the Commission may maintain his claim for an award of damages before the Commission or the courts. Such claim when not filed within two years from the date of the accrual of the action, notwithstanding the order of the Commission declaring the rates unreasonable, was not finally sustained by the courts until long afterwards. Philips Co. *v.* G. T. W. R. Co., 236 U. S. 662, 59 L. Ed. —, 35 Sup. Ct. 444.

An amendment including claims arising since the filing of the original complaint may be allowed. Lehigh V. R. Co. *v.* American Hay Co., 219 Fed. 539, — C. C. A. —.

Allegations in suit on an order of the Commission held sufficient. So. Pac. Co. *v.* Goldfield Con. Milling Co., 220 Fed. 14, — C. C. A. —.

The payment of freight charges, subsequently found by the Interstate Commerce Commission to be unreasonable and excessive, is presumptive evidence of damage to the shipper to the extent of the difference between the rate charged and a reasonable rate, and such presumption can be overcome only by definite proof, not resting upon uncertainty or conjecture, negativing the fact or the amount of damage. Darnell-Taenzer Lumber Co. *v.* So. Pac. Co., 221 Fed. 890, — C. C. A. —.

The ascertainment of the damages occasioned by a carrier's rules as to car distribution, which are unduly discriminatory, is as much within the scope of the Interstate Commerce Commission's authority, as though the damages were due to the exaction of unreasonable rates. Penn. R. Co. *v.* Clark Bros. Coal Min. Co., 238 U. S. 456, 59 L. Ed. —, 35 Sup. Ct. 896, reversing same styled case, 241 Pa. 515, 88 Atl. 754. See Mills *v.* L. V. R. Co., 238 U. S. 473, 59 L. Ed. —, 35 Sup. Ct. 888.

§ 384. **Penalties for Violation of the Act.**—That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willfully suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlaw-

ful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act *for which no penalty is otherwise provided,* or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided,* That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

Section 10 of the original act with the proviso added by the act of March 2, 1889 and the words "for which no penalty is otherwise provided" added the act of June 18, 1910.

The Commission has no power to enforce penalties, the penal provisions being enforcible only in the courts. Slater *v.* N. Pac. R. Co., 2 I. C. C. 359, 2 I. C. R. 243. Sufficient to show that the agent charged had general charge of a freight office of the carrier violating the act. United States *v.* Tozer, 37 Fed. 635, 39 Fed. 369. Reversed. Tozer *v.* United States, 52 Fed. 917. A corporation can not be convicted of a crime and the agent must be one who knowingly aids or abets the violation and not a mere clerk. United States *v.* Mich. Cent. R. Co., 43 Fed. 26. Corporations not criminally liable. Re Pensley, 44 Fed. 271. But see under act 1903 Re Pooling Freights, 115 Fed. 588. The offense is committed when the voucher for rebate is signed and not when the payment is made. United States *v.* Fowkes, 53 Fed. 13, 3 C. C. A. 394. An agent who merely collects rates and has nothing to do with fixing rates is not indictable. United States *v.* Mellen, 53 Fed. 229, 233. Common carrier not a corporation indictable, but not so a corporation. Toledo, A. A. & N. M. Ry. Co. *v.* Penn. Co., 54 Fed. 730, 736, 19 L. R. A. 387, 5 I. C. R. 545, 22 U. S. App. 561. A combination to defeat the provisions of the act to regulate commerce is within this

section. Waterhouse *v.* Comer, 55 Fed. 149, 157, 19 L. R. A. 403, 1 Fed. Anti-Trust Dec. 119. No penalties before amendment of 1889. United States *v.* Howell, 56 Fed. 21. The receiver of a rebate not a criminal under the old law. United States *v.* Hanley, 71 Fed. 672. What should be stated in an indictment for discrimination. United States *v.* DeCoursey, 82 Fed. 302. An indictment under this section for discrimination in failing to furnish switch connections must allege that such connection is practicable. United States *v.* B. & O. R. Co., 153 Fed. 997.

"Carrier" includes express Company. United States *v.* Adams Ex. Co., 229 U. S. 381, 57 L. Ed. 1237, 33 Sup. Ct. 878.

§ 385. **Penalties for False Billing, False Classification, False Weighing, etc., by Carriers.**—Any common carrier, subject to the provisions of this act, or whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

Paragraph two, section ten, of act as amended by act March 2, 1889.

Necessity for this enactment suggested. Re Underbilling. 1 I. C. C. 633, 1 I. C. R. 813, 820.

Construed in connection with and not repealing Elkins Act. Nichols & Cox Lumber Co. *v.* United States, 212 Fed. 588. See also notes Secs. 371 to 374, *supra*.

§ 386. **Penalties against Shippers for False Billing, etc.**—Any, person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly or indirectly,

himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then established and in force on the line of transportation; or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court: *Provided,* That the penalty of imprisonment shall not apply to artificial persons.

Paragraph 3, Sec. 10, added by act March 2nd, 1889, and amended by Act June 18, 1910. The amendment of 1889 read:

Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of

the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.

The intention if the act was to protect carriers as well as shippers. Page *v.* Delaware, L. & W. R. Co., 6 I. C. C. 148, 166, 4 I. C. R. 525, 534. Order not enforced. Int. Com. Com. *v.* Delaware, L. & W. R. Co., 64 Fed. 723. The purpose of the enactment stated. United States *v.* Howell, 56 Fed. 21, 24. A rebate under act March 2, 1889, is not illegal unless granted to some and refused to others in like situation. United States *v.* Hanley, 71 Fed. 672. Crime is committed at the place where the consignor obtains the false billing. Re Belknap, 96 Fed. 614; Davis *v.* United States, 104 Fed. 136, 43 C. C. A. 448.

§ 387. **Penalties and Damages for Inducing Discriminations.**—If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or any other thing of value, solicitation, or otherwise, induce or *attempt to induce* any common carrier subject to the provisions of this act, of any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in any action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

Paragraph 4 of Sec. 10 added by Act March 2, 1889 as amended by Act June 18, 1910. The words italicized were added by the Act of 1910 and the words "on the case" were omitted by that amendment.

Paragraph four of section ten added by act March 2, 1889.

Cited, Washer Grain Co. *v.* Mo. Pac. Ry. Co., 15 I. C. C. 147, 152, 153. What should be stated in an indictment. United States *v.* Hanley, 71 Fed. 672.

§ 388. **Appointment and Term of Office of Commissioner.**—That a Commission is hereby created and established to be known as the Interstate Commerce Commission, which shall be composed of seven Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this Act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, Anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than four of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this Act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission.

Section eleven of original act, except as will appear from section twenty-four added by the act of June 29, 1906, the number of commissioners were increased from five to seven, and this section has consequently been copied to conform to the provisions of section twenty-four.

The commission is a body corporate, with power to sue and be sued. Int. Com. Com. *v.* B. & O. R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844; Int. Com. Com. *v.* A. T. & S. F. Ry. Co., 149 U. S. 264, 37 L. Ed. 727, 13 Sup. Ct. 837; Tex. & Pac.

R. Co. *v.* Int. Com. Com., 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666.

§ 389. **Power and Duty of Commissioners.**—That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

First two paragraphs of section twelve as enacted by act of February 10, 1891, enlarging somewhat the original act and the amendment of March 2, 1889.

The original act covering this section read:

"That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is

conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and for the purposes of this act the Commission shall have power to require the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation, and to that end may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section."

The act of 1889 is as follows:

"That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute, under the direction of the Attorney-General of the United States, all necessary proceedings for the enforcement of the provisions of this act, and for the punishment of all violations thereof; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the Commission shall have the power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation, and in case of disobedience to a subpœna, the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section."

Practice for complainant to obtain production of books. Rice *v.* Cincinnati, W. & B. R. Co., 3 I. C. C. 186, 2 I. C. R. 584,

594. Application to require production of the papers of third persons not before the Commission denied. Haddock *v.* Delaware, L. & W. R. Co., 4 I. C. C. 296, 3 I. C. R. 302. The Commission is vested with only administrative powers, which fall far short of making it a court. Kentucky & I. Bridge Co. *v.* L. & N. R. Co., 37 Fed. 567, 612, 613. The Interstate Commerce Commission is an administrative body and the act authorizing the courts to aid the Commission with process to compel a response to the subpœna of the Commission is unconstitutional. Re Interstate Commerce Commission, Application for Order Against Brimson et al., 53 Fed. 476, 481. Reversed, holding section constitutional. Int. Com. Com. *v.* Brimson, 154 U. S. 477, 38 L. Ed. 1047, 14 Sup. Ct. 1125. Bill in equity filed in name of Commission, its duties stated. Int. Com. Com. *v.* Detroit, G. H. & M. Ry. Co., 57 Fed. 1005, 4 I. C. R. 722. Reversed. 74 Fed. 803, 21 C. C. A. 103, 43 U. S. App. 308, 167 U. S. 633, 42 L. Ed. 306, 17 Sup. Ct. 986. Not necessary in suits to enforce the orders of the Commission to file the testimony taken before it, but when such testimony was taken on notice, it may be offered by either party. Int. Com. Com. *v.* Cincinnati, N. O. & T. P. R. Co., 64 Fed. 981, 13 U. S. App. 700. But the mere opinion of the Commission is not admissible as evidence. Western N. Y. & P. R. Co. *v.* Penn Refining Co., 137 Fed. 343, 70 C. C. A. 23. Affirmed. Penn Refining Co. *v.* Western N. Y. & P. R. Co., 208 U. S. 208, 52 L. Ed. 456, 28 Sup. Ct. 268. Proceedings in the name of the United States are authorized by this section without a preliminary investigation by the Commission. United States *v.* Mo. Pac. Ry. Co., 65 Fed. 903. Reversed. Mo. Pac. Ry. Co. *v.* United States, 189 U. S. 274, 47 L. Ed. 811, 23 Sup. Ct. 507. Suit brought by authority of section. United States *v.* Joint Traffic Asso., 76 Fed. 895, 1 Fed. Anti-Trust Dec. 615. Affirmed. Circuit Court Appeals, 89 Fed. 1020, 32 C. C. A. 491, 45 U. S. App. 726, 1 Fed. Anti-Trust Dec. 869. See decision of Supreme Court, *post,* this section. Section quoted in discussing the refusal of a witness to answer in an investigation by a grand jury of violations of the act. Counselman *v.* Hitchcock, 142 U. S. 547, 35 L. Ed. 1110, 1113, 12 Sup. Ct. 195. After this decision the immunity act of February 11, 1893, was passed. Section twelve is constitutional. Int. Com. Com. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 Sup. Ct. 1125; Int. Com. Com. *v.* Baird, 194 U. S. 25, 48 L. Ed. 860, 24 Sup. Ct. 563.

Upon an inquiry by the Commission, carriers should not withhold their evidence and present it later before the court on a suit to enforce the order of the Commission. Cincinnati, N. O. & T. P. Ry. Co. *v.* Int. Com. Com., 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700. The Commission may be a party plaintiff or defendant. Tex. & Pac. Ry. Co. *v.* Int. Com. Com., 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666. A suit to enjoin a carrier from violating the act to regulate commerce could not be brought by the United States at the request of the Commission prior to the act of February 19, 1903. Mo. Pac. Ry. Co. *v.* United States, 189 U. S. 274, 47 Fed. 811, 23 Sup. Ct. 507. Prior to the Hepburn Act the Commission had no power to fix rates. Int. Com. Com. *v.* Cincinnati, N. O. & T. P. R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896. This case was subsequently followed by other cases citing the principal case. Nor did the Commission have power to fix joint through routes. Int. Com. Com. *v.* Western of A. R. Co., 93 Fed. 83, 35 C. C. A. 217, 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512. See also Ky. & I. B. Co. *v.* L. & N. R. Co., 37 Fed. 567, 2 I. C. R. 351; Little Rock & M. R. Co. *v.* St. Louis & S. W. R. Co., 41 Fed. 559; Little Rock & M. R. Co. *v.* East Tenn., Va. & Ga. Ry. Co., 47 Fed. 771; Chicago & N. W. Ry. Co. *v.* Osborne, 52 Fed. 912, 3 C. C. A. 347, 10 U. S. App. 430; Union P. R. Co. *v.* United States, 117 U. S. 355, 29 L. Ed. 920, 6 Sup. Ct. 772. The Commission an administrative body. Cincinnati, N. O. & T. P. R. Co. *v.* Int. Com. Com., 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700. The powers exercised by the Commission being analogous to a referee or special commissioner. Ky. & I. Bridge Co. *v.* L. & N. R. Co., 37 Fed. 567. Its powers are, however, quasi judicial. Int. Com. Com. *v.* Cincinnati, N. O. & T. P. R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896. Can not require the attendance of witnesses except on complaints or on investigations of subjects that might become the basis of a complaint. Harriman *v.* Int. Com. Com., 211 U. S. 407, 53 L. Ed. 253, 29 Sup. Ct. 115.

Notes of Decisions Rendered Since 1909.

Quære, Can papers ordinarily held to be privileged be required to be produced? United States *v.* L. & N. R. Co., 212 Fed. 486, 494. The Commission has no jurisdiction to require a carrier to submit its correspondence for inspection. U. S. *v.* L. & N. R. Co., 236 U. S. 318, 59 L. Ed.—, 35 Sup. Ct. 363. The Com-

mission can not inquire into the affairs of a stranger to an investigation. Ellis *v.* Int. Com. Com., 237 U. S. 434, 59 L. Ed.—, 35 Sup. Ct. 645.

§ 390. **Power of Courts to Punish for Disobedience, Witnesses Not Excused because Testimony May Incriminate.**—And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a *subpœna* issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said commission and produce books and papers if so ordered and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Paragraph three of section twelve, being paragraph two of said section in original act. See immunity act, act February 11, 1893, *post,* § 457.

An officer of a carrier, not himself incriminated by the documents, must respond to a notice to produce. Re Peasley, 44 Fed. 271. Provision giving court power to punish disobedience to the subpœna of the Commission unconstitutional. Re Interstate Commerce Commission Application for Order Against W. G. Brimson et al., 53 Fed. 476, 481. Reversed, holding section valid. Int. Com. Com. *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 Sup. Ct. 1125. The Commission has plenary power to institute an investigation into any matter within its jurisdiction, and on such investigation to require the attendance of witnesses and the production of papers. Int. Com. Com. *v.* Harriman, 157 Fed. 432. Reversed in part, holding that testimony could only be required in connection with complaints or upon the investigation of subjects that might be made the object of a complaint. Harriman *v.* Int. Com. Com., 211 U. S. 407, 53 L. Ed. 253, 29 Sup. Ct. 115. See also United States *v.* Skinner, 218 Fed. 870.

§ 391. **Right to Take Testimony by Deposition and the Manner Thereof Prescribed.**—The testimony of any witness may be taken, at the instance of a party in any proceeding or investigation depending before the Commission, by deposition, at

any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party, or his attorney, proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

Every person deposing as herein provided shall be cautioned and sworn, or affirm, if he so request, to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

Witnesses whose depositions are taken pursuant to this act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Last paragraphs of section twelve, added by the act of February 10, 1891.

See rule six of Rules of Practice, *ante*. Sec. 278. Section referred to. Foster Bros. Co. *v.* Duluth, etc., R. Co., 14 I. C. C. R. 232.

§ 392. **Persons Who May File Complaints with the Commission and Practice with Reference Thereto.**—That any person, firm, corporation, *company,* or association, or any mercantile, agricultural, or manufacturing society *or other organization,* or body politic or municipal organization, *or any common carrier,* complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the (charges) complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the (said) common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 13 of the original act as amended by the Act of June 18, 1910. The words italicized were added by the amendment. The words in brackets were in the original act and omitted from the amendment.

Complaint of a violation of the act should be made and not a mere request for a construction of the law. Re Petition of Order of Railway Conductors, 1 I. C. C. 8, 1 I. C. R. 18; Penn. Co. *v.* Louisville, N. A. & C. R. Co., 3 I. C. C. 223, 2 I. C. R. 603. When no overt act in violation of the law is charged, complaint will be dismissed. Holbrook *v.* St. Paul, M. & M. R. Co., 1 I. C. C. 102, 1 I. C. R. 323. No replication to answer required. Powers and Procedure of the Commission, 1 I. C. C. 223, 1 I. C. R. 408, 410; Oregon Short Line *v.* N. Pac. R. Co., 3 I. C. C. 264, 2 I. C. R. 639. Vermont State Grange could intervene and complain against charges on east bound freight, though original complaint referred only to west bound freight. Boston & A. R. Co. *v.* Boston & L. R. Co., 1 I. C. C. 158, 1 I. C. R. 500, 571. Where answer denies complaint and complainant fails to appear, complaint dismissed. Jackson *v.* St. Louis, A. & T. R. Co., 1 I.

C. R. 599. New grievances can not be set up in an amendment. Riddle, Dean & Co. *v.* B. & O. R. Co., 1 I. C. C. 372, 1 I. C. R. 701; Delaware State Grange *v.* New York, P. & N. R. Co., 2 I. C. C. 309, 2 I. C. R. 187. Rule as to rehearings stated by Judge Cooley. Riddle, Dean & Co. *v.* Pittsburg & L. E. R. Co., 1 I. C. C. 490, 1 I. C. R. 773. Case not decided on a theory, neither in the complaint nor the evidence. Martin *v.* Chicago, B. & Q. R. Co., 2 I. C. C. 25, 2 I. C. R. 32. Sufficient to make initial carrier a party when complaining against a classification. Any party at interest may be heard without formal intervention. Hurlburt *v.* Lake Shore & M. S. R. Co., 2 I. C. C. 122, 2 I. C. R. 81. Decision of the Commission applies to the facts of the particular case. Re Relative Tank and Barrel Rates, 2 I. C. C. 365, 2 I. C. R. 245. After a case closed, an application from one not a party for a rehearing will not be granted. Re Petition of Produce Exchange of Toledo, 2 I. C. C. 588, 2 I. C. R. 412. Commission may investigate and deal with violations of the law without formal complaint. Re Investigation of Acts of Grand Trunk Ry., 3 I. C. C. 89, 2 I. C. R. 496. Re Alleged Excessive Rates on Food Products, 4 I. C. C. 48, 116, 3 I. C. R. 90, 151. What a petition for rehearing should show. Myers *v.* Penn. Co., 2 I. C. C. 573, 2 I. C. R. 403, 544. Must allege that the violation complained of occurred with reference to an interstate shipment. White *v.* Mich. Cent. R. Co., 3 I. C. C. 281, 2 I. C. R. 641. When a complaint is filed by a state railroad Commission, it will not be dismissed because such Commission is thereafter abolished. Railroad Commission of Florida *v.* Savannah, Fla. & W. R. Co., 5 I. C. C. 13, 3 I. C. R. 688. Complaint may be filed against a receiver of a carrier engaged in interstate commerce. Railroad Commission of Georgia, Trammell et. al. *v.* Clyde S. S. Co., 5 I. C. C. 324, 4 I. C. R. 120. Commission will take proof on complaint that carrier has not answered. Tecumseh Celery Co. *v.* Cincinnati, J. & M. Ry. Co., 5 I. C. C. 663, 4 I. C. R. 318. Different ground of an objection to a rate may be urged in a second complaint. Schumacher Milling Co. *v.* Chicago, R. I. & P. R. Co., 6 I. C. C. 61, 4 I. C. R. 373, 384. Notwithstanding complainant may have violated the law, Commission will act on complaint for benefit of public. Page *v.* Delaware, L. & W. R. Co., 6 I. C. C. 148, 548, 4 I. C. R. 525. Long after complaint decided will not reopen for purpose of acting on application for reparation. Rice, R. & W. *v.* W. N. Y.

& Penn. R. Co., 6 I. C. C. 455. Can not authoritatively determine what is not in issue by pleadings. Commercial Club of Omaha *v.* Chicago, R. I. & P. Ry. Co., 6 I. C. C. 647. An association may bring complaint and defendants not entitled to dismissal because there is no direct damage to complainant. Milk Producers Protective Asso. *v.* Delaware, L. & W. R. Co., 7 I. C. C. 92, 163. Shippers claim submitted by the carrier treated as a formal case. Roth *v.* Tex. & Pac. Ry. Co., 9 I. C. C. 602. Commission clearly has the right to award damages. Cattle Raisers' Asso of Texas *v.* Chicago, B. & Q. R. Co., 10 I. C. C. 83. One a party to a case may amend and claim reparation. id. 105. Complaints against unreasonable rates are in behalf of the public and complainants need not enter with "clean hands." Tift *v.* So. Ry. Co., 10 I. C. C. 548, 578. Order enforced. 138 Fed. 753, 123 Fed. 789. Affirmed. 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. 709. Parties may present a written statement of facts and to obtain the opinion of the Commission thereon. Re Freight Rates Between Memphis and Points in Arkansas, 11 I. C. C. 180. Cases decided before amendment of June 29, 1906, reopened after that amendment for further hearing. Cattle Raisers' Asso. *v.* Mo., Kan. & Tex. Ry. Co., 12 I. C. C. 1. But not when complainant had waited for about a year before trying to enforce an order which the carriers disobeyed. Cattle Raisers' Asso. *v.* Chicago, B. & Q. R. Co., 12 I. C. C. 6, 507. Complaints must be presented with reasonable diligence. Producer's Pipe Line Co. *v.* St. L., I. M. & S. Ry. Co., 12 I. C. C. 186. Reparation asked informally after hearing closes not considered. Dallas Freight Bureau *v.* Gulf C. & S. F. Ry. Co., 12 I. C. C. 223. Testimony alone of a person having no interest in or personal knowledge of the rate complained of insufficient to sustain a complaint. Dallas Freight Bureau *v.* Mo., Kan. & Tex. Ry. Co., 12 I. C. C. 427. The Commission, being an administrative body, is unencumbered by technicalities. Missouri & Kan. Shippers' Asso. *v.* Mo., Kan. & Tex. Ry. Co., 12 I. C. C. 483. Each case must be disposed of on its own facts, and no general rule will be made that through rates must not exceed the sum of the locals. Coffeyville Vitrified Brick & Tile Co. *v.* St. Louis & S. F. R. Co., 12 I. C. C. 498. What is an "association" within meaning of section. Forest City Freight Bureau *v.* Ann Arbor R. Co., 13 I. C. C. 118. A complaint for reparation by a voluntary association must name the members and

specify and describe the shipments with reasonable particularity, but see the facts of the case. Mo. & Kan. Shippers' Asso. *v.* A. T. & S. F. Ry. Co., 13 I. C. C. 411. Amendment not allowed to graft on an application for through routes and joint rates a claim for reparation. La Salle & Bureau Co., R. Co. *v.* Chicago & N. W. Ry. Co., 13 I. C. C. 610. Not necessary in complaint for reparation to allege protest. Baer Bros. Mercantile Co. *v.* Mo. Pac. Ry. Co., 13 I. C. C. 329; Southern Pine Lumber Co. *v.* So. Ry. Co., 14 I. C. C. 195; Nollenberger *v.* Mo. Pac. Ry. Co., 15 I. C. C. 595, 596. This section shows a legislative intention to divorce proceedings before the Commission of all technicalities. Washer Grain Co. *v.* Mo. Pac. Ry. Co., 15 I. C. C. 147, 153. Cited arguing the power to award reparation for past shipments. Arkansas Fuel Co. *v.* Chicago, M. & St. P. Ry. Co., 16 I. C. C. 95, 98. This section prescribed procedure before Commission. Int. Com. Com. *v.* L. & N. R. Co., 73 Fed. 409, 414. An action for mandamus under section twenty-three will not preclude a shipper filing a complaint under section thirteen. Merchants Coal Co. *v.* Fairmont Coal Co., 160 Fed. 769. When a complaint is filed with the Commission, it must, if complaint presents matter within the purview of the act, investigate regardless of whether or not the complainant may suffer direct damage from the act complained of. Int. Com. Com. *v.* Detroit, G. H. & M. Ry. Co., 57 Fed. 1005, 4 I. C. R. 722. Reversed on other grounds. Detroit, G. H. & M. Ry. Co. *v.* Int. Com. Com., 74 Fed. 803, 21 C. C. A. 103, 43 U. S. App. 308. Circuit court of appeals affirmed. Ry. *v.* Co., 167 U. S. 633, 42 L. Ed. 306, 17 Sup. Ct. 986. Int. Com. Com. *v.* Baird, 194 U. S. 25, 39, 48 L. Ed. 860, 867, 24 Sup. Ct. 563. See opinion circuit judge. Int. Com. Com. *v.* Philadelphia & R. Ry. Co., 123 Fed. 969.

Notes of Decisions Rendered Since 1909.

Construing the section with Sections 8, 9, 14 and 16 of the act, held the Commission may award damages for an excessive and unreasonable rate. Arkansas Fuel Co. *v.* C. M. & St. P. Ry. Co., 16 I. C. C. 95, 98; Hillsdale Coal & Coke Co. *v.* P. R. R. Co., dissenting opinion, 19 I. C. C. 356, 382. A complaint is an appeal to the government. Advances in Rates, Western case, 20 I. C. C. 307, 315. Procedure liberal, but carriers should have notice of what is claimed. United States Leather Co. *v.* So. Ry.

Co., 21 I. C. C. 323, 324. Augusta & Savannah Steamboat Co. *v.* O. S. S. Co., 26 I. C. C. 380, 382; Eastern Wheel Mfrs. Co. *v.* A. & V. Ry. Co., 27 I. C. C. 370, 372. Findings under complaint bind only the carrier defendant thereto. Fels & Co. *v.* P. R. R. Co., 23 I. C. C. 483, 486. This and cognate sections guarantee a full hearing preliminary to issuing an order. Wickwire Steel Co. *v.* N. Y. C. & H. R. R. Co., 30 I. C. C. 415, 424, citing Int. Com. Com. *v.* L. & N. R. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185, reversing Louisville & N. R. R. Co. *v.* Int. Com. Com., 195 Fed. 541, Opin. Com. Ct. No. 4, p. 325, 375. For further history of the case see New Orleans Board of Trade *v.* L. & N. R. Co., 17 I. C. C. 231; L. & N. R. R. Co. *v.* Int. Com. Com., 184 Fed. 118. The Commission has power to investigate the true situation with respect to all matters properly affecting the questions involved. So. Ry. Co. *v.* United States, 204 Fed. 465, Opin. Com. Ct. No. 82, p. 603. Commission's findings "supported by substantial, though conflicting, evidence," are conclusive on the courts. Louisville & N. R. Co. *v.* U. S., 238 U. S. 1, 59 L. Ed. —, 35 Sup. Ct. 696.

§ 393. **Commission May on Its Own Motion Institute Investigations.**—Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or Commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this act, or concerning which any question may arise under any of the provisions of this act, or relating to the enforcement of any of the provisions of this act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Paragraph 2 of Sec. 13 as amended by the act of June 18, 1910. The original paragraph read:

Said Commission shall in like manner investigate any complaint forwarded by the Railroad Commissioner or Railroad Commission of any state or territory, at the request of such Commissioner or Commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

Notes of Decisions Rendered Since 1909.

Last Sentence of section cited. Lum *v.* G. N. Ry. Co., 21 I. C. C. 558, 561; Minneapolis Civic & Commerce Ass'n *v.* C. M. & St. P. Ry. Co., 30 I. C. C. 663, 670; Philadelphia R. Co. *v.* United States, 219 Fed. 988.

See also notes next preceding section.

§ 394. **Reports of Commission on Investigations, How Made and Published.**—That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several states without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports.

Section fourteen as amended by the acts of March 2, 1889, and June 29, 1906.

The original act read:

"That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which

the conclusions of the Commissions are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found.

"All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of."

The act of March 2, 1889, added the last paragraph of the present section.

Under the original act, construing section fourteen with section ten, the Commission held that it must be a "willful" violation of the act to authorize it to make a recommendation of reparation. Railroad Com. of Fla. *v.* Savannah, Fla. & W. R. Co., 5 I. C. C. 13, 136, 3 I. C. R. 688, 693, 750. Section cited, Washer Grain Co. *v.* Mo. Pac. R. Co., 15 I. C. C. 147, 153; Arkansas Fuel Co. *v.* Chicago, M. & St. P. R. Co., 16 I. C. C. 95, 98. Section recited in course of opinion. Int. Com. Com. *v.* Cincinnati, N. O. & T. P. R. Co., 64 Fed. 981, 983, 13 U. S. App. 700; Int. Com. Com. *v.* L. & N. R. Co., 73 Fed. 409, 414. What the report should show. Order will be set aside when the Commission excludes relevant evidence, or fails to give consideration thereto. Tex. & Pac. R. Co. *v.* Int. Com. Com., 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666. Effect of the Commission's finding with reference to the classification of a commodity. Int. Com. Com. *v.* Cincinnati, H. & D. Ry. Co., 146 Fed. 559. Affirmed. Cincinnati, H. & D. Ry. Co. *v.* Int. Com. Com., 206 U. S. 142, 51 L. Ed. 995, 27 Sup. Ct. 648. Effect given to the finding of the Commission fixing a reconsignment charge. St. Louis Hay & Grain Co. *v.* So. Ry. Co., 149 Fed. 609. Affirmed. So. Ry. Co. *v.* St. Louis Hay & Grain Co., 153 Fed. 728, 82 C. C. A. 614. Reversed, holding that the Commission erred in law in fixing a reconsignment charge at the actual cost thereof, the carrier being entitled to a profit. So. Ry. Co. *v.* St. Louis Hay & Grain Co., 214 U. S. 297, 53 L. Ed. 1004, 29 Sup. Ct. 678.

Notes of Decisions Rendered Since 1909.

Cited. Arkanas Fuel Co. *v.* C. M. & St. P. Ry. Co., 16 I. C. C. 95, 98. Finding of facts required when award of damages

made. Hillsdale Coal & Coke Co. *v.* P. R. R. Co., 19 I. C. C. 356, 382. No sufficient findings of fact. Lehigh V. R. Co. *v.* Clark, 207 Fed. 717, 125 C. C. A. 235. See order of the Commission denying reparation. Naylor & Co. *v.* L. V. R. Co., 15 I. C. C. 9; but, on rehearing, reparation ordered, Unrep. Opin. 168, 18 I. C. C. 624. Distinction between reparation and general orders. Lehigh Valley R. Co. *v.* Meeker, 211 Fed. 785, reversing Meeker *v.* L. V. R. Co., 175 Fed. 320, 162 Fed. 354, and Meeker *v.* Lehigh V. R. Co., 236 U. S. 412, 434, 59 L. Ed. —, 35 Sup. Ct. 328, 337 and Sec. 383, *supra*.

§ 395. **Power of Commission to Determine and Prescribe Just and Reasonable Rates, Regulations and Practices.**— That whenever, after full hearing of a complaint made as provided in section thirteen of this act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged or collected by any common carrier or carriers subject to the provisions of this act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are unjust or unreasonably or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

First part of paragraph 1, Sec. 15 as amended by act of June 18, 1910. Prior to this amendment the act read:

That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this act, for the transportation of persons or property as defined in the first section of this act, or that any regulations or practices whatsoever affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed.

First part of section fifteen, as added by the act of June 29, 1906.

The original section read:

"That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission; and if,

within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law."

The original act gave the Commission power not only to determine what rates were unreasonable, but what were reasonable. Coxe Bro. & Co. *v.* Lehigh V. R. Co., 4 I. C. C. 535, 577, 578, 3 I. C. R. 460, 478. Order not enforced. Int. Com. Com. *v.* Lehigh V. R. Co., 74 Fed. 784; Murphy, Wasey & Co. *v.* Wabash R. Co., 5 I. C. C. 122, 3 I. C. R. 725, 726. Power to prescribe rates exercised. Merchants Union of Spokane *v.* N. Pac. R. Co., 5 I. C. C. 478, 4 I. C. R. 183, 198. Order not enforced. Farmers Loan & Trust Co. *v.* N. Pac. R. Co., 83 Fed. 249; Freight Bureau of Cincinnati *v.* Cincinnati, N. O. & T. P. Ry. Co., 6 I. C. C. 195, 4 I. C. R. 592, 617. Order not enforced. Int. Com. Com. *v.* Cincinnati, N. O. & T. P. Ry. Co., 76 Fed. 183, 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 986. The Supreme Court having intimated in Cincinnati, N. O. & T. P. Ry. Co. *v.* Int. Com. Com., 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700, 5 I. C. R. 391, and having held in Int. Com. Com. *v.* Cincinnati, N. O. & T. P. Ry. Co., 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896, that the Commission had no power to fix rates, the Commission, after citing these cases, refused to exercise such power. Carey *v.* Eureka Springs R. Co., 7 I. C. C. 286, 319. The power the Commission had and exercised before the act of June 29, 1906, was practically to prescribe the old rate as the rate for the future when an advance was declared illegal. For illustration, see Tift *v.* So. Ry. Co., 10 I. C. C. 548, and Central Yellow Pine Asso. *v.* Ill. Cent. R. Co., 10 I. C. C. 505, where an advance was declared illegal, and Southern Pine Lumber Co. *v.* So. Ry. Co., 14 I. C. C. 195, and Nicola, Stone & Meyers Co. *v.* L. & N. R. Co., 14 I. C. C. 199, where the full advance was decided to be the measure of reparation. No order made because of lack of authority to fix rates. Hastings Malting Co. *v.* Chicago, M. & St. P. Ry. Co., 11 I. C. C. 675. The old law gave power to determine how much reparation should be awarded and thereby to determine to what extent a rate was excessive; the amendment

gave the additional power to prescribe what rate should be collected in the future. Cattle Raisers' Asso. *v.* Mo., Kan. & Tex. Ry. Co., 12 I. C. C. 1, 3. Section construed with reference to elevator allowances. Re Allowances to Elevators, 12 I. C. C. 85. Distribution of coal cars is a regulation and practice affecting rates under this section. Railroad Com. of Ohio *v.* Wheeling & L. E. R. Co., 12 I. C. C. 398; Rail & River Coal Co. *v.* B. & O. R. Co., 14 I. C. C. 86. Rules as to who shall load and unload freight subject to the jurisdiction of this Commission under this section. Wholesale Fruit & Producers Asso. *v.* A. T. & S. F. Ry. Co., 14 I. C. C. 410, 421. Section with section fourteen contemplates awards of money by the Commission. Washer Grain Co. *v.* Mo. Pac. Ry. Co,, 15 I. C. C. 147, 153. Gives power to fix rates for the future and award reparation for the past. Arkansas Fuel Co. *v.* Chicago, M. & St. P. R. Co., 16 I. C. C. 95, 96. Whether or not the Commission had power to fix maximum rates prior to the act of June 29, 1906, was first mooted and doubted in the Supreme Court in the cases of Cincinnati, N. O. & T. P. R. Co. *v.* Int. Com. Com., 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700, and Tex. & Pac. Ry. Co. *v.* Int. Com. Com., 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666, and such power was definitely declared not to have been given the Commission in the case of Int. Com. Com. *v.* Cincinnati, N. O. & T. P. R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896. Subsequently these cases were followed by the inferior courts. See Fed. Stat. Ann. vol. 3, p. 840.

Section fifteen of the old act is little like the Hepburn Amendment. Therefore, citations to the former are not directly applicable to the present section. Construing this section with others, from twelve to eighteen, inclusive, held that "the Commission is invested with only administrative powers of supervision and investigation, which fall far short of making the board a court, or its action judicial, in the proper sense of the term." Kentucky & I. Bridge Co. *v.* L. & N. R. Co., 37 Fed. 567, 613. Section required notice to be given carrier to cease violations of act. Int. Com. Com. *v.* Detroit, G. H. & M. R. Co., 57 Fed. 1005, 1008, 4 I. C. R. 722. While the proceedings of the Commission are not judicial, its procedure should substantially conform to that before a court. Int. Com. Com. *v.* L. & N. R. Co., 73 Fed. 409, 414. When the Commission adopts an erroneous principle in arriving at a conclusion, its order based thereon will not be

judicially enforced. Int. Com. Com. *v.* Lehigh V. R. Co., 74 Fed. 784, 787.

While the Hepburn Act gives power to the Commission to fix rates, courts may enjoin advance until the Commission can determine whether or not the advance is legal. Kiser *v.* Cent. of Ga. Ry. Co., 158 Fed. 193, 198. The Commission may make a finding without being embarrassed by admissions in a complaint. Cincinnati, H. & D. R. Co. *v.* Int. Com. Com., 206 U. S. 142, 149, 51 L. Ed. 995, 998, 27 Sup. Ct. 648. Immaterial error of law not ground to set aside order of Commission which is given the force "due to the judgments of a tribunal appointed by law and informed by experience." Ill. Cent. R. Co. *v.* Int. Com. Com., 206 U. S. 441, 454, 51 L. Ed. 1128, 1134, 27 Sup. Ct. 700. Some orders of the Commission entered since the passage of the Hepburn Act have reached the courts. In Stickney *v.* Int. Com. Com., 164 Fed. 638, 644, the circuit judge said: "This court has ample jurisdiction to set aside or suspend any order of the commission resulting from a misconception and misapplication of a law to conceded or undisputed facts." In Mo., Kan. & Tex. R. Co. *v.* Int. Com. Com., 164 Fed. 645, the circuit judge held: That the same rules of law applied when a suit was brought to enjoin an order of the Commission as when brought to enforce such order, and when complainants case for an injunction was "wanting in that certainty, fullness, and persuasive force which ought to be, and is, essential to overcome the force of the Commission's finding or determination upon which the order is based," a preliminary injunction was denied. Injunctions granted against order of Commission for error in law. Delaware, L. & W. R. Co. *v.* Int. Com. Com., 166 Fed. 498; same style case, 166 Fed. 499. Stickney case, *supra*, C. R. I. & P. R. Co. *v.* Int. Com. Com. (Mo. River Rate Case), 171 Fed. 680. Injunctions denied. So. Pac. Ter. Co. *v.* Int. Com. Com., 166 Fed. 134; Mo., Kan. & Tex. Ry. case, *supra*.

Notes of Decisions Rendered Since 1909.

This section is the dominating and controlling expression of the meaning of the act. Joynes *v.* P. R. Co., 17 I. C. C. 361. Wide authority given the Commission. Commutation Rate case, 21 I. C. C. 428, 431; Central Com. Co. *v.* L. & N. R. Co., 27 I. C. C. 114, 115. Coal Rates from Oak Hills, Colo., 30 I. C. C. 505, 508. Full hearing required. Douglas & Co. *v.* C. R. I. & P.

Ry. Co., 21 I. C. C. 541, citing So. Pac. Co. *v.* Int. Com. Com., 219 U. S. 433, 55 L. Ed. 283, 31 Sup. Ct. 288; Int. Com. Com. *v.* L. & N. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185, and cases cited. Commission has authority to determine how cars shall be distributed. Int. Com. Com. *v.* I. C. R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. 163; Int. Com. Com. *v.* C. & A. R. Co., 215 U. S. 479, 54 L. Ed. 291, 30 Sup. Ct. 155. For history of the order here involved see: Chicago & A. R. Co. *v.* Int. Com. Com., 173 Fed. 930; Traer *v.* C. & A. R. Co., 13 I. C. C. 451. Other cases bearing upon the question. Ry. Com. of Ohio et al. *v.* Hocking Valley Ry. Co. et al., 12 I. C. C. 398; U. S. ex rel. Pitcairn Coal Co. *v.* B. & O. Ry. Co., (C. C.), 154 Fed. 108; Logan Coal Co. *v.* Pa. Ry. Co. (C. C.), 154 Fed. 497.

The Commission can not condemn a rate which is not unreasonable, for the purpose of encouraging an industry. So. Pac. Co. *v.* I. C. C., 219 U. S. 433, 55 L. Ed. 283, 31 Sup. Ct. 288. See further history of case: So. Pac. Co. *v.* Int. Com. Com., 177 Fed. 963; same styled case, 215 U. S. 226, 54 L. Ed. 169, 30 Sup. Ct. 89; Western Oregon Lumber Mfgrs. Asso. *v.* So. Pac. Co., 14 I. C. C. 61. The Commission must act by formal order. Am. Sugar Refining Co. *v.* D. L. & W. R. Co., 207 Fed. 733, 125 C. C. A. 251, reversing same styled case, 200 Fed. 652. The statute gives the right to a full hearing and that confers the privilege of introducing testimony and at the same time imposes the duty of deciding in accordance with the facts proved. Int. Com. Com. *v.* L. & N. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185, reversing L. & N. R. Co. *v.* Int. Com. Com., 195 Fed. 541. For Commission's decision see New Orleans Board of Trade *v.* L. & N. R. Co., 17 I. C. C. 231. In the opinion of the Supreme Court is cited the authorities in which the force of an order of the Commission is discussed. See also Louisville & N. R. Co. *v.* U. S., 238 U. S. 1, 59 L. Ed. —, 35 Sup. Ct. 696.

§ 396. **When Orders Take Effect and How Long Continue unless Modified or Set Aside by the Commission or a Court.**—All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be sus-

pended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction.

Second part of paragraph one of section fifteen as added by act of June 29, 1906.

Cited, Mo., Kan. & Tex Ry. Co. *v.* Int. Com. Com., 164 Fed. 645, 649.

Notes of Decisions Rendered Since 1909.

A finding without evidence is beyond the power of the Commission, and must be "set aside by a court of competent jurisdiction." Int. Com. Com. *v.* L. & N. R. Co., 227 U. S. 88, 33 Sup. Ct. 185, cited next preceding section. See also Tang Tun *v.* Edsell, 223 U. S. 673, 681, 56 L. Ed. 606, 32 Sup. Ct. 359; Low Wah Suey *v.* Backus, 225 U. S. 460, 468, 56 L. Ed. 1165, 32 Sup. Ct. 734; Zakonite *v.* Wolf, 226 U. S. 272, 57 L. Ed. 218, 33 Sup. Ct. 31; United States *v.* B. & O. S. W. R. R., 226 U. S. 14, 57 L. Ed. 104, 33 Sup. Ct. 5; Atlantic C. L. *v.* North Carolina Corp. Com., 206 U. S. 1, 20, 51 L. Ed. 933, 27 Sup. Ct. 585; Wisconsin, M. P. R. Co. *v.* Jacobson, 179 U. S. 287, 301, 45 L. Ed. 194, 21 Sup. Ct. 115; Oregon Railroad *v.* Fairchild, 224 U. S. 510, 56 L. Ed. 863, 32 Sup. Ct. 55; I. C. C. *v.* Illinois Central, 215 U. S. 452, 470, 54 L. Ed. 280, 30 Sup. Ct. 155; So. Pac. Co. *v.* Int. Com. Com., 219 U. S. 433, 55 L. Ed. 283, 31 Sup. Ct. 288; Muser *v.* Magone, 155 U. S. 240, 247, 39 L. Ed. 135, 15 Sup. Ct. 77.

§ 397. **Division of Joint Rate May Be Prescribed by Commission.**—Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may after hearing make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

Last part of paragraph one of section fifteen as added by act of June 29, 1906.

Before the amended act Commission had no authority to compel carriers to make joint rates. Re Application of F. W. Clark, 3 I. C. C. 649, 2 I. C. R. 797; Commercial Club of Omaha *v.* Chicago, R. I. & Pac. Ry. Co., 6 I. C. C. 647, 677; Fred G. Clark Co. *v.* Lake Shore & M. S. Ry. Co., 11 I. C. C. 558, Re Alleged

Unlawful Discrimination Against Enterprise Transportation Co., 11 I. C. C. 587; Ky. & I. Bridge Co. *v.* L. & N. R. Co., 37 Fed. 567; Little Rock & M. R. Co. *v.* St. L., I. M. & S. Ry. Co., 41 Fed. 559; Chicago & N. W. Ry. Co. *v.* Osborne, 52 Fed. 912, 915, 3 C. C. A. 347; Memphis & L. R. R. Co. *v.* So. Express Co. (Express cases), 117 U. S. 1, 29 L. Ed. 791, 6 Sup. Ct. 542, 628; So. Pac. Co. *v.* Int. Com. Com., 200 U. S. 536, 553, 50 L. Ed. 585, 593, 20 Sup. Ct. 330. Under the Hepburn law, in fixing a division of joint rates between carriers, all circumstances should be considered and such divisions should not be on a mileage or other fixed basis. Star Grain & Lumber Co. *v.* A. T. & S. F. Ry. Co., 14 I. C. C. 364.

Notes of Decisions Rendered Since 1909.

The power to prescribe divisions is a continuing power. Rates on Lumber and Other Forest Products, 30 I. C. C. 371, 372. The power exercised, People's Fuel Co. *v.* Grand T. W. Ry. Co., 30 I. C. C. 657; Coal Rates from Oak Hills, Colo., 35 I. C. C. 456; Texas Cement Plaster Co. *v.* St. Louis & S. F. R. Co., 26 I. C. C. 508, 510. Dispute over divisions no justification for increasing rates. New Mexico Coal Rates, 28 I. C. C. 328; Missouri River Illinois Wheat & Flour Rates, 27 I. C. C. 286; Advances on Ground Iron Ore, 26 I. C. C. 675. Divisions established without previously fixing joint rates. Louisville Board of Trade *v.* I. C. & S. Traction Co., 34 I. C. C. 640. The words "or otherwise" would seem to make clear the power of the Commission in all cases of a dispute over divisions.

§ 398. **Right to Suspend Proposed Increases in Rates.**—Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension

may suspend the operation of such schedule and defer the use of such fare, rate, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective: *Provided,* That if any such hearing can not be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months.

This is a new provision enacted by the amendment of June 18, 1910, being part of par. 2, Sec. 15. The meaning of the section discussed. Advances in Rates, Eastern case, 20 I. C. C. 243, 247, 248; Advances in Rates, Western case, 20 I. C. C. 307, 310-314. No power to suspend a rate already effective. Rates on Lumber by V. S. & P. Ry. Co., 21 I. C. C. 16. "Propriety" of an advance considered. Advances in Rates on Grain, 21 I. C. C. 22, 24; Wickwire Steel & Wire Co. *v.* N. Y. C. & H. R. R. Co., 30 I. C. C. 415, 420; Coal Rates from Oak Hills, Colo., 30 I. C. C. 505, 508. The Commission has the power to suspend reductions in rates in any case where such suspension will operate to prevent an apparent discrimination. Suspension of Rates on Packing House Products, 21 I. C. C. 68, 70; Coal Rates from Oak Hills, Colo., 30 I. C. C. 505, 508. In the last named case it was held that rates decreased are new rates. Relative Adjustment of Rates Considered. Rates of Cement from Md. to Va., 24 I. C. C. 290; Rates on Barley from California, 24 I. C. C. 664, 669. In re Advance in Class and Commodity Rates, 25 I. C. C. 401; In re Advance in Class Rates, 25 I. C. C. 268; In re Advances on Furniture, 25 I. C. C. 299; Wharton Steel Co. *v.* D. L. & W. R. R. Co., 25 I. C. C. 303; In re Advances on Oil, 25 I. C. C. 349; In re Advances Knitting Factory Products, 25 I. C. C. 634; In re Advances on Manganese Ore, 25 I. C. C. 663; Philadelphia Veneer & Lumber Co. *v.* C. R. R. Co. of N. J., 25 I. C. C. 653; Arkansas Fertilizer Co. *v.* St. L. I. M. & S. Ry. Co., 25 I. C. C. 645; In re Advance on Hay, 25 I. C. C. 680; Taylor *v.* N. & W. Ry.

Co., 25 I. C. C. 613; Wichita Board of Trade *v.* A. T. & S. F. Ry. Co., 25 I. C. C. 625; Evens & Howard Fire Brick Co. *v.* St. L. I. M. & S. Ry. Co., 25 I. C. C. 141; In re Advances on Live Stock, 25 I. C. C. 63; In re Advances on Hops, 25 I. C. C. 16; Superior Commercial Club *v.* G. N. Ry. Co., 25 I. C. C. 342. But when the proposed increase does not change the adjustment the relation not determined. Grain Rates in C. F. A. Territory, 28 I. C. C. 549, 557. Proposed rates may be suspended when they create unlawful discrimination. Wickwire Steel Co. *v.* N. Y. C. & H. R. R. Co., 30 I. C. C. 415, 420. The Commission held to have power to cancel a tariff which "affected a practice and a rate." A. T. & S. F. R. Co. *v.* U. S., "Precooling Case," 232 U. S. 199, 58 L. Ed. 568, 34 Sup. Ct. 291, affirming same styled case, 204 Fed. 647, Op. Com. Ct. No. 41, p. 627. For report of the Commission see Arlington Heights Fruit Exchange *v.* S. P. Co., 20 I. C. C. 106. Suspension Regulations Relating to Precooling, 23 I. C. C. 267. The "propriety" of a rate is in issue where proposed increased rates are under investigation, Wickwire case *supra* and Transcontinental Commodity Rates, 32 I. C. C. 449. Whether the existence of lower intrastate rates should be a sufficient reason to refuse increased rates otherwise just and reasonable is an unsettled question. The practice of the Commission has been to presume that state rates will be adjusted and if not the question should properly be determined on a formal complaint.

Rates on poultry in Western Trunk Line Territory, 32 I. C. C. 380; Five Per Cent case, 31 I. C. C. 355; Corp. Com. of Okla. *v.* A. T. & S. F. R. Co., 31 I. C. C. 532, 540, 541; Rates on Beer and Other Malt Products, 31 I. C. C. 544. Dissenting Opin. Western Advance Rate case, 35 I. C. C. 668 *et. seq.*

Seemingly applying a contrary principle, see Class Rates between Stations in La., 33 I. C. C. 302; Western Rate Advance Case 1915, 35 I. C. C. 497; Live Stock Rates from Colo., 35 I. C. C. 682.

§ 399. **Burden of Proof to Justify Rates Increased after Jan. 1, 1910.**—At any hearing involving a rate increased after January first, nineteen hundred and ten, or of a rate sought to be increased after the passage of this act, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and the Commission shall give to the hearing and decision of such questions

preference over all other questions pending before it and decide the same as speedily as possible.

Part of Paragraph 2 Section 15 added by amendment of June 18, 1910.

Prior to this amendment the Commission had held with more or less definiteness that a rate long in existence was presumed to be reasonable, Sec. 102 *ante*. This amendment is discussed by the Commission in Advance in Rates—Eastern case, 20 I. C. C. 243. Advances in Rates—Western case, 20 I. C. C. 307, 314, 315, 316. At p. 315 of the report in the last named proceeding the Commission held that "burden of proof" did not have the same technical meaning given the phrase in the courts of law, and the Commission said: "In accepting this theory, therefore, it is not within belief that Congress intended by the language now under consideration to convert this Commission into a tribunal which should merely determine as between two sides the preponderance of evidence and base its decisions upon technical and somewhat archaic rules of evidence." "The railroad must assume to prove to this Commission that the new and the increased rates are within the words of description and limitation used in the act; that is, that they are just and reasonable. And to say that they must prove this is to say that they must satisfy our minds of this fact."

General adjustment left to the carrier when rates proposed to be increased were cancelled. Advances in Rate on Grain, 21 I. C. C. 22, 35. When no testimony is offered burden not met. Rates for Transportation of Locomotives, 21 I. C. C. 103, 111. Proof of increased cost of transportation should be directed to the particular transportation affected by the proposed increase. Victor Mfg. Co. *v.* S. Ry. Co., 21 I. C. C. 222, 226. Advance of Commodity Rate under claim that such rate was not properly proportioned to all rates considered. U. S. Leather Co. *v.* So. Ry. Co., 21 I. C. C. 323, 325. Cancellation of a through rate, leaving a combination of locals higher than the through rate puts the burden on the carrier. Rates on Lumber and Other Forest Products, 21 I. C. C. 455. Suspensions of Advances on Soft Coal, 23 I. C. C. 518, 519. Burden on carrier to justify increased car load minimum. Advance in Rates on Potatoes, 23 I. C. C. 69. Statement made that admission of complainant relieved defendant of burden of proof. Wisconsin State Millers' Ass'n *v.* C. M. & St. P. Ry. Co., 23 I. C. C. 494, 495. Refusal

of one carrier to accept for a through haul less than its full locals fails to meet the burden of proof. Advance in Rates on Cement from Md. to Va., 24 I. C. C. 290, 291. Discriminatory increased charges cancelled. Switching Ice in Chicago, 24 I. C. C. 660. That an advance is of no "great consequence" does not relieve from the statute. Rates on Corn, Oats and Other Feed, 25 I. C. C. 46. The burden of proof applies to the total charges and the separately stated charges which make the total. Pacific Fuel & Supply Co. *v.* G. T. W. Ry. Co., 27 I. C. C. 24. Notwithstanding the statute, parties who obtain a suspension of rates should present facts to the Commission. Commodity Rates between Missouri River Points, 28 I. C. C. 265, 267. "Statements of earnings per ton mile and suggestions of increased general operating expenses" not sufficient. Kansas-Iowa Brick Rates, 28 I. C. C. 285, 287. Existing contracts for lower rates will not prevent an increase in rates. Rates on Carload Stone, 29 I. C. C. 136. The theory of equalization of rates not sufficient here. Wickwire Steel Co. *v.* N. Y. C. & H. R. R. Co., 30 I. C. C. 415, 419. Statute discussed. Five Per Cent case, 31 I. C. C. 351, 448. That a commodity usually takes a class rate justifies increasing the rate to the class basis. Rates on Beer and other Malt Products, 31 I. C. C. 544. Not applied when rates were increased to the point where they normally had been. Corp. Com. of Okla. *v.* A. T. & S. F. Ry. Co., 31 I. C. C. 532, 535, 536. Here the charge was increased and the burden of proof was on the carriers. Empire Coke Co. *v.* B. & S. R. R. Co., 31 I. C. C. 573, 582. Cases discussed. East J. R. Co. *v.* C. R. R. of N. J., 36 I. C. C. 146.

§ 400. **Through Routes and Joint Rates May Be Established by the Commission.**—The Commission may also, after hearing, on a complaint or upon its own initiative without complaint establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line. The Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the gen-

eral business of transporting freight in addition to their passenger and express business and railroads of a different character, nor shall the Commission have the right to establish any route, classification, rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this act shall be subject to the laws and regulations applicable to transportation by water.

Par. 3 of Sec. 15 as amended by act June 18, 1910. The old law read:

The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line.

Second paragraph of section fifteen added by act June 29, 1906.

The power conferred by this section did not exist until this amendment was passed. See annotation next preceding section. The proviso to this section prevents new lines from forcing joint traffic arrangements when satisfactory through routes exist. Chicago & M. Elec. R. Co. *v.* Ill. Cent. R. Co., 13 I. C. C. 20. Through route established under this section. Pacific Coast Lumber Mfgrs. Asso. *v.* N. Pac. Ry. Co., 14 I. C. C. 51; Enterprise Fuel Co. *v.* Penn. R. Co., 16 I. C. C. 219, 220, 222.

Notes of Decisions Rendered Since 1909.

Former and present statutes compared. C. & C. Traction Co. *v.* B. & O. S. W. R. R. Co., 20 I. C. C. 486. Section quoted and discussed. Brook-Rauch Mill & Elevator Co. *v.* St. L. I. M. & S. Ry. Co., 21 I. C. C. 651, 654. Statute discussed and decisions under the common law cited. Mobile Chamber of Commerce *v.* M. & O. R. R. Co., 23 I. C. C. 417, 421. "Railroads of a different character" and "through route" defined. Kansas City *v.* K. C. V. & T. Ry. Co., 24 I. C. C. 22, 26. The Commission has a discretion under the amendment. Flour City S. S. Co. *v.* L. V. R. R. Co., 24 I. C. C. 179, 185; Crane Iron Works *v.* U. S., 209

Fed. 238, Op. Com. Ct. No. 55, p. 453. See Crane R. R. Co. *v.* P. & R. Ry. Co., 15 I. C. C. 248; Crane Iron Works *v.* C. R. R. Co. of N. J., 17 I. C. C. 514; Truckers Transfer Co. *v.* C. & W. C. R. R. Co., 27 I. C. C. 275, 277.

Section cited: Wichita Falls System Joint Coal Rate cases, 26 I. C. C. 215, 222; St. L. & St. P. R. R. Co. *v.* P. & P. N. Ry. Co., 26 I. C. C. 226, 234; Texas Cement Products Co. *v.* St. L. & S. F. R. R. Co., 26 I. C. C. 508, 510. Lumber Rates from Texas, 28 I. C. C. 471, 473; Rates on Lumber and Other Forest Products, 30 I. C. C. 371, 372. No connection ordered with a plant facility. Mfgrs. Ry. Co. *v.* St. L. I. M. & S. Ry. Co., 28 I. C. C. 93, 120. The grant of this authority contemplates the exercise of judgment. Merchants & Mfgrs. Ass'n *v.* C. R. R. of N. J., 30 I. C. C. 396, 401, citing cases. The practice of the Commission stated, citing cases. Decatur Navigation Co. *v.* L. & N. R. R. Co., 31 I. C. C. 281, 287. An order of the Commission made prior to the effective date of the amendment of 1910 can not be made effective by the courts under that amendment. Omaha & C. B. St. Ry. Co. *v.* Int. Com. Com., 230 U. S. 324, 57 L. Ed. 1501, 33 Sup. Ct. 890, 46 L. R. A. (N. S.) 385; reversing same styled case, 191 Fed. 40, Opin. Com. Ct. No. 25, p. 147. See further history of this case: West End Improvement Club *v.* O. C. B. Ry. & Bridge Co., 17 I. C. C. 239; O. & C. B. St. Ry. & Bridge Co. *v.* I. C. C., 179 Fed. 243. Limitation under former statute discussed. Int. Com. Com. *v.* N. P. R. R. Co., 216 U. S. 538, 54 L. Ed. 608, 30 Sup. Ct. 417. See Sec. 338, *supra*.

§ 401. **Limitation on the Power to Prescribe Through Routes.**—And in establishing such through route, the Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

Par. 3, Sec. 15, added by amendment of June 18, 1910. Limitation stated, Cincinnati & Traction Co. *v.* B. & O. S. W. R. R. Co., 20 I. C. C. 486, 492. The Commission must work under the limitation imposed. Rates on Meats, 23 I. C. C. 656, 662. The

law recognizes the right of the carrier to protect its own haul. Chamber of Commerce of N. Y. *v.* N. Y. C. & H. R. R. Co., 24 I. C. C. 55, 76. Limitation applied. Davis Bros. Lumber Co. *v.* C. R. I. & P. Ry. Co., 26 I. C. C. 257, 259. This section gives the carrier no right "to exclude from points of consumption on its line manufacturers located elsewhere." Meridan Fertilizer Factory *v.* T. P. Ry. Co., 26 I. C. C. 351, 352. Route found unreasonably long. Omaha Grain Exchange *v.* C. B. & Q. R. R. Co., 26 I. C. C. 553, 557; United States *v.* N. P. R. R. Co., 28 I. C. C. 518, 523; Hughes Creek C. Co. *v.* K. & M. Ry. Co., 29 I. C. C. 671, 679. Does not apply to making joint rates, through routes having been voluntarily established. Rates on Cotton Seed and Its Products, 28 I. C. C. 219, 221; Lumber Rates Oregon & Washington to Eastern Points, 29 I. C. C. 609. Cancellation of through routes not justified. Lumber Rate from North Pacific Coast Points, 30 I. C. C. 111. Section applied. Cement Rates from Mason City, Iowa, 30 I. C. C. 426, 430. This limitation does not prevent ordering through routes with another carrier when such through routes have been voluntarily established with one carrier. Pacific Nav. Co. *v.* S. P. Co., 31 I. C. C. 472. Carriers can not insist on this Section when they have voluntarily established one through route or when to deny a through route would continue an unjust discrimination. Decatur Nav. Co. *v.* L. & N. R. Co., 31 I. C. C. 281; Pacific Nav. Co. *v.* S. P. Co., 31 I. C. C. 472; Eastern Shore Develop. S. S. Co. *v.* B. & O. R. Co., 32 I. C. C. 238; U. S. Button Co. *v.* C. R. I. & P. Ry. Co., 32 I. C. C. 149; Penn. Co. *v.* U. S., 236 U. S. 351, 59 L. Ed. —, 35 Sup. Ct. 370. Switching may be ordered for one shipper only. Union Lime Co. *v.* C. & N. W. R. Co., 233 U. S. 211, 58 L. Ed. 924, 34 Sup. Ct. 522.

Carriers may cancel through routes which they could not have been compelled to establish. The Ogden Gateway case, 35 I. C. C. 131.

§ 402. **Shippers May Designate Routing.**—In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this act provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such

shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported.

Par. 4 Sec. 15 added by the amendment of June 18, 1910.

Ruling under prior law stated and held that tariff provisions can not exempt the carrier from the duty imposed by this law. Weyl-Zuckerman & Co. *v.* C. M. Ry. Co., 27 I. C. C. 493, 495.

§ 403. **Unlawful to Give or Receive Information Relative to Shipments.**—It shall be unlawful for any common carrier subject to the provisions of this act, or any officer, agent, or employee of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose or to permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used: *Provided,* That nothing in this act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any state or federal court, or to any officer or agent of the Government of the United States, or of any state

or territory, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime; or information given by a common carrier to another carrier or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

Any person, corporation, or association violating any of the provisions of the next preceding paragraph of this section shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not more than one thousand dollars.

Paragraphs 5 and 6 Sec. 15 added by the amendment of June 18, 1910. This section indicates a legislative intent to secure shippers immunity from a disclosure of their business. Albree *v.* M. R. R. Co., 22 I. C. C. 303, 321. Possible violation of Section suggested. Concentration of Cotton, 26 I. C. C. 585, 593. Purpose of Section discussed, citing Conference Ruling 356; Re Freight Bills, 29 I. C. C. 496, 498.

§ 404. **Charges for Instrumentalities Furnished by Shipper Must Be Reasonable.**—If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or *on its own initiative*, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect to be enforced in like manner as the orders above provided for under this section.

Paragraph 7 of Sec. 15 added by amendment of June 29, 1906 and the words italicized added by the amendment of June 18, 1910.

Storage and switching tracks within the inclosure of the shipper and established for his convenience will not furnish a basis for the shipper's claim for compensation for storing cars under this section. General Elec. Co. *v.* New York C. & H. R. R. Co., 14 I. C. C. 237, 242.

Notes of Decisions Rendered Since 1909.

Matter of Allowances, 12 I. C. C. 55, quoted as referring to the Statute. Federal Sugar Refining *v.* B. & O. R. R. Co., 17 I. C. C. 40, 47. The section has no application to a warehouse company not the owner of the commodity shipped. Merchants Cotton Compress & Storage Co. *v.* I. C. R. R. Co., 17 I. C. C. 98, 105. Such allowances must be without discrimination. Federal Sugar Refining Co. *v.* B. & O. R. R. Co., 20 I. C. C. 200. Cases discussing allowances cited and former holdings adhered to. Manufacturing Ry. Co. *v.* St. L. I. M. & S. Ry. Co., 21 I. C. C. 304, 315. Claims for allowances should be submitted to the Commission. Sterling & Son Co. *v.* M. C. R. R. Co., 21 I. C. C. 451, 454. Allowances for repairs on cars are of a dangerous character. Balfour, Guthrie & Co. *v.* O. W. R. R. & Nav. Co., 21 I. C. C. 539, 540. Allowances to industries discussed. Manufacturers Ry. Co. *v.* St. L. I. M. & S. Ry. Co., 28 I. C. C. 93, 101, 102. "Connected with such transportation" defined. Inman, Akers & Inman *v.* A. C. L. R. Co., 32 I. C. C. 146. Statute applied and allowances held legal. Union Pac. R. Co. *v.* Updike Grain Co., 222 U. S. 215, 56 L. Ed. 171, 32 Sup. Ct. 39; Int. Com. Com. *v.* Diffenbaugh, 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22. The amount of the allowance must be reasonable, and what is reasonable a question to be determined by the Commission. Mitchell Coal & Coke Co. *v.* P. R. Co., 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916. The question is discussed in the several opinions and reports in the Sugar Lighterage case. United States *v.* B. & O. R. Co., 231 U. S. 274, 58 L. Ed. 218, 34 Sup. Ct. 75, affirming B. & O. R. Co. *v.* United States, 200 Fed. 779, Op. Com. Ct. No. 38, p. 499, and setting aside the order of the Commission in the Federal Sugar Refining Co. *v.* B. & O. R. Co., 20 I. C. C. 200. See the related case of the Am. Sugar Refining Co. *v.* D. L. & W. Ry. Co., 200 Fed. 652, reversed American Sugar Refining Co. *v.* D. L. & W. R. Co., 207 Fed. 733, 125 C. C. A. 251. The Tap Line case involved the question, United States *v.* L. & P. R. Co., 234 U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 741; Louisiana & P. Ry. Co. *v.* United States, 209 Fed. 244, Op. Com. Ct. No. 90, p. 709; The Tap Line case, 23 I. C. C. 277, 549, 31 I. C. C. 490. The provision does not apply where rate contracted on the theory that the shipper shall furnish the instrumentality. Best *v.* G. N. Ry. Co., 33 I. C. C. 1, 4.

§ 405. **Enumeration of Powers of Commission Not Exclusive.**—The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this act.

Last paragraph of section fifteen added by act June 29, 1906.

The statute gives shippers new rights but preserves existing rights. Copp *v.* L. & N. R. Co., 43 La. Ann. 511, 12 L. R. A. 725, 26 Am. St. Rep. 198, 9 So. 441; Carlisle *v.* Mo. Pac. R. Co., 168 Mo. 656, 68 S. W. 898; Western & A. R. Co. *v.* White Provision Co., —— Ga. ——, 82 S. E. 644; Gulf, C. & S. F. R. Co. *v.* Moore, 98 Tex. 302, 83 S. W. 362, 4 Ann. Cas. 770; Puritan Coal Min. Co. *v.* Penn'a R. Co., 237 Pa. 448, 85 Atl. 426, Ann. Cas. 1914B, 37; Mitchell Coal & Coke Co. *v.* Penn'a R. Co., 230 U. S. 247, 57 L. Ed. 1473, 33 Sup. Ct. Rep. 916.

Compare Texas & P. R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 439-446, 51 L. Ed. 553, 561, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Robinson *v.* B. & O. R. Co., 222 U. S. 506, 56 L. Ed. 288, 32 Sup. Ct. Rep. 114; 36 Stat. at L. 551 (15), chap. 309, Comp. Stat. 1913, Sec. 8583; 38 Stat. at L. 220, chap. 32. Penn. R. Co. *v.* Puritan Coal Mining Co., 237 U. S. 121, 59 L. Ed. ——, 35 Sup. Ct. 484, 486, 487. Ill. C. R. Co. *v.* Mulberry Hill Coal Co., 238 U. S. 275, 59 L. Ed. ——, 35 Sup. Ct. 760, 763.

§ 406. **Award of Damages Shall Be Made by Commission after Hearing.**—That if, after hearing on a complaint made as provided in section thirteen of this act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

First paragraph of section sixteen as it now exists is an amendment passed June 29, 1906.

The original section read:

"That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate or refuse or neglect to obey any lawful order or requirement of the Commission in this act named, it shall be the duty of the Commission, and lawful for any company or person interested in such order or requirement, to apply, in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its prin-

cipal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants, in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of said Commission shall be *prima facie* evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money not exceeding for each carrier or person in default the sum of five hundred dollars for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or

otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining, or into court to abide the ultimate decision of the court, or into the treasury; and payment thereof may, without prejudice to any other mode of recovering the same be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree in *personam* in such court. When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon; and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented by the Commission it shall be the duty of the district attorney, under the direction of the Attorney-General of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session."

The section as amended by the act of March 2, 1889, is as follows:

"That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate, or refuse or neglect to obey or perform any lawful order or requirement of the Commission created by this act, not founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, it shall be lawful for the Commission or for any company or person interested in such order or requirement, to apply in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the cause may be; and the said court shall have power to hear and determine the matter, on such notice to the common carrier complained of as

the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the findings of fact in the report of said Commission shall be *prima facie* evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction, or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of five hundred dollars for every day, after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining or into court, to abide the ultimate decision of the court, or into the treasury; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced

by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree in *personam* in such court. When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon, and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented by the Commission, it shall be the duty of the district attorney, under the direction of the Attorney-General of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

"If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the fifteenth section of this act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the circuit court of the United States sitting as a court of law in the judicial district in which the carrier complained or has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and said court shall by its order then fix a time and place for the trial of said cause, which shall not be less than twenty nor more than forty days from the time said order is made, and it shall be the duty of the marshal of the district in which said proceeding is pending to forthwith serve a copy of said petition, and of said order, upon each of the defendants, and it shall be the duty of the defendants to file their answers to said petition within ten days after the service of the same upon them as aforesaid. At the trial the findings of fact of said Commission as set forth in its reports shall be *prima facie* evidence of the matters therein stated, and if either party shall demand a jury

or shall omit to waive a jury the court shall, by its order, direct the marshal forthwith to summons a jury to try the cause; but if all the parties shall waive a jury in writing, then the court shall try the issues in said cause and render its judgment thereon. If the subject in dispute shall be of the value of two thousand dollars or more either party may appeal to the Supreme Court of the United States under the same regulations now provided by law in respect to security for such appeal; but such appeal must be taken within twenty days from the day of the rendition of the judgment of said circuit court. If the judgment of the circuit court shall be in favor of the party complaining, he or they shall be entitled to recover a reasonable counsel or attorney's fee, to be fixed by the court, which shall be collected as part of the costs in the case. For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session."

In Council *v.* Railroad Co., 1 I. C. C. 339, 1 I. C. R. 683, the Commission declined to go into the question of a claim for damages for trespass, stating that a jury trial was necessary in such cases. See a similar holding, Heck *v.* East Tenn., Va. & Ga. Ry. Co., 1 I. C. C. 495, 1 I. C. R. 775; Riddle *v.* New York, L. E. & W. R. Co., 1 I. C. C. 594, 1 I. C. R. 787. In the case of Rawson *v.* Newport N. & M. V. R. Co., 3 I. C. C. 266, 2 I. C. R. 626, the Commission said that the amendment of March 2, 1889, having provided for a trial by jury in suits on the Commission's orders of reparation, such orders could under that amendment be issued. For a time even after the amendment the Commission refused to issue money orders for reparation, leaving the matter to the courts, but a circuit court having decided that the failure of the Commission to act, barred the complainant; the Commission decided that it was its duty, where the facts and law authorized it, to make awards of reparation. MacLoon *v.* Chicago & N. W. R. Co., 5 I. C. C. 84, 3 I. C. R. 711, 715, 716. See also Cattle Raisers' Asso. *v.* Chicago B. & Q. R. Co., 10 I. C. C. 83, 89, 95. Section quoted. Blume & Co. *v.* Wells Fargo & Co., 15 I. C. C. 53, 55. Clearly the commission has authority to make an award of damages. Washer Grain Co. *v.* Mo. Pac. Ry. Co., 15 I. C. C. 147, 153. Arkansas Fuel Co. *v.* Chicago, M. & St. P. Ry. Co., 16 I. C. C. 95, 98. The difference between the old law and the amended act of June 29, 1906, should be kept in mind when considering the de-

cisions relating to the section prior to that amendment. A suit on an order of the Commission is an independent suit, in which the court hears the case *de novo*, though the Commission's report is *prima facie* evidence of the matters of fact therein stated. Kentucky & I. Bridge Co. *v.* L. & N. R. Co., 37 Fed. 567, 614. This is true whether the Commission itself or an individual seeks to enforce the order of the Commission. Int. Com. Com. *v.* Lehigh V. R. Co., 49 Fed. 177. Other evidence may overcome the prima facie effect of the Commission's report. Int. Com. Com. *v.* A. T. & S. F. R. Co., 50 Fed. 295, 304; Int. Com. Com. *v.* Cincinnati, N. O. & T. P. Ry. Co., 56 Fed. 925, 934, 935. If order not obeyed, duty of Commission to apply to a court to enforce. Int. Com. Com. *v.* Detroit, G. H. & M. Ry. Co., 57 Fed. 1005, 4 I. C. R. 722. Courts can only enforce or refuse to enforce orders as made. Shinkle, etc., *v.* L. & N. R. Co., 62 Fed. 690; Detroit, G. H. & M. R. Co. *v.* Int. Com Com., 74 Fed. 803, 841, 21 C. C. A. 103. Order not enforced because Commission failed to recognize "the element of the value of the service." Int. Com. Com. *v.* Delaware, L. & W. R. Co., 64 Fed. 723, 724. Section cited. Int. Com. Com. *v.* Cincinnati, N. O. & T. P. Ry. Co., 64 Fed. 981, 984, 13 U. S. App. 700. The Commission's report is analagous to that of a referee or special master in chancery. Int. Com. Com. *v.* L. & N. R. Co., 73 Fed. 409, 414. The circuit court sitting as a court of equity has no jurisdiction of that part of the Commission's order relating to reparation. Int. Com. Com. *v.* Western N. Y. & P. R. Co., 82 Fed. 192. An order to be enforced must be definite and within the legal power of the Commission. Farmers' L. & T. Co. *v.* N. Pac. Ry. Co., 83 Fed. 249. If, after a hearing, the court finds the facts different from those found by the Commission, the court will act on the facts found by it. Int. Com. Com. *v.* East Tenn., Va. & Ga. Ry. Co., 85 Fed. 107. Act remedial and a hearing should be had, although the benefit to be derived from the order appears unappreciable. Int. Com. Com. *v.* Chicago, B. & Q. R. Co., 94 Fed. 272. A decree enforcing order of the Commission may be suspended pending an appeal to the Supreme Court. Int. Com. Com. *v.* L. & N. R. Co., 101 Fed. 146. Order not set aside unless error clearly appears. Int. Com. Com. *v.* L. & N. R. Co., 102 Fed. 709. When the Commission has erred in the principles of law applied, the suit to enforce should be dismissed without prejudice to the right to again apply to that body. Int. Com. Com. *v.* So. Ry.

Co., 105 Fed. 703, 710; L. & N. R. Co. *v.* Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209. A bill will not lie to prevent discrimination under section three prior to action by the Commission. Central Stock Yards Co. *v.* L. & N. R. Co., 112 Fed. 823. Affirmed on another ground. 118 Fed. 113, 55 C. C. A. 63. Affirmed by the Supreme Court, with the statement, "For the purposes of decision, we assume * * * that such rights as the plaintiff has may be enforced by bill in equity," (citing Interstate Stock Yards Co. *v.* Indianapolis U. R. Co., 99 Fed. 472.) 192 U. S. 568, 570, 48 L. Ed. 565, 569, 24 Sup. Ct. 339. Burden on the carrier to show order erroneous. Int. Com. Com. *v.* L. & N. R. Co., 118 Fed. 613, 622; Int. Com. Com. *v.* So. Pac. Co., 123 Fed. 597, 602, 603, 604; Int. Com. Com. *v.* Cincinnati, H. & D. Ry. Co., 146 Fed. 559. Affirmed. Cincinnati H. & D. Ry. Co. *v.* Int. Com. Com., 206 U. S. 142, 51 L. Ed. 995, 27 Sup. Ct. 648. The court may adopt different grounds to arrive at the same conclusion as the Commission. Int. Com. Com. *v.* So. Pac. Co., 132 Fed. 829, 137 Fed. 606. Decree reversed. So. Pac. Co. *v.* Int. Com. Com., 200 U. S. 536, 50 L. Ed. 585, 26 Sup. Ct. 330. Courts can not separate the legal from the illegal parts of an order of the Commission, and if any part is illegal, must refuse to enforce. Int. Com. Com. *v.* Lake Shore & M. S. Ry. Co., 134 Fed. 942, 947. The findings of fact of the Commission should be separated from its arguments, opinions and conclusions. Western N. Y. & P. R. Co. *v.* Penn. Refining Co., 137 Fed. 343, 70 C. C. A. 23. Affirmed. Penn. Refining Co. *v.* Western N. Y. & P. R. Co., 208 U. S. 208, 52 L. Ed. 456, 28 Sup. Ct. 268. "*Prima facie* evidence of a fact is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose." Tift *v.* So. Ry. Co., 138 Fed. 753, 759. Affirmed. So. Ry. Co. *v.* Tift, 148 Fed. 1021, 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. 709. Section cited to show that Commission may sue in its own name to enforce its orders. Tex. & Pac. R. Co. *v.* Int. Com. Com., 162 U. S. 197, 203, 40 L. Ed. 940, 942, 16 Sup. Ct. 666. This section applies to complaints brought under the fourth section, notwithstanding the proviso of the last named section. Int. Com. Com. *v.* Alabama M. R. Co., 168 U. S. 144, 169, 170, 40 L. Ed. 414, 424, 18 Sup. Ct. 45. Under section eleven of the act of March 3, 1891 (26 Stat. L. 829, chap. 517), a supersedeas may be granted by the circuit court of appeals,

when an appeal is granted on a suit brought under section sixteen of the act to regulate commerce. L. & N. R. Co. *v.* Behlmer, 169 U. S. 644, 42 L. Ed. 889, 18 Sup. Ct. 502. Case dismissed without prejudice to right of Commission further to investigate conformably to the law announced by the court. L. & N. R. Co. *v.* Behlmer, 175 U. S. 648, 676, 44 L. Ed. 309, 320, 20 Sup. Ct. 209; East Tenn., Va. & Ga. Ry. Co. *v.* Int. Com. Com., 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516; Int. Com. Com. *v.* Clyde S. S. Co., 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512; Int. Com. Com. *v.* Chicago, B. & Q. R. Co., 186 U. S. 320, 46 L. Ed. 1182, 22 Sup. Ct. 824. The statute gives *prima facie* effect to the findings of the Commission, and when these findings are concurred in by the circuit court, they should not be interfered with unless the record discloses clear and unmistakable error. Cincinnati, H. & D. R. Co. *v.* Int. Com. Com., 206 U. S. 142, 154, 51 L. Ed. 995, 1000, 27 Sup. Ct. 648; Ill. Cent. R. Co. *v.* Int. Com. Com., 206 U. S. 441, 466, 51 L. Ed. 1128, 1138, 27 Sup. Ct. 700. The parties at interest may proceed on the order of the Commission in the circuit court. So. Ry. Co. *v.* Tift, 206 U. S. 428, 437, 51 L. Ed. 1124, 1127, 27 Sup. Ct. 709. "The findings of the Commission are made by law *prima facie* true. This court has ascribed to them the strength due to the judgment of a tribunal appointed by law and informed by experience." Ill. Cent. R. Co. *v.* Int. Com. Com., 206 U. S. 441, 454, 51 L. Ed. 1128, 1133, 1134, 27 Sup. Ct. 700.

Notes of Decisions Rendered Since 1909.

See notes Section 13 of act, Sec. 393, ante. Statute of Limitation. Shoecraft & Son Co. *v.* I. C. R. Co., 19 I. C. C. 492; Blinn Lumber Co. *v.* S. P. Co., 18 I. C. C. 430. After determining a rate unreasonable, improper not to award reparation. Thompson Lumber Co. *v.* Int. Com. Com., 193 Fed. 682, Op. Com. Ct. No. 19, p. 319. See Thompson Lumber Co. *v.* Ill. C. R. Co., 13 I. C. C. 657; Russe & Burgess *v.* Int. Com. Com., 193 Fed. 678. General statement of findings of the Commission sufficient. Lehigh Valley R. Co. *v.* American Hay Co., 219 Fed. 539. Ultimate facts should be stated. Meeker *v.* Lehigh V. R. Co., 236 U. S. 412, 59 L. Ed. —, 35 Sup. Ct. 328.

§ 407. **Carrier Failing to Comply With Order for Reparation, Suit May Be Brought Thereon in United States**

Circuit Courts, the Order Being Prima Facie Evidence of Right to Recover.—If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, *or in any state court of general jurisdiction having jurisdiction of the parties,* a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

First part of second paragraph of Sec. 16. For old Sec. 16 see next preceding section. The words italicized were added by the amendment of June 18, 1910.

Basis of reparation fixed, but the courts left to determine the amount. Independent Refiners' Asso. *v.* Western New York & P. R. Co., 6 I. C. C. 378, 449, 454. Reparation disallowed. Western New York & P. R. Co. *v.* Penn Refining Co., 137 Fed. 343, 70 C. C. A. 23. Affirmed. Penn Refining Co. *v.* Western N. Y. & P. R. Co., 208 U. S. 208, 52 L. Ed. 456, 28 Sup. Ct. 268. No suit prior to an award by the Commission. Howard Supply Co. *v.* Chesapeake & O. Ry. Co., 162 Fed. 188, 191. Texas & Pac. Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350.

Notes of Decisions Rendered Since 1909.

Applies only when previous award made by the Commission, R. J. Darnell, Inc. *v.* Ill. C. R. Co., 190 Fed. 656; Franklin *v.* P. & R. Ry. Co., 203 Fed. 134. Order not *prima facie* evidence of liability, but only of the facts stated. Darnell-Taenzer Lumber Co. *v.* So. Pac. Co., 190 Fed. 659; reversing same styled case, 221 Fed. 890, —— C. C. A. ——. See also Russe & Burgess *v.*

Int. Com. Com., 193 Fed. 678; Thompson Lumber Co. *v.* Ill. C. R. Co., 193 Fed. 682, Op. Com. Ct. No. 19, p. 319. No attorneys' fees for loss of property. Mo. Pac. Ry. Co. *v.* Harper Bros., 201 Fed. 671, 121 C. C. A. 570. Not just a suit on the award but a plenary suit. Lehigh V. R. Co. *v.* Clark, 207 Fed. 717, 125 C. C. A. 235. See opinion of the Commission, Naylor & Co. *v.* L. V. R. Co., 15 I. C. C. 9, 18 I. C. C. 624. Not necessary to fix a new rate preliminary to an award of reparation. Baer Bros. Mercantile Co. *v.* D. & R. G. R. R. Co., 233 U. S. 479, 58 L. Ed. 1035, 34 Sup. Ct. 641. Reversing Denver & R. G. R. R. Co. *v.* Baer Bros. Mercantile Co., 187 Fed. 485, 109 C. C. A. 337. See Baer Bros. Mercantile Co. *v.* M. P. Ry. Co., 17 I. C. C. 225; Denver & R. G. Co. *v.* Baer Bros. Merct. Co., 209 Fed. 577, 126 C. C. A. 399. Same styled case, 200 Fed. 614. Order fixing unreasonableness of rates in favor of one party may be sued on by others. National Pole Co. *v.* Chicago & Mo. Ry. Co., 211 Fed. 65. Suit may be brought where beneficiary resides. St. L. & S. W. Ry. Co. *v.* Samuels Co., 211 Fed. 588. The evidential value of an order of the Commission is for the determination of the court and jury. Lehigh Valley R. Co. *v.* Meeker, 211 Fed. 785. Interest and attorneys' fees allowed, 209 Fed. 577, *supra*. No attorneys' fees can be allowed where recovery is under a state law for failure to furnish cars. A. T. & S. F. Ry. Co. *v.* Vosberg, 238 U. S. 56, 59 L. Ed. —, 35 Sup. Ct. 675. See annotations Secs. 382 and 383, *supra*.

§ 408. **Limitation on Action for Damages.**—All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court or state court within one year from the date of the order, and not after.

Last part of second paragraph of Sec. 16, amended by the act of June 18, 1910 by adding the words "or state court."

Prior to this amendment no limitation was prescribed by the act, and the Commission held that the law of the state in which was located the circuit court in which suit was brought on the order of reparation would control as to limitation. Cattle Raisers' Asso. *v.* C., B. & Q. R. Co., 10 I. C. C. 83, 100, 101, 102, 103, 104. Question as to limitation raised, but not decided. Oshkosh Logging Tool Co. *v.* Chicago & N. W. Ry. Co., 14 I. C. C.

109, 113. The limitation period of one year begins to run August 28, 1906, and claims arising prior to that date, which is the effective date of the amended act, though accrued more than two years prior thereto, may be presented prior to midnight of August 28, 1907. Nicola, Stone & Myers Co. *v.* L. & N. R. Co., 14 I. C. C. 199, 206. A written presentation of a claim without formal complaint stops limitation. Venus *v.* St. Louis, I. M. & S. Ry. Co., 15 I. C. C. 136. The cause of action accrues when the carrier violates the act. Re When a Cause of Action Accrues, 15 I. C. C. 201. Or when freight charges are paid. Kile & Morgan Co. *v.* Deepwater Ry. Co., 15 I. C. C. 235. This statute does not apply to suits brought primarily in a federal court. Lyne *v.* Delaware, L. & W. R. Co., 170 Fed. 847.

Notes of Decisions Rendered Since 1909.

Ruling on Blinn Lumber Co. *v.* S. P. Co., 18 I. C. C. 430; Standard Oil Co. *v.* C. T. & R. R. Co., 21 I. C. C. 460, 461; Shoecraft & Son Co. *v.* I. C. R. Co., 19 I. C. C. 492. Informal complaint stops the running of the statute. Memphis Freight Bureau *v.* St. L. S. W. Ry. Co., 18 I. C. C. 67; Riverside Mills *v.* Ga. R. R. Co., 20 I. C. C. 423, 424. Liability of carrier several. Sondheimer *v.* I. C. R. R. Co., 20 I. C. C. 606, 610, citing Independent Refiners' Ass'n *v.* W. N. Y. & P. R. R. Co., 6 I. C. C. 378. What is a sufficient statement of the claim to stop the running of the statute. Fels & Co. *v.* P. R. R. Co., 23 I. C. C. 483, 488. Complaint dismissed, action barred. Memphis Freight Bureau *v.* St. L. I. M. & S. Ry. Co., 24 I. C. C. 547; Arkansas Fertilizer Co. *v.* St. L. I. M. & S. Ry. Co., 25 I. C. C. 266. The question goes to the jurisdiction which is lost after the statute has run. Michigan Hardwood Mfgrs. Ass'n *v.* Freight Bureau, 27 I. C. C. 32. Filing complaint by an association does not stop the running of the statute save in favor of those named in the complaint. Commercial Club of Omaha *v.* A. & S. R. Ry. Co., 27 I. C. C. 302, 307. Receipt of a claim is filing. Marion Coal Co. *v.* D. L. & W. R. R. Co., 27 I. C. C. 441, 442. Better practice to file claim for reparation in the original complaint. Alleged Unreasonable Rates on Meat, 28 I. C. C. 332, 335. Intent of the statute discussed. Lehigh V. R. Co. *v.* Meeker, 211 Fed. 785, 802, 128 C. C. A. 311; Meeker *v.* Lehigh V. R. Co., 236 U. S. 412, 59 L. Ed. —, 35 Sup. Ct. 328; Penn. R. Co. *v.* Jacoby, 239

U. S. —, 60 L. Ed. —, 36 Sup. Ct. —, affirming by divided courts, Jacoby *v.* Penn. R. Co., 19 I. C. C. 392.

§ 409. **All Parties Jointly Awarded Damages May Sue as Plaintiff against All Carriers Parties to the Award.**—In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

Third paragraph of section sixteen.

§ 410. **Service of Orders of Commission.**—Every order of the Commission shall be forthwith served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law.

Fourth paragraph of Sec. 16 as amended by Act June 18, 1910. The former section read:

Every order of the Commission shall be forthwith served by mailing to any one of the principal officers or agents of the carrier at his usual place of business a copy thereof; and the registry mail receipt shall be *prima facie* evidence of the receipt of such order by the carrier in due course of mail.

§ 411. **Commission May Suspend or Modify Its Orders.**—The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

Fifth paragraph of section sixteen.

Power exercised. Traffic Bureau Merchants Ex. of St. Louis *v.* Chicago, B. & Q. R. Co., 14 I. C. C. 551.

§ 412. **Punishment for Knowingly Disobeying an Order Issued under Section Fifteen.**—It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this act shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

The forfeiture provided for in this act shall be payable into the treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Paragraphs six, seven, eight and nine of section sixteen.

§ 413. **District Attorney and Attorney-General to Prosecute—Special Attorneys May Be Employed.**—The Commission may employ such attorneys as it finds necessary for the proper legal aid and service of the Commission or its members in the conduct of their work or for proper representation of the public interests in investigations made by it or causes or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for and represent the Commission in any case pending in the Commerce Court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

Paragraph ten of Sec. 16 as amended by the act of June 18, 1910. The former Section read:

It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. The Commission may, with the consent of the Attorney-General, employ special counsel in any proceeding under this act, paying the expenses of such employment out of its own appropriation.

Paragraph nine of original section sixteen.

§ 414. **Courts May Enforce Obedience to Commission's Orders, Mandatory or Otherwise.**—If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the Commerce court for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

Paragraph eleven of Sec. 16 being amendment of June 18, 1910. The commerce court having been abolished, application must now be made to the district court. Sec. 461 *post*. The Section prior to the amendment read:

If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect, any pary injured thereby, or the Commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily

exercised by it in compelling obedience to its writs of injunction and mandamus.

Tenth paragraph of original section sixteen.

§ 415. **Schedules, Contracts, etc., Must Be Filed with the Commission, and, When Filed, Original or Certified Copy Prima Facie Evidence.**—The copies of schedules *and classifications* and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual *or other* reports of carriers made to the Commission as required under the provisions of this act shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as *prima facie* evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of and extracts from any of said schedules, *classifications,* tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the Commission's seal, shall be received in evidence with like effect as the originals.

Last paragraph of Sec. 16 as amended by the act of June 18, 1910, the words italicized being added by the amendment.

§ 416. **Rehearings May be Granted by Commission.**—That after a decision, order or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or

modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

Secton 16-a added by the act of June 29, 1906.

The Commission exercised the right to grant rehearings prior to his amendment. Rehearing not granted unless Commission is satisfied result would be changed. Riddle *v.* Pittsburg & L. E. R. Co., 1 I. C. C. 490, 1 I. C. R. 773. After hearing complaint on pleadings and proof, a rehearing will not be granted to one not a party to the proceedings. Re Petition of Produce Exchange, 2 I. C. C. 588, 2 I. C. R. 412. Application should be verified and should state the nature of the new testimony. Commission may of its own motion grant a rehearing when general public interest is involved. Rice *v.* Western N. Y. & P. R. Co., 2 I. C. C. 389, 2 I. C. R. 298. Will not reopen just to rediscuss the facts and law already before the Commission. Myers *v.* Penn. Co., 2 I. C. C. 573, 2 I. C. R. 403, 544. Upon rehearing with additional evidence former order set aside. Bates *v.* Penn. R. Co., 4 I. C. C. 281, 3 I. C. R. 296. Petition must be supported by proof showing *prima facie* error. Proctor & Gamble *v.* Cincinnati, H. & D. R. Co., 4 I. C. C. 443, 3 I. C. R. 374. A form of petition. Haddock *v.* Delaware, L. & W. R. Co., 3 I. C. R. 410. Application denied. Railroad Com. of Fla. *v.* Savannah, F. & W. Ry. Co., 5 I. C. C. 136, 3 I. C. R. 750; Delaware State Grange *v.* New York, P. & N. R. Co., 5 I. C. C. 161, 3 I. C. R. 828; Brady *v.* Penn. R. Co., 4 I. C. R. 283; Cattle Raisers' Asso. *v.* Chicago, B. & Q. R. Co., 10 I. C. C. 83, 106, 12 I. C. C. 507, 514; Johnston-Larimer Dry Goods Co. *v.* A. T. & S. F. Ry. Co., 12 I. C. C. 188; Poor *v.* Chicago, B. & Q. R. Co., 12 I. C. C. 469; Muscogee Commercial Club *v.* Mo., Kan. & Tex. Ry. Co., 13 I. C. C. 68; Hussey *v.* Chicago, R. I. & P. Ry. Co., 14 I. C. C. 215; Randolph Lumber Co. *v.* Seaboard A. L. Ry. Co., 14 I. C. C. 338. Granted to correct the record. Independent Refiners' Asso. *v.* Penn. R. Co., 4 I. C. R. 369. Not granted when sought to secure reparation upon questions not considered in original case. Rice *v.* Western N. Y. & P. R. Co., 6 I. C. C. 455. Rehearing granted. Page *v.* Delaware, I. & W. R. Co., 6 I. C. C. 548. Re Matters of Allowance to Elevators, 12 I. C. C. 85, 13 I. C. C. 498, 14 I. C. C. R. 315, 320; Thompson Lumber Co. *v.* Ill. Cent. R. Co., 14 I. C. C.

566. Rehearing had, but, after hearing, dismissed or denied. Cattle Raisers' Asso. *v.* Ft. Worth & D. C. Ry. Co., 7 I. C. C. 555-a; City of Danville *v.* So. Ry. Co., 8 I. C. C. 571. Rehearing granted that the Commission might exercise the power granted it under act June 29, 1906. Cattle Raisers' Asso. *v.* Mo., Kan. & Tex. Ry. Co., 12 I. C. C. 1; Banner Milling Co. *v.* New York C. & H. R. R. Co., 14 I. C. C. 398, but not so when complainant neglected to enforce in the courts a former order. Cattle Raisers' Asso. *v.* Chicago, B. & Q. R. Co., 12 I. C. C. 6. Power to grant discretionary. City of Atchison *v.* Mo. Pac. Ry. Co., 12 I. C. C. 254.

§ 417. **Procedure before the Commission.**—That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commisson may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpœnas.

Original section seventeen, except the words "and sign subpœnas" added at the end by act March 2, 1889.

Under authority of this section, the Commission has formulated rules of procedure, *ante*. Sections 268-291.

§ 418. **Salaries and Expenses of the Commission.**—That each commissioner shall receive an annual salary of ten thousand dollars, payable in the same manner as the judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive an annual salary of five thousand dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of

its duties. Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

All of the expenses of the Commission, including all necessary expenses for transportation incurred by the commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission.

Section eighteen as amended by act of March 2, 1889.

The original act made the employment and salaries of employees subject to the approval of the Secretary of the Interior, and directed that cabinet officer to furnish the Commission with suitable offices. The section as it now is, is the amendment of March 2, 1889, changing the original act in the above two particulars. The salary up to June 29, 1906, was seven thousand five hundred dollars. The present salary is made to conform to section twenty-four of the present act. Cited, Moseley *v.* United States, 35 Ct. Claims, 355; United States *v.* Moseley, 187 U. S. 322, 47 L. Ed. 198, 23 Sup. Ct. 90.

The salary of the secretary was formerly $3500.00, which is the amount stated in the act of 1889.

§ 419. **Principal Office of Commission in Washington, but May Prosecute Inquiries Elsewhere.**—The principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or the parties may be promoted, or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this act.

Section nineteen as originally enacted.

The Commission, or some of its members, frequently hold sessions out of Washington for the purpose of taking evidence in complaints filed with it. But from press of business hearings

away from Washington are usually conducted by Examiner Attorneys of Special Examiners.

§ 420. **The Commission Is Authorized to Investigate, Ascertain and Report the Value of Railroad Property.**—That the Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this act. To enable the Commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The Commission may appoint examiners who shall have power to administer oaths, examine witnesses, and take testimony. The Commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

First. In such investigation said Commission shall ascertain and report in detail as to each piece of property owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The Commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value, and each of the foregoing cost values.

Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed.

Fourth. In ascertaining the original cost to date of the property of such common carrier the Commission, in addition to such other elements as it may deem necessary, shall investigate and report upon the history and organization of the present and of any previous corporation operating such property; upon any increases or decreases of stocks, bonds, or other securities, in any reorganization; upon moneys received by any such corporation by reason of any issues of stocks, bonds, or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made and the expense thereof; and upon the net and gross earnings of such corporations; and shall also ascertain and report in such detail as may be determined by the Commission upon the expenditure of all moneys and the purposes for which the same were expended.

Fifth. The Commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the Government of the United States or by any State, county, or municipal government, or by individuals, associations, or corporations; and it shall also ascertain and report the grants of land to any such common carrier, or any previous corporation operating such property, by the Government of the United States, or by any State, county, or municipal government, and the amount of money derived from the sale of any portion of such grants and the value of the unsold portion thereof at the time acquired and at the present time, also, the amount and value of any concession and allowance made by such common carrier to the Government of the United States, or to any State, county, or municipal government in consideration of such aid, gift, grant, or donation.

§ 421. **Method of Procedure to Be Prescribed by the Carrier.**—Except as herein otherwise provided, the Commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that constitute the ascertained value, and such investigation shall show the value of the property of every common carrier as a whole and separately the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required.

§ 422. **How Such Investigation Prosecuted.**—Such investigation shall be commenced within sixty days after the approval of this act and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

§ 423. **Duty of Carriers to Aid the Investigation.**—Every common carrier subject to the provisions of this act shall furnish to the Commission or its agents from time to time and as the Commission may require maps, profiles, contracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier, and shall grant to all agents of the Commission free access to its right of way, its property, and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to cooperate with and aid the Commission in the work of the valuation of its property in such further particulars and to such extent as the Commission may require and direct, and all rules and regulations made by the Commission for the purpose of administering the provisions of this section and section twenty of this act shall have the full force and effect of law. Unless otherwise ordered by the Commission, with the reasons therefor, the records and data of the Commission shall be open to the inspection and examination of the public.

§ 424. **Valuations to Be Revised and Corrected.**—Upon the completion of the valuation herein provided for, the Commission shall thereafter in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property of all common carriers, and shall ascertain the value thereof, and shall from time to time, revise and correct its valuations, showing such revision and correction classified and as a whole and separately in each of the several States and Territories and the District of Columbia, which valuations, both original and corrected, shall be tentative valuations and shall be reported to Congress at the beginning of each regular session.

§ 425. **Carrier to Make Reports.**—To enable the Commission to make such changes and corrections in its valuations of each class of property, every common carrier subject to the pro-

visions of this Act shall make such reports and furnish such information as the Commission may require.

§ 426. **Notice of Completion of Valuation.**—Whenever the Commission shall have completed the tentative valuation of the property of any common carrier as herein directed, and before such valuation shall become final, the Commission shall give notice by registered letter to the said carrier, the Attorney General of the United States, the governor of any state in which the property so valued is located, and to such additional parties as the Commission may prescribe, stating the valuation placed upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the Commission. If no protest is filed within thirty days, said valuation shall become final as of the date thereof.

§ 427. **Hearings before Valuation Fixed.**—If notice of protest is filed, the Commission shall fix a time for the hearing of same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid. If, after hearing any protest of such tentative valuation under the provisions of this act, the Commission shall be of the opinion that its valuation should not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof. All final valuations by the Commission and the classification thereof shall be published and shall be *prima facie* evidence of the value of the property in all proceedings under the act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the act approved February fourth, eighteen hundred and eighty-seven, commonly known as "the act to regulate commerce," and the various acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

§ 428. **Effect of Valuation as Evidence.**—If upon the trial of any action involving a final value fixed by the Commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto and substantially affecting said value, the court, before proceeding to render judgment shall transmit a copy of such evidence to the Commission,

and shall stay further proceedings in said action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the Commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend or rescind any order which it has made involving said final value, and shall report its action thereon to said court within the time fixed by the court. If the Commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the Commission in the first instance. If the original order shall not be rescinded or changed by the Commission, judgment shall be rendered upon such original order.

§ 429. **Applicable to Receivers—Penalty.**—The provisions of this section shall apply to receivers of carriers and operating trustees. In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with all the requirements of this section and in the manner prescribed by the Commission such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in section sixteen of the act to regulate commerce.

§ 430. **Jurisdiction of Courts to Aid.**—That the district courts of the United States shall have jurisdiction, upon the application of the Attorney-General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section.

Sections 420 to 430 *supra* inclusive constitute Sec. 19-a of the Act to Regulate Commerce. Section 19-a being added by the Amendment of March 1, 1913.

§ 431. **Requirements as to Transportation of Employees of the Commission with Supplies Therefor.**—It shall be the duty of every common carrier by railroad whose property is being valued under the act of March first, nineteen hundred and thirteen, to transport the engineers, field parties and other employees of the United States who are actually engaged in making

surveys and other examination of the physical property of said carrier necessary to execute said act from point to point on said railroad as may be reasonably required by them in the actual discharge of their duties; and, also, to move from point to point and store at such points as may be reasonably required the cars of the United States which are being used to house and maintain said employees; and, also, to carry the supplies necessary to maintain said employees and the other property of the United States actually used on said railroad in said work of valuation. The service above required shall be regarded as a special service and shall be rendered under such forms and regulations and for such reasonable compensation as may be prescribed by the Interstate Commerce Commission and as will insure an accurate record and account of the service rendered by the railroad, and such evidence of transportation, bills of lading, and so forth, shall be furnished to the Commission as may from time to time be required by the Commission.

Amendment of Aug. 1, 1914 to act March 1, 1913, Sec. 19 of Act to Regulate Commerce.

§ 432. **Annual Reports Required and What They Shall Contain. Penalties for Failure to Make.**—That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, and from the owners of all railroads engaged in interstate commerce as defined in this act to prescribe the manners in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; [the accidents to passengers, employees, and other persons, and the causes thereof]; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance

sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, *or on the thirty-first day of December in each year if the Commission by order substitute that period for the year ending June thirtieth,* and shall be made out under oath and filed with the Commission at its office in Washington *within three months after the close of the year for which the report is made,* [on or before the thirtieth day of September then next following], unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission, for making and filing the same or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, *and to file periodical* or special, *or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the Commission so requires;* and if any such carrier shall fail to make and file any such *periodical or special* report within the time fixed by the Commission, it shall be subject to the forfeitures last above provided.

Said forfeiture shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act.

The oath required by this section may be taken before any per-

son authorized to administer an oath by the laws of the State in which the same is taken.

Paragraphs 1 to 4 of Section 20 as amended by Act June 18, 1910. The words added by the amendment are italicized. The Act June 29, 1906 required an annual report to be made "not later than the 30th day of September." The words enclosed in brackets in this Section were in the act of 1906 but repealed by act 1910.

The original law read:

"That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises and equipment; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers, as the Commission may require; and the said Commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe (if in the opinion of the Commission it is practicable to prescribe such uniformity and methods of keeping accounts), a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept."

The Commission formerly required an apportionment of expenses between freight and passenger business, this being found to be arbitrary and valueless was discontinued. Consolidated

Forwarding Co. *v.* So. Ry. Co., 10 I. C. C. 590, 600. The old law did not apply to a carrier doing purely intrastate business. Int. Com. Com. *v.* Bellaire, Z. & C. Ry. Co., 77 Fed. 942; United States *v.* Chicago, K. & S. R. Co., 81 Fed. 783. But does apply when the state carrier joins in a through rate of charges. United States ex rel. Int. Com. Com. *v.* Seaboard Ry. Co., 82 Fed. 563, but mandamus should not issue to compel a report by an officer who has resigned. Same case, 85 Fed. 955. Act applies when state carrier engages in transporting interstate commerce, even though not on a through bill of lading and charging its full local charges. United States *v.* Colorado & N. W. R. Co., 157 Fed. 321, 342, 85 C. C. A. 27. Language from this section quoted as showing the scope of the Commission's power to make investigations. Int. Com. Com. *v.* Harriman, 157 Fed. 432, 438. Reversed. Harriman *v.* Int. Com. Com., 211 U. S. 407, 53 L. Ed. 253, 29 Sup. Ct. 115. Federal courts prior to June 29, 1906, had no jurisdiction by original proceeding in mandamus to compel filing of reports. United States *v.* Lake S. & M. S. Ry. Co., 197 U. S. 536, 49 L. Ed. 870, 25 Sup. Ct. 538. States may require reports not inconsistent with act of Congress. People *v.* Chicago, I. & L. Ry. Co., 223 Ill. 581, 79 N. E. 144.

Notes of Decisions Rendered Since 1909.

Regulations prescribed relating to separation of operating expenses. Re Separation of Operating Expenses, 30 I. C. C. 676. Power of the Commission stated as to hours of service of employees. B. & O. R. Co. *v.* Int. Com. Com., 221 U. S. 612, 55 L. Ed. 878, 31 Sup. Ct. 621. As to Water Carriers. Int. Com. Com. *v.* Goodrich Transit Co., 224 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436; The statute is valid and the powers of the Commission discussed. Kansas City So. Ry. Co. *v.* United States, 231 U. S. 423, 58 L. Ed. 296, 34 Sup. Ct. 125. Affirming, same styled case, 204 Fed. 641, Opin. Com. Ct. No. 56, p. 641.

§ 433. **Commission May Prescribe Form of Keeping Accounts and Inspect Same.**—The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to

this act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

Fifth paragraph of section twenty as amended by act of June 29, 1906.

In compliance with and under the authority of this section, the Commission has prescribed an elaborate and uniform system of accounts for carriers subject to the act.

Notes of Decisions Rendered Since 1909.

Records of the transit house are subject to the provision of the Section. Transit case, 24 I. C. C. 340, 351. See Re Separation of Operating Expenses, 30 I. C. C. 676, and Rules Governing the Separation of Operating Expenses between Freight and Passenger Service issued by the Commission, effective July 1, 1915.

§ 434. **Penalties for Failure to Keep Accounts and for Falsifying the Record.**—In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, or memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this act.

Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device, falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall

be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment.

Sixth and part of seventh paragraphs of section twenty as amended by act June 29, 1906.

§ 435. **The Commission May Permit the Destruction of Papers.**—That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

Last part of paragraph 7 of Section 20 as amended by act of June 29, 1906.

§ 436. **Penalty for an Examiner Divulging Information Received as Such.**—Any examiner who divulges any fact or information which may come into his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

Eighth paragraph of section twenty as amended by act June 29, 1906.

§ 437. **United States Circuit and District Courts May, upon Application of Attorney-General at Request of Commission, Enforce Provisions of Act.**—That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney-General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said act to regulate commerce or of any act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said acts, or any of them.

Ninth paragraph of section twenty as amended by act June 29, 1906.

The authority with reference to reports of the carriers did

not exist prior to the Hepburn Act. United States *v.* Lake S. & M. S. Ry. Co., 197 U. S. 536, 49 L. Ed. 870, 25 Sup. Ct. 538.

Circuit courts having been abolished, district courts have jurisdiction.

Notes of Decisions Rendered Since 1909.

"Does not confer on the court power to compel by mandamus, in aid of an investigation by the Interstate Commerce Commission pursuant to a resolution of the Senate requiring the investigation, a railroad to disclose the amount of stocks and bonds of another railroad company it owns or controls, and whether the two railroads serve the same territory in whole or in part, and whether, under separate ownership, they will be competitors, and other facts showing further relations between the two railroads, and showing whether such relations restrict competition and maintain fixed rates; since the investigation does not relate to interstate commerce as regulated by the Interstate Commerce Act, but relates perhaps to other legislation, such as the anti-trust act," nor does the section authorize courts to compel a disclosure of privileged communication. United States *v.* L. & N. R. Co., 212 Fed. 486. Case affirmed. United States *v.* L. & N. R. Co., 236 U. S. 318, 59 L. Ed. —, 35 Sup. Ct. 363.

§ 438. **Commission May Employ Agents or Examiners.**—And to carry out and give effect to the provisions of said acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.

Tenth paragraph of section twenty as amended by act June 29, 1906.

§ 439. **Receiving Carrier Liable for Loss, Remedy Cumulative.**—That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from any liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt

or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

No suit brought in any State court of competent jurisdiction against a railroad company, or other corporation, or person, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section twenty of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended June twenty-ninth, nineteen hundred and six, April thirteenth, nineteen hundred and eight, February twenty-fifth, nineteen hundred and nine, and June eighteenth, nineteen hundred and ten, shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of $3,000.

Last three paragraphs of section twenty as amended by section 7 of the act June 29, 1906, and January 20, 1914.

This section is fully and ably discussed and authorities cited in Re Released Rates, 13 I. C. C. 550, *et seq.* Provision constitutional. Smeltzer *v.* St. L. & S. F. R. Co., 158 Fed. 649; Riverside Mills *v.* Atlantic C. L. R. Co., 168 Fed. 987, 990. A bill of lading limiting liability to fifty dollars void. Greenwall *v.* Weir, 111 N. Y. Sup. 235, 59 Misc. Rep. 431; Schutte *v.* Weir, 111 N. Y. Sup. 240, 59 Miss. Rep. 438; Silverman *v.* Weir, 114 N. Y. Sup. 6. Section valid. So. Pac. Co. *v.* Crenshaw Bros., 5 Ga. App. 675, 65 S. E. 865; Galveston, H. & S. A. Ry. Co. *v.* Crow, 117 S. W. 170.

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The carrier not permitted to avoid this liability. Coal Rates on Stony Fork Branch, 26 I. C. C. 168, 174; Adams Exp. Co. *v.* Cronniger, 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. 148, 44 L. R. A. (N. S.), 257; Chicago, St. P., M. & O. Ry. Co. *v.* Latta, 266 U. S. 519, 57 L. Ed. 328, 33 Sup. Ct. 155, reversing judgments,

Latta *v.* Chicago, St. P., M. & O. Ry. Co., 172 F. 80, 97 C. C. A. 198, and Chicago, St. P., M. & O. Ry. Co. *v.* Latta, 184 Fed. 987, 106 C. C. A. 664. See also holding that there may be a limitation of the amount that may be recovered for loss. See also Wells-Fargo Co. *v.* Neiman-Marcus Co., 227 U. S. 469, 57 L. Ed. 600, 33 Sup. Ct. 267; M. K. & T. R. Co. *v.* Harriman, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. 397; reversing Harriman Bros. *v.* M. K. & T. R. R. Co., —— Tex. Civ. App. —— 128 S. W. 932; Kansas C. S. R. Co. *v.* Carl, 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. 227, reversing Carl *v.* Kansas C. S. R. Co., 91 Ark. 97, 121 S. W. 932, 134 Am. St. Rep. 56. This limitation being stated in a tariff sufficient. B. & M. R. Co. *v.* Hooker, 233 U. S. 97, 58 L. Ed. 901, 34 Sup. Ct. 526, reversing Hooker *v.* B. & M. R. Co., 209 Mass. 598, 95 N. E. 945, Ann. Cas. 1912B 669. Validity of statute discussed. N. C. & St. L. R. Co. *v.* Burnside Mills, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.), 7; Louisville & N. R. Co. *v.* Scott, 219 U. S. 209, 55 L. Ed. 183, 31 Sup. Ct. 171; Galveston, H. & S. A. R. Co. *v.* Wallace, 223 U. S. 481, 56 L. Ed. 516, 32 Sup. Ct. 205, and see note to 56 L. Ed. 517-519.

That the shipper selects the route makes no difference. Norfolk & W. R. Co. *v.* Dixie Tobacco Co., 228 U. S. 593, 57 L. Ed. 980, 33 Sup. Ct. 609, affirming Dixie Tobacco Co. *v.* N. & W. R. Co., 111 Va. 813, 69 S. E. 1106.

This Section supersedes all state regulation on the same subject. C. B. & Q. R. R. Co. *v.* Miller, 226 U. S. 513, 57 L. Ed. 323, 33 Sup. Ct. 155; reversing judgment Miller *v.* Chicago, B. & Q. R. Co., 123 N. W. 449, 85 Neb. 458; Chicago, St. P., M. & O. Ry. Co. *v.* Latta, 226 U. S. 519, 57 L. Ed. 328, 33 Sup. Ct. 155, reversing judgments Latta *v.* Chicago, St. P., M. & O. Ry. Co., 172 Fed. 850, 97 C. C. A. 198, and Chicago, St. P. M. & O. Ry. Co. *v.* Latta, 184 F. 987, 106 C. C. A. 664; Chicago, R. I. & P. Ry. Co. *v.* Cramer, 232 U. S. 490, 58 L. Ed. 697, 34 Sup. Ct. 383, reversing Cramer *v.* C. R. I. & P. Ry. Co., 153 Iowa 103, 133 N. W 387; A. T. & S. F. Ry. Co. *v.* Robinson, 233 U. S. 173, 58 L. Ed. 90, 34 Sup. Ct. 556, reversing Robinson *v.* A. T. & S. F. Ry. Co., 36 Okla. 435, 129 Pac. 20; Pierce Co. *v.* Wells-Fargo, 236 U. S. 278, 59 L. Ed. —, 35 Sup. Ct. 351. Intermediate carrier not at fault can not be sued for loss or damage. Hudson *v.* Chicago St. P. M. & O. Ry. Co., 226 Fed. 38.

§ 440. **Carrier Liable for Full Value of Property Transported—Cummins Amendment.**—"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or a bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law," be, and the same is hereby, amended so as to read as follows, to wit:

"That any common carrier, railroad, or transportation company subject to the provisions of this act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such com-

mon carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: *Provided, however,* That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however,* That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

Sec. 2. That this act shall take effect and be in force from ninety days after its passage.

The foregoing section is the act of March 4, 1915, known as the Cummins Amendment to Section 20 of the original act, Section 7 of the act of 1906.

The amendment did not automatically increase rates when the schedule of tariff provided for higher rates where there was no limit to the valuation; it made the carrier liable for the full value of the property, does not apply to export or import ship-

ments, "character" defined and the act applies to baggage. Cummins Amendment, 33 I. C. C. 682. Carmack & Cummins Amendments discussed. Louisiana State Rice Milling Co. *v.* M. L. & T. R. Co., 34 I. C. C. 511.

§ 441. **Annual Reports by Commission to Congress.**—That the Commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission.

Section twenty-one as amended by act March 2, 1889.

The original act said "reports issued from the Interior Department," where the present act says "reports transmitted to Congress." The amendment also added the words, "and the names and compensation of the persons employed by said Commission."

Cited in discussing the scope of the powers of the Commission. United States *v.* Lake S. & M. S. Ry. Co., 197 U. S. 536, 49 L. Ed. 870, 25 Sup. Ct. 538; Harriman *v.* Int. Com. Com., 211 U. S. 407, 420, 421, 53 L. Ed. 253, 29 Sup. Ct. 115.

§ 442. **Circumstances under Which Reduced or Free Fares and Rates May Be Given.**—That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, state, or municipal governments, or for charitable purposes, or to and from fairs and expositions for exhibition thereat (or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation), or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion (or to municipal governments for the transportation of indigent persons, or to the inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards

of managers of said home) ; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees.

Part of section twenty-two as amended by act March 2, 1889.

The original act used the words "apply to" in the first line where the amended act uses the word "prevent." The words in brackets in the above copied section were added by the act of March 2, 1889.

Individuals desiring to make proposals to sell the government Indian supplies may receive special rates. Re Indian Supplies, 1 I. C. C. R. 22. Pass issued to induce the holder to throw business to carrier illegal. Slater *v.* N. Pac. R. Co., 2 I. C. C. 359, 2 I. C. R. 243. Men eminent for public service not on that account alone entitled to use passes. Re Carriage of Persons Free or at Reduced Rates, 5 I. C. C. 69, 3 I. C. R. 717. Illegal to grant pass to members of city council. Harvey *v.* L. & N. R. Co., 5 I. C. C. 153, 3 I. C. R. 793. Land and immigration agents not entitled to free pass. Re Complaint of Illinois Central R. Co., 12 I. C. C. 7. Rule announced as to employees of telegraph companies. Re Railroad Telegraph Contracts, 12—— I. C. C. 10. Caretakers of newspapers not excepted by section. Re Free Transportation of Newspaper Employees, 12 I. C. C. 15. Nor are employees of baggage express companies. Re Right of Railroad Companies to Exchange Transportation with Transfer Companies, 12 I. C. C. 39. Section cited. Export Shipping Co. *v.* Wabash R. Co., 14 I. C. C. 437, 455. Exception does not apply to families of officers or employees. Ex parte Koehler, 31 Fed. 315, 12 Sawy. 446. Section as originally enacted by making certain exceptions was not intended to prohibit party rate tickets. Int. Com. Com. *v.* B. & O. R. Co., 43 Fed. 37, 45, 3 I. C. C. 192. Affirmed, with same holding, 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844. To issue pass to person not excepted by section is illegal discrimination. Re Charge to Grand Jury, 66 Fed. 146. Exceptions do not apply to officers of express companies. United States *v.* Wells Fargo Express Co., 161 Fed. 606, 609. Affirmed. American Ex. Co. and other Express Co.'s *v.* United States, 212 U. S. 522, 53 L. Ed. 635, 29 Sup. Ct. 315. Publishers can not pay for transportation by ad-

vertising. United States *v.* Chicago, I. & L. Ry. Co., 163 Fed. 114. Does not prohibit free transportation of employees of the Federal Government engaged in the postal service. 18 Opin. Atty.-Gen. 587.

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See notes Section 342. *Supra.*

Carriers may give reduced rates to municipal authorities, but what they may do is a very different thing from what they may be required to do. Metropolitan Paving Brick Co. *v.* A. & R. R. Co., 17 I. C. C. 197, 204; Field *v.* S. R. Co., 13 I. C. C. 298; Carnegie Board of Trade *v.* P. R. Co., 28 I. C. C. 122, 129; Dairyman's Supply Co. *v.* P. R. Co., 28 I. C. C. 406, 408. Excursion tickets not to be issued as to abuse the privilege. Weber Club Intermountain Fair Ass'n *v.* O. S. L. R. Co., 17 I. C. C. 212. Mileage books voluntarily issued are subject to the general provisions of the statute. Commutation Rate case, 21 I. C. C. 428, 442, citing cases. Free pass situation discussed. Colorado Free Pass Investigation, 26 I. C. C. 491. A carrier subject to the act may exchange transportation with other common carriers not subject to the act. U. S. *v.* Erie R. Co., 213 Fed. 391. "Mileage books" discussed and cases cited. Re Mileage Book, 28 I. C. C. 318; Re Mileage, Excursion and Commutation Tickets, 23 I. C. C. 95. The Supreme Court of Georgia held that carriers having issued mileage books, such books could be regulated by the Railroad Commission of the state, and that then Commission could require the carrier to accept the mileage on trains without demanding an exchange for a ticket. Railroad Commission of Ga. *v.* L. & N. R. Co., 140 Ga. 817, 80 S. E. 327, cited in Wadley So. *v.* Georgia, 235 U. S. 651, 59 L. Ed. ——, 35 Sup. Ct. 214. See *Contra* Lake S. & M. S. Ry. Co. *v.* Smith, 173 U. S. 684, 43 L. Ed. 858, 19 Sup. Ct. 565; State *v.* Boneval, 128 La. 702, 55 So. 569, Ann. Cases 1912C, 837; Virginia-Commonwealth ex rel. *v.* A. C. L., 106 Va. 61, 55 S. E. 572, 7 L. R. A. (N. S.) 1086, 117 Am. St. Rep. 983, and North Dakota—State *v.* Great N. Ry. Co., 17 N. D. 370, 116 N. W. 89.

§ 443. **Existing Remedies Not Abridged or Altered. Pending Litigation Not Affected.**—And nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act

are in addition to such remedies: Provided, That no pending litigation shall in any way be affected by this act.

Part of section twenty-two as originally enacted.

Right of courts to enjoin an illegal advance in rates before they become effective not supplanted by special remedies granted by the act to regulate commerce. Tift *v.* So. Ry. Co., 123 Fed. 789, 138 Fed. 753. Affirmed. So. Ry. Co. *v.* Tift, 148 Fed. 1021, 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. 709; Jewett Bros. *v.* Chicago, M. & St. P. R. Co., 156 Fed. 160; Kalispell Lumber Co. *v.* Great N. R. Co., 157 Fed. 845. Reversed because rate had become effective before injunction applied for. 165 Fed. 25, 91 C. C. A. 63. Kiser *v.* Cent. of Ga. Ry. Co., 158 Fed. 193; Macon Grocery Co. *v.* Atlantic C. L. R. Co., 163 Fed. 736. Reversed. Atlantic C. L. R. Co. *v.* Macon Grocery Co., 166 Fed. 206, 92 C. C. A. 114. Nor. Pac. Ry. Co. *v.* Pacific Coast Lumber Mfg. Asso., 165 Fed. 1. Union Pac. R. Co. *v.* Oregon & W. L. Mfg. Asso., 165 Fed. 13, 91 C. C. A. 51. *Contra* if the rates have becomes effective. Potlatch Lumber Co. *v.* Spokane Falls & N. Ry. Co., 157 Fed. 588; Great N. Ry. Co. *v.* Kalispell Lumber Co., 165 Fed. 25, 91 C. C. A. 63. Circuit courts can not enjoin the taking effect of an illegal advance prior to action by the Interstate Commerce Commission. Atlantic Coast L. R. Co. *v.* Macon Grocery Co., 166 Fed. 206. While a court has jurisdiction to enjoin an illegal advance before it becomes effective, it can not do so merely as ancillary to a complaint before the Commission. Jewett Bros. *v.* Chicago, M. & St. P. Ry. Co., 156 Fed. 160. The cases holding that injunctions may be granted, *supra,* also hold that jurisdiction in the federal courts being exclusive, suit may be brought wherever the defendant can be found and served. In Sunderland Bros. *v.* Chicago, R. I. & P. R. Co., 158 Fed. 877, it was held that suit could only be brought in the district of the residence of either the complainant or the defendant. Notwithstanding this section, courts have no jurisdiction to award damages for excessive rates prior to a determination by the Commission that such rates are excessive. Tex. & Pac. Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 446, 51 L. Ed. 553, 561, 27 Sup. Ct. 350. But this decision does not mean that an illegal advance may not be enjoined. So. Ry. Co. *v.* Tift, 206 U. S. 428, 51 L. Ed. 112, 27 Sup. Ct. 709. Same effect as Abilene case, *supra.* Gatton *v.* Chicago, etc., R. Co., 95 Iowa 113.

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This Section must be construed with the whole act, which act so construed gives the Commission jurisdiction to determine the questions of the lawfulness and unlawfulness of rates. Mitchell Coal & Coke Co. *v.* P. R. Co., 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916; same styled case below, 181 Fed. 403, 183 Fed. 908; Morrisdale Coal Co. *v.* P. R. Co., 230 U. S. 304, 57 L. Ed. 1474, 33 Sup. Ct. 939, affirming same styled case, 183 Fed. 929, 106 C. C. A. 269. But where an act is required by law and the Commission has no duty to perform the courts have jurisdiction. Penn. R. Co. *v.* International Coal Co., 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 983; So. Ex. Co. *v.* Long, 202 Fed. 462, 120 C. C. A. 568, reversing Long *v.* So. Ex. Co., 201 Fed. 441. The courts may not in the first instance determine whether a rate is inherently reasonable. A. T. & S. F. Ry. Co. *v.* U. S., 203 Fed. 56, Op. Com. Ct. No. 61, p. 537; Atl. Coast Line R. Co. *v.* Int. Com. Com., 194 Fed. 449; L. & N. Ry. Co. *v.* Int. Com. Com., 195 Fed. 541; Int. Com. Com. & U. S. *v.* L. & N. Ry. Co., 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431; Robinson *v.* B. & O. R. Co., 222 U. S. 506, 56 L. Ed. 288, 32 Sup. Ct. 114.

§ 444. **Interchangeable Mileage Tickets, How Issued.**— Provided further, that nothing in this act shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provision of this act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage

tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section ten of this act shall apply to any violation of the requirements of this proviso.

Proviso to section twenty-two added by the act of February 8, 1895.

Proviso applies only to the issuance of such tickets and the terms, conditions and the persons to whom issued must be without discrimination. Larrison *v.* Chicago & G. T. R. Co., 1 I. C. C. 147, 1 I. C. R. 369. Excursion and commutation tickets are not the basis for fixing price of mileage tickets. Associated Wholesale Grocers of St. Louis *v.* Mo. Pac. R. Co., 1 I. C. C. 156, 1 I. C. R. 393. Mileage, excursion or commutation tickets must be offered impartially. Re Passenger Tariffs, 2 I. C. C. 649, 2 I. C. R. 445. Party rates should not be lower than contemporaneous single tickets. Pittsburg, C. & St. L. R. Co. *v.* B. & O. R. Co., 3 I. C. C. 465, 2 I. C. R. 729. Order not enforced. Int. Com. Com. *v.* B. & O. R. Co., 43 Fed. 37, 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844, 4 I. C. R. 92. Provision merely permissive and gives the Commission no power to compel the issuance of mileage tickets. Sprigg *v.* B. & O. R. Co., 8 I. C. C. 443, 450. See the able and cogent dissenting opinion of Mr. Commissioner Clements, 457 *et seq.* See Re Party Rate Tickets, 12 I. C. C. 95. Export Shipping Co. *v.* Wabash R. Co., 14 I. C. C. 437, 455. Tariff Circular No. 18-A.

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See notes to Sec. 442 *supra.*

§ 445. **Discrimination May Be Prevented by Writ of Mandamus, Remedy Cumulative.**—That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said

common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: Provided, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: Provided, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement.

New section, section twenty-three, added by act March 2, 1889, and being section ten of that act.

Cited in support of the holding that a carrier can not discriminate in favor of industries on its own line against industries on a connecting line. Standard Lime & Stone Co. *v.* Cumberland V. R. Co., 15 I. C. C. 620. Remedy is given only for unjust discrimination. United States *v.* N. & W. Ry. Co., 109 Fed. 831. Second suit abated pending appeal of the first one. United States *v.* Norfolk & W. Ry. Co., 114 Fed. 682. Suit brought under authority of section and amendment of Feb. 8, 1895. United States *v.* West Virginia N. R. Co., 125 Fed. 252. Affirmed, holding that writ may run against individuals. West Virginia N. R. Co. *v.* United States, 134 Fed. 198, 67 C. C. A. 220. Writ will not issue to enforce a private contract for car distribution. United States *v.* Norfolk & W. R. Co., 138 Fed. 849. Reversed, holding that a right exists for an equal distribution of cars, and a contract therefor is in aid of the act and may be enforced. Same style case, 143 Fed. 266, 74 C. C. A. 404. Mandamus will not issue in suit by United States except under authority of a statute. United States ex rel. Knapp et al. Commissioners *v.* Lake Shore & M. S. Ry. Co., 197 U. S. 536, 49 L. Ed. 870, 25 Sup. Ct. 538. Act cumulative and not exclusive of preexisting remedies. Tift *v.* So. Ry. Co., 123 Fed. 789, 138 Fed. 753. Affirmed. So. Ry. Co. *v.* Tift, 148 Fed. 1021, 206 U. S. 428, 41 L. Ed. 1124, 27 Sup. Ct. 709. Car distribution determined in suit under section. United States *v.* B. & O.

R. Co., 154 Fed. 108. Sustained in so far as relief granted relator and reversed because other relief not granted. United States *v.* B. & O. R. Co., 165 Fed. 113, 91 C. C. A. 147. This section does not prevent an individual from applying to the Commission, and this even when another operator has filed a complaint for mandamus. Merchants Coal Co. *v.* Fairmont Coal Co., 160 Fed. 769, 88 C. C. A. 23. Appealed to Supreme Court. 163 Fed. 1021, 1022. Injunction will not issue to prevent considering private cars in making distribution of cars to coal companies. Majestic Coal & Coke Co. *v.* Ill. Cent. R. Co., 162 Fed. 810. Private cars should be charged against their owners in making distribution. United States ex rel. Pitcairn Coal Co. *v.* B. & O. R. Co., 165 Fed. 113.

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Right stated and case brought under this Section. B. & O. R. Co. *v.* United States ex rel. Pitcairn Coal Co., 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164. Reversing U. S. ex rel. Pitcairn Coal Co. *v.* B. & O. R. Co., 165 Fed. 113, 91 C. C. A. 147; Hillsdale Coal & Coke Co. *v.* P. R. R. Co., 19 I. C. C. 356, 380. See also notes Section 20, Sec. 437 *supra*.

§ 446. **Number, Terms, Qualification, Salary and Appointment of Commissioners.**—That the Interstate Commerce Commission is hereby enlarged so as to consist of seven members with terms of seven years, and each shall receive ten thousand dollars compensation annually. The qualifications of the commissioners and the manner of the payment of their salaries shall be as already provided by law. Such enlargement of the Commission shall be accomplished through appointment by the President, by and with the advice and consent of the Senate, of two additional Interstate Commerce Commissioners, one for a term expiring December thirty-first, nineteen hundred and eleven, one for a term expiring December thirty-first, nineteen hundred and twelve. The terms of the present commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional commissioners herein provided for shall be appointed for the full term of seven years, except that any person appointed to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. Not

more than four commissioners shall be appointed from the same political party.

Section twenty-four added by the act June 29, 1906.

See Sec. 11 of act, Sec. 388 *supra*.

§ 447. **Existing Laws as to Obtaining Testimony Applicable to Act.**—That all existing laws relating to the attendance of witnesses and the production of evidence and the compelling of testimony under the act to regulate commerce and all acts amendatory thereof shall apply to any and all proceedings and hearings under this act.

Section nine of the act of June 29, 1906.

Cited in discussion of the power of the Commission to make investigations. Harriman *v.* Int. Com. Com., 211 U. S. 407, 422, 53 L. Ed. 253, 29 Sup. Ct. 115.

§ 448. **Repealing Conflicting Laws Not to Affect Pending Suits.**—That all laws and parts of laws in conflict with the provisions of this act are hereby repealed; but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.

Section ten of the act June 29, 1906.

Does not prevent the indictment if those violating the old law. United States *v.* Standard Oil Co., 148 Fed. 719, 155 Fed. 305. Reversed on other grounds. 164 Fed 376, 90 C. C. A. 364; United States *v.* Chicago, St. P. & M. Ry. Co., same *v.* G. N. Ry. Co., 151 Fed. 84. Affirmed, same ruling. Great N. Ry. Co. *v.* United States, 208 U. S. 452, 52 L. Ed. 567, 28 Sup. Ct. 313.

Applies to rebate cases and an indictment good under the Elkins law prior to its amendment remains good since. United States *v.* Delaware L. & W. R. Co., 152 Fed. 269; United States *v.* New York C. & H. R. R. Co., 153 Fed. 630; Great N. Ry. Co. *v.* United States, 155 Fed. 945, 84 C. C. A. 93. Affirmed. 208 U. S. 452, 52 L. Ed. 567, 28 Sup. Ct. 313; United States *v.* Great N. R. Co., 157 Fed. 288, 290.

§ 449. **Time of Taking Effect of Act.**—That this act shall take effect and be in force from and after its passage.

Joint resolution of June 30, 1906, provides: That the act entitled "An act to amend an act entitled 'An act to regulate commerce,' approved February 4, 1887, and all the acts amendatory thereof, and to enlarge the powers of the Interstate Com-

merce Commission, shall take effect and be in force sixty days after its approval by the President of the United States."

Section eleven of the act of June 29, 1906, and the joint resolution of June 30, 1906.

The effective date of the act of June 29, 1906, was August 28, 1906. Nicola, Stone & Meyers Co. *v.* L. & N. R. Co., 14 I. C. C. 199, 206.

Joint resolution ineffective to prevent law becoming in force on the date of its approval by the President. United States *v.* Standard Oil Co., 148 Fed. 719. Reversed on other grounds. Standard Oil Co. *v.* United States, 164 Fed. 376, 90 C. C. A. 364.

Section cited, Philips *v.* G. T. W. Ry. Co., 236 U. S. 662, 59 L. Ed. —, 35 Sup. Ct. 444.

§ 450. **Carriers Must Designate Agents in Washington.** —It shall be the duty of every common carrier subject to the provisions of this act, within sixty days after the taking effect of this act, to designate in writing an agent in the city of Washington, District of Columbia, upon whom service of all notices and processes may be made for and on behalf of said common carrier in any proceeding or suit pending before the Interstate Commerce Commission or before said commerce court, and to file such designation in the office of the secretary of the Interstate Commerce Commission, which designation may from time to time be changed by like writing similarly filed; and thereupon service of all notices and processes may be made upon such common carrier by leaving a copy thereof with such designated agent at his office or usual place of residence in the city of Washington, with like effect as if made personally upon such common carrier by leaving a copy thereof with such designated agent, service of any notice or other process in any proceeding before said Interstate Commerce Commission or commerce court may be made by posting such notice or process in the office of the secretary of the Interstate Commerce Commission.

New Section added by amendment of June 18, 1910.

§ 451. **Pending Cases Not Affected.**—That nothing in this act contained shall undo or impair any proceedings heretofore taken by or before the Interstate Commerce Commission or any of the acts of said Commission; and in any cases, proceedings, or matters now pending before it, the Commission may exercise any of the powers hereby conferred upon it, as would be proper in cases, proceedings, or matters hereafter initiated and nothing

in this act contained shall operate to release or affect any obligation, liability, penalty, or forfeiture heretofore existing against or incurred by any person, corporation or association.

Section 15 act June 18, 1910.

§ 452. **Commission to Investigate Questions Pertaining to Issuance of Stocks and Bonds.**—That the President is hereby authorized to appoint a Commission to investigate questions pertaining to the issuance of stocks and bonds by railroad corporations, subject to the provisions of the act to regulate commerce, and the power of Congress to regulate or affect the same, and to fix the compensation of the members of such Commission. Said Commission shall be and is hereby authorized to employ experts to aid in the work of inquiry and examination, and such clerks, stenographers, and other assistants as may be necessary, which employees shall be paid such compensation as the Commission may deem just and reasonable, upon a certificate to be issued by the chairman of the Commission. The several departments and bureaus of the Government shall detail from time to time such officials and employees and furnish such information to the Commission as may be directed by the President. For the purpose of its investigations the Commission shall be authorized to incur and have paid upon the certificate of its chairman such expenses as the Commission shall deem necessary: *Provided, however,* That the total expenses authorized or incurred under the provisions of this section for compensation, employees, or otherwise, shall not exceed the sum of twenty-five thousand dollars.

Section 16 of the Act of June 18, 1910.

§ 453. **Injunctions against Operation of State Statutes.**—That no interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state "Or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state." By restraining the action of any officer of such state in the enforcement or execution of such statute shall be issued or granted by any justice of the supreme court, or by any circuit court of the United States, or by any judge thereof, or by any district judge acting as circuit judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented

to a justice of the Supreme Court of the United States, or to a circuit judge, or to a district judge acting as circuit judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court of the United States or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court of the United States, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court of the United States or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the Attorney-General of the state, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damages would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court of the United States, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall only remain in force until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case.

Section 266 of the Judicial Code, a new provision, being Sec. 17 of the act of June 18, 1910. Ch. 309, 36 Stat. L. 557. Amended by act March 4, 1913, Ch. 160, 37 Stat. 1013, which amendment added after the word "statute" in the first sentence of the section; the words "Or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state." The purpose of the statute stated. Chicago, B. & Q. R. Co. *v.* Oglesby,

198 Fed. 153. See Ex Parte Yung, 209 U. S. 123, 52 L. Ed. 714, 28 Sup. Ct. 441, 13 L. R. A. (N. S.) 932.

Held that the statute had no application to a city ordinance. Cumberland Tel. & Tel. Co. *v.* Memphis, 198 Fed. 955; Sperry-Hutchinson Co. *v.* Tacoma, 190 Fed. 682; Birmingham Water Works *v.* Birmingham, 211 Fed. 497; Calhoun *v.* City of Seattle, 215 Fed. 226. Nor to a tax levied under a special law. Lykins *v.* Chesapeake & O. Ry. Co., 209 Fed. 573, 126 C. C. A. 395.

When the statute does apply. Ex parte Metropolitan Water Co., 220 U. S. 539, 55 L. Ed. 575, 31 Sup. Ct. 600; Seaboard A. L. Ry. *v.* Railroad Commission of Ga., 213 Fed. 27; Louisville & N. R. Co. *v.* Garrett, 231 U. S. 298, 58 L. Ed. 229, 34 Sup. Ct. 48.

Cited as to right of appeal to Supreme Court. Rail & River Coal Co. *v.* Yaple, 214 Fed. 273, 276. Death of the state officer defendant abates an appeal. Pullman Co. *v.* Croom, 231 U. S. 571, 58 L. Ed. 375, 34 Sup. Ct. 182.

By Sec. 5 act Jan. 28, 1915 Congress provided:

"No court of the United States shall have jurisdiction of any section or suit by or against any railroad company upon the ground that said railroad company was in operation under an act of Congress."

§ 454. **When Act Effective.**—That this act shall take effect and be in force from and after the expiration of sixty days after its passage, except as to sections twelve and sixteen, which sections shall take effect and be in force immediately.

Public, No. 41, approved February 4, 1887, as amended by Public, No. 125, approved March 2, 1889; Public, No. 72, approved February 10, 1891; Public, No. 38, approved February 8, 1895; Public, No. 337, approved June 29, 1906; Public Res., No. 47, approved June 30, 1906; Public No. 95 approved April 13, 1908; Public, No. 262, approved February 25, 1909; Public, No. 218, approved June 18, 1910; Public, No. 337, approved August 24, 1912; Public, No. 400, approved March 1, 1913; Public, No. 48, approved January 20, 1914; and Public, No. 161, approved August 1, 1914.

Section 18 of act June 18, 1910.

§ 455. **Parties Defendant Other than Carriers in Suit to Enforce Provisions of Act.**—That in any proceeding for the enforcement of the provisions of the statutes relating to inter-

state commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

Section two of the original act of February 19, 1903 (Elkins Act).

In 1888 the Commission held that it was proper to make parties all carriers interested in a through rate, though the complaint was not defective if only the initial carrier was a party. Hurlburt *v.* Lake S. & M. S. R. Co., 2 I. C. C. 122, 2 I. C. R. 81.

§ 456. **Equitable Proceedings May Be Instituted by the Commission to Restrain Discrimination or Departure from Published Rates.**—That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or state, it may be dealt with, inquired of, tried, and determined in either such judicial district or state, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty

of the several district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings and the proceedings provided for by this act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said act approved February fourth, eighteen hundred and eighty-seven, entitled "An act to regulate commerce and the acts amendatory thereof."

First part of section three of the act February 19, 1903 (Elkins Act), as originally enacted.

Prior to this amendment suit could be maintained in the name of the United States to enjoin discrimination. United States *v.* Mo. Pac. R. Co., 65 Fed. 903, 5 I. C. R. 106. Affirmed by circuit court of appeals without written opinion. Reversed, holding that prior to Elkins Act such suit could not be maintained. Mo. Pac. R. Co. *v.* United States, 189 U. S. 274, 47 L. Ed. 811, 23 Sup. Ct. 507; United States *v.* Atchison, T. & S. F. Ry. Co., 142 Fed. 176, 185, 186. Prior to this act a shipper could enjoin a discrimination prior to action by the Commission. Interstate Stock Yards *v.* Indianapolis U. Ry. Co., 99 Fed. 472, 483. Cited by Supreme Court. 192 U. S. 568, 570, 48 L. Ed. 565, 569, 24 Sup. Ct. 339. Under this act violations occurring prior to its passage could be enjoined. United States *v.* Mich. Cent. R. Co., 122 Fed. 544. May enjoin giving rebates. United States *v.* Milwaukee Refrigerator T. Co., 145 Fed. 1007, 1010, citing Swift & Co. *v.* United States, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. 276. Suit prosecuted under section. Armour Packing Co. *v.* United States, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. 428. May enjoin giving transportation for advertising. United States *v.* Chicago, I. & L. R. Co., 163 Fed. 114.

§ 457. **Immunity and Compulsory Attendance of Witnesses, Production of Books and Papers.**—And in proceedings under this act and the acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate

the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in such proceeding.

Second part of section three of the act of February 19, 1903 (Elkins Act), as originally enacted.

§ 458. **Expediting Act Applicable to Suits Brought under Direction of Attorney-General.**—Provided, That the provisions of an act entitled "An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July second, eighteen hundred and ninety, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that may hereafter be enacted, approved February eleventh nineteen hundred and three," shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission.

Last part of section three of the act of February 19, 1903 (Elkins Act), as originally enacted.

Cited, holding that proviso did not prevent an action by Commission to compel the production of papers. Int. Com. Com. *v.* Baird, 194 U. S. 25, 36, 48 L. Ed. 860, 865, 866, 24 Sup. Ct. 563.

See Expediting Act Sec. 468. *Post.*

§ 459. **Repealing Clause Not Affecting Pending Suits or Accrued Rights. When Act Takes Effect.**—That all acts and parts of acts in conflict with the provisions of this act are hereby repealed, but such repeal shall not affect causes now pending, nor rights which have already accrued, but such causes shall be prosecuted to a conclusion, and such rights enforced in a manner heretofore provided by law and as modified by the provisions of this act.

This act shall take effect from its passage. Public, No. 103, approved February 19, 1903.

Sections four and five of act February 19, 1903 (Elkins Act), as originally enacted.

Section four did not save a suit prosecuted to a decree prior to the enactment of the Elkins Act. Mo. Pac. R. Co. *v.* United

States, 189 U. S. 274, 47 L. Ed. 811, 23 Sup. Ct. 507. But prosecution for injunction against acts committed prior to the passage of the Elkins law could be maintained. United States *v.* Mich. Cent. R. Co., 122 Fed. 544.

§ 460. **Commerce Court.**—That a court of the United States is hereby created which shall be known as the commerce court and shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds:

First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction or criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

Third. Such cases as by section three of the act entitled "An act to further regulate commerce with foreign nations and among the states," approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

Fourth. All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the act entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States.

Nothing contained in this act shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the commerce court.

The jurisdiction of the commerce court over cases of the foregoing classes shall be exclusive; but this act shall not affect the jurisdiction now possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes.

The commerce court shall be a court of record, and shall have a seal of such form and style as the court may prescribe. The said court shall be composed of five judges, to be from time to time designated and assigned thereto by the Chief Justice of the United States, from among the circuit judges of the United

States, for the period of five years, except that in the first instance the court shall be composed of the five additional circuit judges to be appointed as hereinafter provided, who shall be designated by the President to serve for one, two, three, four, and five years, respectively, in order that the period of designation of one of the said judges shall expire in each year thereafter. In case of the death, resignation, or termination of assignment of any judge so designated, the Chief Justice shall designate a circuit judge to fill the vacancy so caused and to serve during the unexpired period for which the original designation was made. After the year nineteen hundred and fourteen no circuit judge shall be redesignated to serve in the commerce court until the expiration of at least one year after the expiration of the period of his last previous designation. The judge first designated for the five-year period shall be the presiding judge of said court, and thereafter the judge senior in designation shall be the presiding judge.

Each of the judges during the period of his service in the commerce court shall, on account of the regular sessions of the court being held in the city of Washington, receive in addition to his salary as circuit judge an expense allowance at the rate of one thousand five hundred dollars per annum.

The President shall, by and with the advice and consent of the Senate, appoint five additional circuit judges no two of whom shall be from the same judicial circuit, who shall hold office during good behavior and who shall be from time to time designated and assigned by the Chief Justice of the United States for service in the circuit court for any district, or the circuit court of appeals for any circuit, or in the commerce court.

The associate judges shall have precedence and shall succeed to the place and powers of the presiding judge whenever he may be absent or incapable of acting in the order of the date of their designations. Four of said judges shall constitute a *quorum,* and at least a majority of the court shall concur in all decisions.

The court shall also have a clerk and a marshal, with the same duties and powers, so far as they may be appropriate and are not altered by rule of the court, as are now possessed by the clerk and marshal, respectively, of the Supreme Court of the United States. The offices of the clerk and marshal of the

court shall be in the city of Washington, in the District of Columbia. The judges of the court shall appoint the clerk and marshal, and may also appoint, if they find it necessary, a deputy clerk and deputy marshal; and such clerk, marshal, deputy clerk, and deputy marshal shall hold office during the pleasure of the court. The salary of the clerk shall be four thousand dollars per annum; the salary of the marshal three thousand dollars per annum; the salary of the deputy clerk two thousand five hundred dollars per annum; and the salary of the deputy marshal two thousand five hundred dollars per annum. The said clerk and marshal may, with the approval of the court, employ all requisite assistance. The costs and fees in said court shall be established by the court in a table thereof, approved by the Supreme Court of the United States, within four months after the organization of the court; but such costs and fees shall in no case exceed those charged in the Supreme Court of the United States, and shall be accounted for and paid into the Treasury of the United States.

The commerce court shall always be open for the transaction of business. Its regular sessions shall be held in the city of Washington, in the District of Columbia; but the powers of the court or of any judge thereof, or of the clerk, marshal, deputy clerk, or deputy marshal may be exercised anywhere in the United States; and for expedition of the work of the court and the avoidance of undue expense or inconvenience to suitors the court shall hold sessions in different parts of the United States as may be found desirable. The actual and necessary expenses of the judges, clerk, marshal, deputy clerk, and deputy marshal of the court incurred for travel and attendance elsewhere than in the city of Washington shall be paid upon the written and itemized certificate of such judge, clerk, marshal, deputy clerk, or deputy marshal by the marshal of the court, and shall be allowed to him in the statement of his accounts with the United States.

The United States marshals of the several districts outside of the city of Washington in which the commerce court may hold its sessions shall provide, under the direction and with the approval of the Attorney-General of the United States, such rooms in the public buildings of the United States as may be necessary for the court's use; but in case proper room can not

be provided in such public buildings, said marshals, with the approval of the Attorney-General of the United States, may then lease from time to time other necessary rooms for the court.

If, at any time, the business of the commerce court does not require the services of all the judges, the Chief Justice of the United States may, by writing, signed by him and filed in the Department of Justice, terminate the assignment of any of the judges or temporarily assign him for service in any court or circuit court of appeals. In case of illness or other disability of any judge assigned to the commerce court the Chief Justice of the United States may assign any other circuit judge of the United States to act in his place, and may terminate such assignment when the exigence therefor shall cease; and any circuit judge so assigned to act in place of such judge shall, during his assignment, exercise all the powers and perform all the functions of such judge.

In all cases within its jurisdiction the commerce court, and each of the judges assigned thereto, shall, respectively, have and may exercise any and all of the powers of a circuit court of the United States and of the judges of said court, respectively, so far as the same may be appropriate to the effective exercise of the jurisdiction hereby conferred. The commerce court may issue all writs and process appropriate to the full exercise of its jurisdiction and powers and may prescribe the form thereof. It may also, from time to time, establish such rules and regulations concerning pleading, practice, or procedure in cases or matters within its jurisdiction as to the court shall seem wise and proper. Its orders, writs, and process may run, be served, and be returnable anywhere in the United States; and the marshal and deputy marshal of said court and also the United States marshals and deputy marshals in the several districts of the United States shall have like powers and be under like duties to act for and in behalf of said court as pertain to United States marshals and deputy marshals generally when acting under like conditions concerning suits or matters in the circuits of the United States.

The jurisdiction of the commerce court shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A

copy of such petition shall be forthwith served by the marshal or a deputy marshal of the commerce court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office, and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court; and may prescribe that the evidence be taken before a single judge of the court, with power to rule upon the admission of evidence. Except as may be otherwise provided in this act, or by rule of the court, the practice and procedure in the commerce court shall conform as nearly as may be to that in like cases in a circuit court of the United States.

The commerce court shall be opened for the transaction of business at a date to be fixed by order of the said court, which shall not be later than thirty days after the judges thereof shall have been designated.

Sec. 2. That a final judgment or decree of the commerce court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of said final judgment or decree. Such appeal may be taken in like manner as appeals from a circuit court of the United States to the Supreme Court, and the commerce court may direct the original record to be transmitted on appeal instead of a transcript thereof. The Supreme Court may affirm, reverse, or modify the final judgment or decree of the commerce court as the case may require.

Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the commerce court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require.

An appeal may also be taken to the Supreme Court of the United States from an interlocutory order or decree of the Commerce Court granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission, provided such appeal be taken within thirty days from the entry of such order or decree.

Appeals to the Supreme Court under this section shall have priority in hearing and determination over all other causes except criminal causes in the court.

Sec. 3. That suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the commerce court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the commerce court, in its discretion, may restrain or suspend, in whole or in part, the operation of the Commission's order pending the final hearing and determination of the suit. No order or injunction so restraining or suspending an order of the Interstate Commerce Commission shall be made by the commerce court otherwise than upon notice and after hearing, except that in cases where irreparable damage would otherwise ensue to the petitioner, said court, or a judge thereof, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney-General, allow a temporary stay or suspension in whole or in part of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of such court or judge, pending application to the court for its order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judge making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until its decision upon the application.

Sec. 4. That all cases and proceedings in the commerce court which but for this act would be brought by or against the Interstate Commerce Commission shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the commerce court whenever, though it has not been made a party, public interests are involved.

Sec. 5. That the Attorney-General shall have charge and control of the interest of the Government in all cases and proceedings in the commerce court, and in the Supreme Court of the United States upon appeal from the commerce court; and if in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney-General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided,* That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits: *Provided further,* That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the terms of this act, or the acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof, and the Attorney-General shall not dispose of or discontinue said suit or proceeding over the objections of such party

or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney-General of the United States therein.

Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States.

Sec. 6. That until the opening of the commerce court as in section one hereof provided, all cases and proceedings of which from that time the commerce court is hereby given exclusive jurisdiction may be brought in the same courts and conducted in like manner and with like effect as is now provided by law; and if any such case or proceeding shall have gone to final judgment or decree before the opening of the commerce court, appeal may be taken from such final judgment or decree in like manner and with like effect as is now provided by law. Any such case or proceeding within the jurisdiction of the commerce court which may have been begun in any other court as hereby allowed before the said date shall be forthwith transferred to the commerce court, if it has not yet proceeded to final judgment or decree in such other court unless it has been finally submitted for the decision of such court, in which case the cause shall proceed in such court to final judgment or decree any further proceeding thereafter, and appeal may be taken direct to the Supreme Court, and if remanded such cause may be sent back to the court from which the appeal was taken or to the commerce court for further proceeding as the Supreme Court shall direct; and all previous proceedings in such transferred case shall stand and operate notwithstanding the transfer, subject to the same control over them by the commerce court and to the same right of subsequent action in the case or proceeding as if the transferred case or proceeding had been originally begun in the commerce court. The clerk of the court from which any case or proceeding is so transferred to the commerce court shall transmit to and file in the commerce court the originals of all papers filed in such case or proceeding and a certified transcript of all record entries in the case or proceeding up to the time of transfer.

It shall be the duty of every common carrier subject to the provisions of this act, within sixty days after the taking effect of this act, to designate in writing an agent in the city of Washington, District of Columbia, upon whom service of all notices and processes may be made for and on behalf of said common carrier in any proceeding or suit pending before the Interstate Commerce Commission or before said commerce court, and to file such designation in the office of the secretary of the Interstate Commerce Commission, which designation may from time to time be changed by like writing similarly filed; and thereupon service of all notices and processes may be made upon such common carrier by leaving a copy thereof with such designated agent at his office or usual place of residence in the city of Washington, with like effect as if made personally upon such common carrier, and in default of such designation of such agent, service of any notice or other process in any proceeding before said Interstate Commerce Commission or commerce court may be made by posting such notice or process in the office of the secretary of the Interstate Commerce Commission.

While the commerce court has been abolished, the jurisdiction conferred thereon has been transferred to the district courts, which makes the statute creating the commerce court of interest. See also Judicial Code Sections 200 to 214 inclusive. For practice and procedure in the commerce court see Standard Encyclopoedia of Procedure, Vol. 5, p. 153, article by the author hereof. The commerce court had no jurisdiction when the Commission refused relief to a shipper. Hooker *v.* Knapp, 225 U. S. 302, 56 L. Ed. 1099, 32 Sup. Ct. 769. Right of commerce court to issue injunctions. Int. Com. Com. *v.* B. & O. R. R. Co., 225 U. S. 326, 56 L. Ed. 1107, 32 Sup. Ct. 742.

§ 461. **Commerce Court Abolished.**—The commerce court, created and established by the act entitled "An act to create a commerce court and to amend the act entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes," approved June eighteenth, nineteen hundred and ten, is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in commerce court by said act is transferred to and vested in the several district courts of the United States, and all acts or parts of acts in so far as they

relate to the establishment of the said commerce court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment under the terms of said act, but such judges shall continue to act under assignment, as in the said act provided, as judges of the district courts and circuit courts of appeals; and in the event of and on the death, resignation, or removal from office of any of such judges, his office is hereby abolished and no successor to him shall be appointed.

First paragraph of that section of the Appropriation Act which abolished the commerce court—act approved Oct. 22, 1913. Known as District Court Jurisdiction Act. The succeeding four sections are taken from the same act.

§ 462. **Venue of Suits on Order of Interstate Commerce Commission.**—The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

Second paragraph of Section of act of October 22, 1913.

The former statute, being the first part of the 11th paragraph of Section 16, read:

The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made

against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts.

First part of the eleventh paragraph of section sixteen.

Jurisdiction under the old law of suits by the Commission. Int. Com. Com. *v.* Tex. & Pac. Ry. Co., 57 Fed. 948, 6 C. C. A. 653, 20 U. S. App. 1, 4 I. C. R. 408; Int. Com. Com. *v.* So. Pac. Co., 74 Fed. 42.

Under the Hepburn law, Sanborn, Hook and Adams, Judges, announced this proposition:

"We refrain from expressing any opinion concerning what other jurisdiction, if any, is conferred upon this court by the broad and comprehensive language of the Hepburn Act, authorizing it to 'enjoin, set aside, annul or suspend any order or requirement of the Commission.' All we are required to hold, and all we do hold, is that this court has ample jurisdiction to set aside or suspend any order of the Commission resulting from a misconception and misapplication of a law to conceded or undisputed facts." Stickney *v.* Int. Com. Com., 164 Fed. 638, 644. Rules announced in a suit to set aside an order of the Commission. Judges Van Devanter, Hook and Adams. Mo., Kan. & Tex. R. Co. *v.* Int. Com. Com., 164 Fed. 645; C., R. I. & P. R. Co. *v.* Int. Com. Com. (Missouri River Rate case), 171 Fed. 680.

§ 463. **Procedure in the District Courts.**—The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this act shall be the same as that heretofore prevailing in the commerce court. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the commerce court. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge,

unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application of two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney-General of the United States, and to such other persons as may be defendants in the suit.

First part of third paragraph of the Section of act of Oct. 22, 1913. What force shall be given by the courts to orders of the Commission is a question discussed in Sec. 309 *ante*. See also Int. Com. Com. *v.* Chicago, R. I. & P. R. Co., 218 U. S. 88, 54 L. Ed. 946, 30 Sup. Ct. 651; Int. Com. Com. *v.* Chicago, B. & Q. R. Co., 218 U. S. 113, 54 L. Ed. 959, 30 Sup. Ct. 660; Int. Com. Com. *v.* Delaware, L. & W. R. Co., 220 U. S. 235, 55 L. Ed. 448, 31 Sup. Ct. 392; Int. Com. Com. *v.* Union P. R. Co., 222 U. S. 541, 56 L. Ed. 308, 32 Sup. Ct. 108; Int. Com. Com. *v.* Northern P. R. Co., 216 U. S. 538, 54 L. Ed. 608, 30 Sup. Ct. 417; Int. Com. Com. *v.* Louisville & N. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185.

The Commission must grant a hearing which must be both adequate and fair, and the conclusions must not be contrary "to the indisputable character of the evidence." Int. Com. Com. *v.* L. & N. R. Co., 227 U. S. 88, *supra*, citing cases.

§ 464. **Temporary Restraining Orders.**—*Provided,* That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney-General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of the said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The

said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for.

Second part third paragraph of Section 4 of act Oct. 22, 1913.

§ 465. **An Appeal to the Supreme Court from Interlocutory Orders.**—An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

Third part of paragraph 3 of the Section of act Oct. 22, 1913.

The provision of the former law proviso to paragraph 12 of Section 16 of the Act to Regulate Commerce read:

Provided, That no injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the Commission shall be granted except on hearing after not less than five days' notice to the Commission. An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: Provided further, That the appeal must be taken within thirty days from the entry of such order or decree and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes.

Proviso of paragraph twelve of section sixteen.

Preliminary injunction denied. Delaware, L. & W. R. Co. *v.* Int. Com. Com., 155 Fed. 512; So. Pac. Ter. Co. *v.* Int. Com. Com., 166 Fed. 134. Preliminary injunction granted. Delaware, L. & W. R. Co. *v.* Int. Com. Com., 166 Fed. 498; Delaware, L. & W. R. Co. *v.* Int. Com. Com., 166 Fed. 499. In the last named case, under the peculiar facts and at the request of the Commission, shipper allowed to intervene. 169 Fed. 894.

See Missouri River Rate case (C. R. I. & P. R. Co. *v.* Int. Com. Com.), 171 Fed. 680.

Amended section cited as a reason why temporary restraining orders might with propriety be granted where danger of irreparable injury exists. Louisville & N. R. Co. *v.* U. S., 238 U. S. 1, 59 L. Ed. —, 35 Sup. Ct. 696.

§ 466. **Appeals from Final Judgments.**—A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by and aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the Attorney-General of the state.

Fourth part of paragraph 3 of Section of act Oct. 22, 1913. The provision of the former law, paragraph 11 of Section 16 of Act to Regulate Commerce read:

From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the case shall have priority in hearing and determination over all other cases except criminal cases, but such appeal shall not vacate or suspend the order appealed from.

§ 467. **Pending Causes Transferred to District Courts.**—All cases pending in the commerce court at the date of the passage of this act shall be deemed pending in and be transferred forthwith to said district courts except cases which may previously have been submitted to that court for final decree and the latter to be transferred to the district courts if not decided by the commerce court before December first, nineteen hundred and thirteen, and all cases wherein injunctions or other orders or decrees, mandatory or otherwise, have been directed or entered prior to the abolition of the said court shall be transferred forthwith to said district courts, which shall have jurisdiction to proceed therewith and to enforce said injunctions, orders, or decrees. Each of said cases and all the records, papers, and proceedings shall be transferred to the district court wherein it might have been filed at the time it was filed in the commerce court if this act had then been in effect; and if it might have been filed in any one of two or more district courts it shall be transferred to that one of said district courts which may be

designated by the petitioner or petitioners in said case, or, upon failure of said petitioners to act in the premises within thirty days after the passage of this act, to such one of said district courts as may be designated by the judges of the commerce court. The judges of the commerce court shall have authority, and are hereby directed, to make any and all orders and to take any other action necessary to transfer as aforesaid the cases and all the records, papers, and proceedings then pending in the commerce court to said district courts. All administrative books, dockets, files, and all papers of the commerce court not transferred as part of the record of any particular case shall be lodged in the Department of Justice. All furniture, carpets, and other property of the commerce court is turned over to the Department of Justice and the Attorney-General is authorized to supply such portion thereof as in his judgment may be proper and necessary to the United States Board of Mediation and Conciliation.

Any case hereafter remanded from the Supreme Court which, but for the passage of this act, would have been remanded to the commerce court, shall be remanded to a district court, designated by the Supreme Court, wherein it might have been instituted at the time it was instituted in the commerce court if this act had then been in effect, and thereafter such district court shall take all necessary and proper proceedings in such case in accordance with law and such mandate, order, or decree therein as may be made by said Supreme Court. All laws or parts of laws inconsistent with the foregoing provisions relating to the Commerce Court, are repealed.

§ 468. **Certain Cases Given Precedence and Hearing Expedited. Hearing before Three Judges.**—That in any suit in equity pending or hereafter brought in any circuit court of the United States under the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney-General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence

over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said court, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select; or, in case the full court shall not at any time be made up by reason of the necessary absence or disqualification of one or more of the said circuit judges, the justice of the Supreme Court assigned to that circuit or the other circuit judge or judges may designate a district judge or judges within the circuit who shall be competent to sit in said court at the hearing of said suit. In the event the judges sitting in such case shall be equally divided in opinion as to the decision or disposition of said cause, or in the event that a majority of said judges shall be unable to agree upon the judgment, order, or decree finally disposing of said case in said court which should be entered in said cause, then they shall immediately certify that fact to the Chief Justice of the United States, who shall at once designate and appoint some circuit judge to sit with said judges and to assist in determining said cause. Such order of the Chief Justice shall be immediately transmitted to the Clerk of the circuit court in which said cause is pending, and shall be entered upon the minutes of said court. Thereupon said cause shall at once be set down for reargument and the parties thereto notified in writing by the clerk of said court of the action of the court and the date fixed for the reargument thereof. The provisions of this section shall apply to all causes and proceedings in all courts now pending, or which may hereafter be brought.

Section 1 of act of Feb. 11, 1903, known as the Expediting Act as amended by the act of June 25, 1910. The second part of paragraph 12 of Sec. 16 of the Act to Regulate Commerce as amended by the Act of 1906 read:

The provisions of "An act to expedite the hearing and determination of suits in equity, and so forth," approved February eleventh, nineteen hundred and three, shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the act to regulate commerce approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof or sup-

plemental thereto. It shall be the duty of the Attorney-General in every such case to file the certificate provided for in said expediting act of February eleventh, nineteen hundred and three, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States, the case shall have in such court priority in hearing and determination over all other causes except criminal causes.

Second part of paragraph twelve of section sixteen.

When two of the three circuit judges agree case will not be certified to the Supreme Court. So. Pac. Ter. Co. *v.* Int. Com. Com., 166 Fed. 134, C. C. A.

In So. Pac. Ter. Co. *v.* Int. Com. Com., 166 Fed. 134, the section being under discussion, the court of appeals for the Fifth Circuit, Pardee, Judge, delivering the opinion, said:

"This expediting act, fairly construed, permits the case to proceed (except it is to be given precedence and expedited) until final hearing when it is to be set down before three circuit judges. After final decree it may be carried within 60 days by appeal to the Supreme Court by either party, and the only office left for the certificate is in the contingency that the judges shall be unable to agree on a final decree.

"We can find nothing further in the acts requiring three circuit judges to sit in any other phases of the case than the hearing on application for a preliminary injunction and on the final hearing. To apply it to all proceedings in the case is, in the nature of things to defeat the very object of the act, and change it from an expediting act into a hindering and delaying act."

§ 469. **Direct Appeal to Supreme Court.**—That every suit in equity pending or hereafter brought in any circuit court of the United States under any of said acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the circuit court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: Provided, That in any case where an appeal may have been taken from the final decree of a circuit court to the circuit court of appeals before this act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law.

Public No. 82, approved February 11, 1903.

Section two of the Expediting Act, act February 11, 1893.

A direct appeal to the Supreme Court is authorized by this section from a final decree in the circuit court in a proceeding to compel the production of testimony. Int. Com. Com. *v.* Baird, 194 U. S. 25, 48 L. Ed. 860, 24 Sup. Ct. 563. Appeal taken from the circuit court to the Supreme Court from an order granting a preliminary injunction under the Sherman Anti-Trust Act. Swift & Co. *v.* United States, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. 276; Circuit court decree, United States *v.* Swift & Co., 122 Fed. 529.

By Section 289 of the Judicial Code circuit courts of the United States are abolished and district courts should be read where circuit courts appear in the section relating to courts.

§ 470. **Government Aided Railroad and Telegraph Lines.**—That all railroad and telegraph companies to which the United States has granted any subsidy in lands or bonds or loan of credit for the construction of either railroad or telegraph lines, which, by the acts incorporating them, or by any acts amendatory or supplementary thereto, are required to construct, maintain, or operate telegraph lines, and all companies engaged in operating said railroad or telegraph lines shall forthwith and henceforward, by and through their own respective corporate officers and employees, maintain and operate, for railroad, governmental, commercial, and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them under the acts making the grants as aforesaid.

Section 1, act of Aug. 7, 1888 amending act of July 1st, 1862.

§ 471. **Connecting Telegraph Lines.**—That whenever any telegraph company which shall have accepted the provisions of title sixty-five of the Revised Statutes shall extend its line to any station or office of a telegraph line belonging to anyone of said railroad or telegraph companies, referred to in the first section of this act, said telegraph company so extending its line shall have the right and said railroad or telegraph company shall allow the line of said telegraph company so extending its line to connect with the telegraph line of said railroad or telegraph company to which it is extended at the place where their lines may meet, for the prompt and convenient interchange of telegraph business between said companies; and such railroad and telegraph companies, referred to in the first section of this act, shall

so operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company, or corporation whatever, and shall receive, deliver, and exchange business with connecting telegraph lines on equal terms, and affording equal facilities, and without discrimination for or against any one of such connecting lines; and such exchange of business shall be on terms just and equitable.

Section 2 of act of August 7, 1888 amending act of July 1, 1862.

§ 472. **Duties Imposed on Interstate Commerce Commission.**—That if any such railroad or telegraph company referred to in the first section of this act or company operating such railroad or telegraph line shall refuse or fail, in whole or in part, to maintain and operate a telegraph line as provided in this act and acts to which this is supplementary, for the use of the Government or the public, for commercial and other purposes, without discrimination, or shall refuse or fail to make or continue such arrangements for the interchange of business with any connecting telegraph company, then any person, company, corporation, or connecting telegraph company may apply for relief to the Interstate Commerce Commission, whose duty it shall thereupon be, under such rules and regulations as said Commission may prescribe, to ascertain the facts, and determine and order what arrangement is proper to be made in the particular case, and the railroad or telegraph company concerned shall abide by and perform such order; and it shall be the duty of the Interstate Commerce Commission, when such determination and order are made, to notify the parties concerned, and, if necessary, enforce the same by writ of mandamus in the courts of the United States, in the name of the United States, at the relation of either of said Interstate Commerce Commissioners: *Provided,* That the said Commissioners may institute any inquiry, upon their own motion, in the same manner and to the same effect as though complaint had been made.

Section 3 of the act of Aug. 7, 1888 amending the act of July 1, 1862.

§ 473. **Duty of the Attorney-General.**—That in order to secure and preserve to the United States the full value and benefit of its liens upon all the telegraph lines required to be constructed by and lawfully belonging to said railroad and telegraph companies referred to in the first section of this act, and to have the

same possessed, used, and operated in comformity with the provisions of this act and of the several acts to which this act is supplementary, it is hereby made the duty of the Attorney-General of the United States, by proper proceedings, to prevent any unlawful interference with the rights and equities of the United States under this act, and under the acts hereinbefore mentioned, and under all acts of Congress relating to such railroads and telegraph lines, and to have legally ascertained and finaly adjudicated all alleged rights of all persons and corporations whatever claiming in any manner any control or interest of any kind in any telegraph lines or property, or exclusive rights of way upon the lands of such railroad companies, or any of them, and to have all contracts and provisions of contracts set aside and annulled which have been unlawfully and beyond their powers entered into by said railroad or telegraph companies, or any of them, with any other person, company, or corporation.

Section 4 of the act of Aug. 7, 1888. Amending the act of July 1, 1862.

§ 474. **Penalties Provided.**—That any officer or agent of said railroad or telegraph companies, or of any company operating the railroads and telegraph lines of said companies, who shall refuse or fail to operate the telegraph lines of said railroad or telegraph companies under his control, or which he is engaged in operating, in the manner directed in this act and by the acts to which it is supplementary, or who shall refuse or fail, in such operation and use, to afford and secure to the government and the public equal facilities, or to secure to each of said connecting telegraph lines equal advantages and facilities in the interchange of business, as herein provided for, without any discrimination whatever for or adverse to the telegraph line of any or either of said connecting companies, or shall refuse to abide by, or perform and carry out within a reasonable time the order or orders of the Interstate Commerce Commission, shall in every such case of refusal or failure be guilty of a misdemeanor, and, on conviction thereof, shall in every such case be fined in a sum not exceeding one thousand dollars, and may be imprisoned not less than six months; and in every such case of refusal or failure the party aggrieved may not only cause the officer or agent guilty thereof to be prosecuted under the provisions of this section, but may also bring an action for the damages sustained thereby against the company whose officer or agent may be guilty thereof, in

the circuit or district court of the United States in any State or Territory in which any portion of the road or telegraph line of said company may be situated; and in case of suit process may be served upon any agent of the company found in such State or Territory, and such service shall be held by the court good and sufficient.

Section 5 of the act of Aug. 7, 1888 amending the act of July 1, 1862.

§ 475. **Duty of Telegraph and Railroad Companies to File Contracts with and Make Reports to Interstate Commerce Commission.**—That it shall be the duty of each and every one of the aforesaid railroad and telegraph companies, within sixty days from and after the passage of this act, to file with the Interstate Commerce Commission copies of all contracts and agreements of every description existing between it and every other person or corporation whatsoever in reference to the ownership, possession, maintenance, control, use, or operation of any telegraph lines, or property over or upon its rights of way, and also a report describing with sufficient certainty the telegraph lines and property belonging to it, and the manner in which the same are being then used and operated by it, and the telegraph lines and property upon its right of way in which any other person or corporation claims to have a title or interest, and setting forth the grounds of such claim, and the manner in which the same are being then used and operated; and it shall be the duty of each and every one of said railroad and telegraph companies annually hereafter to report to the Interstate Commerce Commission, with reasonable fullness and certainty, the nature, extent, value, and condition of the telegraph lines and property then belonging to it, the gross earnings, and all expenses of maintenance, use, and operation thereof, and its relation and business with all connecting telegraph companies during the preceding year, at such time and in such manner as may be required by a system of reports which said Commission shall prescribe; and if any of said railroad or telegraph companies shall refuse or fail to make such reports or any report as may be called for by said Commission or refuse to submit its books and records for inspection, such neglect or refusal shall operate as a forfeiture, in each case of such neglect or refusal, of a sum not less than one thousand dollars nor more than five thousand dollars, to be recovered by the Attorney-General of the United States, in the name and

for the use and benefit of the United States; and it shall be the duty of the Interstate Commerce Commission to inform the Attorney-General of all such cases of neglect or refusal, whose duty it shall be to proceed at once to judicially enforce the forfeitures hereinbefore provided.

Section 6 of the act of Aug. 7, 1888 amending the act of July 1, 1862.

§ 476. **Right of Congress to Alter or Annul This Act.**—That nothing in this act shall be construed to affect or impair the right of Congress, at any time hereafter, to alter, amend, or repeal the said acts hereinbefore mentioned; and this act shall be subject to alteration, amendment, or repeal as, in the opinion of Congress justice or the public welfare may require; and nothing herein contained shall be held to deny, exclude, or impair any right or remedy in the premises now existing in the United States, or any authority that the Postmaster General now has under title sixty-five of the Revised Statutes to fix rates, or, of the Government, to purchase lines as provided under said title, or to have its messages given precedence in transmission.

Public, No. 237, approved August 7, 1888.

Section 7 of the act of Aug. 7, 1888 amending the act of July 1, 1862.

The act of July 1, 1862, 12 Stat. 489, chap. 120, Sec. 6, cited as to right of government to fair and reasonable rates. So. Pac. Co. *v.* U. S., 237 U. S. 202, 59 L. Ed. ——, 35 Sup. Ct. 573.

§ 477. **Lake Erie & Ohio River Ship Canal.**—Sec. 17. That the said canals shall be open to the use and navigation of all suitable and proper vessels or other water craft, by whomsoever owned or operated, upon fair and equal terms, conditions, rates, tolls, and charges; and the said company may demand, take, and recover for its own proper use, for all persons and things of whatsoever description transported upon the said canals, feeders, and other works, or in vessels and craft using the same, just and reasonable charges, rates, and tolls; but all such charges, rates, and tolls shall be equal to all persons, vessels, and goods under certain classifications to be established by the company and approved by the Interstate Commerce Commission; and no rebate, reduction, drawback, or discrimination of any sort on such charges, rates, and tolls shall ever be made directly or indirectly. And the said charges, rates, and tolls for the ensuing year shall be fixed, published, and posted on or in every place where they

are to be collected, on or before the fifteenth day of February of each year, and shall not be changed except after thirty days' public notice, which notice shall plainly state the changes proposed to be made in the charges, rates, and tolls then in force and the time when the changed charges, rates and tolls will go into effect; and the proposed changes shall be shown by printing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided,* That the Interstate Commerce Commission may, in its discretion and for good cause shown, allow changes upon less notice than herein specified or modify the foregoing requirements in respect to publishing and posting of such schedules, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

Public, No. 402, approved June 30, 1906.

§ 478. **Parcel Post.**—The classification of articles mailable as well as the weight limit, the rates of postage, zone or zones and other conditions of mailability under this act, if the Postmaster General shall find on experience that they or any of them are such as to prevent the shipment of articles desirable, or to permanently render the cost of the service greater than the receipts of the revenue therefrom, he is hereby authorized, subject to the consent of the Interstate Commerce Commission after investigation, to reform from time to time such classification, weight limit, rates, zone or zones or conditions, or either, in order to promote the service to the public or to insure the receipt of revenue from such service adequate to pay the cost thereof.

An act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes.

Public, No. 336, approved August 24, 1912.

§ 479. **Compulsory Attendance of Witnesses and Production of Papers Provided for.**—Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpœna of the Commission, whether such subpœna be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or

otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding: Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpœna or lawful requirement of the Commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year or by both such fine and imprisonment.

Act of February 11, 1893.

§ 480. **Amendment to Act Making Compulsory Attendance of Witnesses and Production of Papers.**—Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That under the immunity provisions in the act entitled "An act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, in section six of the act entitled "An act to establish the Department of Commerce and Labor," approved February fourteenth, nineteen hundred and three, and in the act entitled "An act to further regulate commerce with foreign nations and among the states," approved February nineteenth, nineteen hundred and three, and in the act entitled "An act making appropriations for the legislative, executive, and judicial expenses of the government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," approved February twenty-

fifth, nineteen hundred and three, immunity shall extend only to a natural person who, in obedience to a subpœna, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

Public No. 389, approved June 30, 1906.

Act June 30, 1906.

CHAPTER X.

Acts Relating to the Transportation of Animals.

Act to prevent cruelty to animals while in interstate transit, known as the 28-hour law, Act June 29, 1906, Chapter 3594, 34 Stat. L. 607, U. S. Comp. St. Supp. 1907, p. 918, Fed. Stat. Ann. Sup. 1907, p. 25.

Act March 4, 1907, Chapter 2907, 34 Stat. L. 1260 et seq., requiring inspection of meat.

Act March 3, 1905, 33 Stat. L. 1264, Ch. 1496, U. S. Comp. St. Supp. 1909, p. 1185, relating to transportation of animals from quarantine territory.

§ 481. Time Prescribed for Feeding and Unloading Animals in Transit.
482. Feeding Shall Be at Expense of Owner, Lien Given for Food.
483. Penalty.
484. Meat Inspection Act.
485. Transportation of Animals from Quarantine Territory.

§ 481. **Time Prescribed for Feeding and Unloading Animals in Transit.**—That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one state or territory or the District of Columbia into or through another state or territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one state or territory or the District of Columbia into or through another state or territory or the District of Columbia, shall confine the same in cars, boats or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight: Provided, That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or

other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: Provided, That it shall not be required that sheep be unloaded in the nighttime, but where the time expires in nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

Section one of the act.

The act of March 3, 1873, 17 Stat. L. 584, R. S. U. S. §§ 4386 to 4390, inclusive, had the same purpose, though was somewhat less comprehensive than the present law.

The old law, and for that matter the present law, did not apply to transportation wholly within a state. United States *v.* East Tenn., Va. & Ga. R. Co., 13 Fed. 642. The statute constitutional.* United States *v.* Boston & A. R. Co., 15 Fed. 209. Reason for the law stated. United States *v.* L. & N. R. Co., 18 Fed. 480. Accident to a train due to negligence of the carrier not excuse, the present law is different in this respect, but the decision would probably apply to the law now. Newport N. & M. V. R. Co. *v.* United States, 61 Fed. 488, 9 C. C. A. 579. The same rule was applied United States *v.* So. Pac. Co., 157 Fed. 459; followed holding that proof need only be by a preponderance of the evidence, same style case, 162 Fed. 412. Opposite rule adopted United States *v.* Louisville & N. R. Co., 157 Fed. 979. The rule that action civil affirmed. Montana C. Ry. Co. *v.* United States, 164 Fed. 400, 90 C. C. A. 388. Under the old law a receiver was not liable, he is expressly named in the present law. United States *v.* Harris, 85 Fed. 533. Affirmed, same style case, 177 U. S. 305, 44 L. Ed. 780, 20 Sup. Ct. 609. A complaint for penalties must charge that the neglect was wilful, though need not negative exceptions. Action civil not criminal. United States *v.* Oregon Short L. R. Co., 160 Fed. 526. "Knowingly and wilfully" defined. Terminal railroad within act. United States *v.* Sioux City Stock Yards Co., 162 Fed. 556. Affirmed without discussing questions involved, same

style case, 167 Fed. 126. Act constitutional. United States *v.* Oregon R. & Nav. Co., 163 Fed. 640. Objections to allegation must be taken before verdict; action civil; wilful does not mean an evil intent but a violation purposely. New York C. & H. R. R. Co. *v.* United States, 165 Fed. 833, 91 C. C. A. 519.

"Knowingly and wilfully" defined. United States *v.* Union Pacific R. Co., 169 Fed. 65, 94 C. C. A. 433; St. Louis & S. F. Ry. Co. *v.* United States, 169 Fed. 69, 94 C. C. A. 437; Wisconsin Cent. Ry. Co. *v.* United States, 169 Fed. 76, 94 C. C. A. 444.

Notes of Decisions Rendered Since 1909.

Not a criminal statute subject to the strict rules of construction applied in criminal prosecutions. Montana C. Ry. Co. *v.* U. S., 164 Fed. 400, 90 C. C. A. 388. No defense that animals detained beyond the statutory limit because of "oversight, forgetfulness and unintentional neglect" of an employee.

Provisions relating to sheep not fatally defective for uncertainty. So. Pac. Co. *v.* U. S., 171 Fed. 360, 96 C. C. A. 252. Owner's request to extend period to 36 hours must be written and for each shipment, "contingencies hereinbefore stated" defined, U. S. *v.* Pere Marquette R. Co., 171 Fed. 586. No particular kind of equipment prescribed. U. S. *v.* St. Louis, I. M. & S. Ry. Co., 177 Fed. 205, 101 C. C. A. 365. Application for extension may be printed or stamped, made before the transportation commences, and may be made by an agent and on a form furnished by the carrier. Wabash R. Co. *v.* U. S., 178 Fed. 5, 101 C. C. A. 133; Atchison, T. & S. F. Ry. Co. *v.* U. S., 178 Fed. 12, 101 C. C. A. 140; Missouri, K. & T. Ry. Co. *v.* U. S., 178 Fed. 15, 101 C. C. A. 143. A terminal company receiving horses which have been kept confined for more than 28 hours and delivering them for a short distance did not violate the statute. Northern Pac. T. Co. *v.* U. S., 184 Fed. 603, 106 C. C. A. 583; U. S. *v.* Chicago J. Ry. Co., 211 Fed. 724. Sheep may not be detained more than 36 hours in any case. U. S. *v.* Atchison, T. & S. F. Ry. Co., 185 Fed. 105, 107 C. C. A. 323. Terminal stock yards railroad subject to provision of act. St. Joseph Stock Yards Co. *v.* U. S., 187 Fed. 104, 110 C. C. A. 432; See note 110 C. C. A. 435. The statute applies when the shipment passes through a foreign country. Lehigh Valley R. Co. *v.* U. S., 187 Fed. 1006, 109 C. C. A. 211, affirming U. S. *v.* Le-

high V. R. Co., 184 Fed. 971. Not sufficient to show that food, rest, etc., could have been had; must show that they were furnished. Chicago, B. & Q. R. Co. *v.* U. S., 195 Fed. 241, 115 C. C. A. 193, affirming U. S. *v.* C. B. & Q. R. Co., 184 Fed. 984. That there is room to enable the cattle to lie down does not except the movement from the provision of the statute. Erie R. Co. *v.* U. S., 200 Fed. 406, affirming U. S. *v.* Erie R. Co., 191 Fed. 941. No willful violation. U. S. *v.* Chicago, R. I. & P. Ry. Co., 211 Fed. 770. Initial carrier liable here for acts of its agent the terminal carrier. U. S. *v.* Union Pac. R. Co., 213 Fed. 332, —— C. C. A. ——. The responsibility of the carrier continues until delivery is completed. U. S. *v.* Philadelphia & R. Ry. Co., 223 Fed. 202, 206, 207.

§ 482. **Feeding Shall Be at Expense of Owner, Lien Given for Food.**—That animals so unloaded shall be properly fed and watered during such rest, either by the owner or person having the custody thereof, or, in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section one of this act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

Section two of the act.

§ 483. **Penalty.**—That any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred

dollars: Provided, That when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply.

Section three of the act.

A penalty can not be assessed for each animal. United States *v.* Boston & A. R. Co., 15 Fed. 209. The penalty should be assessed on each train load. United States *v.* St. Louis & S. F. R. Co., 107 Fed. 870. The shipper may recover his damages unaffected by the act. Southern Pac. Co. *v.* Arnett, 126 Fed. 75, 61 C. C. A. 131. Where there are several shipments in the same train, each shipment constitutes a separate case upon which for a violation of the act the penalty may be recovered. United States *v.* Bal. & O. S. W. R. Co., 159 Fed. 33, 86 C. C. A. 223; United States *v.* New York C. & H. R. R. Co., 168 Fed. 699, 94 C. C. A. 76. See to same effect. United States *v.* Atchison, T. & S. F. Ry. Co., 166 Fed. 160. Must show that carrier "knowingly and wilfully" confined the animals longer than twenty-eight hours, the government need not negative exceptions, and confinement in hands of connecting carrier is counted. United States *v.* Oregon S. L. R. Co., 160 Fed. 526. Action for penalty a civil suit, § 590 *supra*.

Notes of Decisions Rendered Since 1909.

A penalty for each loading and not for each car where more than one car loaded at same time. Baltimore & O. R. Co. *v.* U. S., 220 U. S. 94, 55 L. Ed. 384, 31 Sup. Ct. 368, reversing U. S. *v.* B. & O. R. Co., 159 Fed. 33, 86 C. C. A. 223, and citing old law, R. S. U. S. Sects. 4386, 4388 and decisions thereunder as follows: U. S. *v.* Boston & E. R. Co., 15 Fed. 209; U. S. *v.* St. L. & S. F. R. Co., 107 Fed. 870.

§ 484. **Meat Inspection Act.**—The meat inspection act of March 4, 1907, chapter 2907, 34 Stat. L. 1260, contains provisions for the inspection of meats and animals that enter into interstate commerce. The provisions of this act are not generally germane to the subject of this book. One provision, however, does apply and it is here inserted.

That on and after October first, nineteen hundred and six, no person, firm, or corporation shall transport or offer for transportation, and no carrier of interstate or foreign commerce shall

transport or receive for transportation from one state or territory or the District of Columbia to any other state or territory or the District of Columbia, or to any place under the jurisdiction of the United States, or to any foreign country, any carcasses or parts thereof, meat, or meat food products thereof which have not been inspected, examined, and marked as "Inspected and passed," in accordance with the terms of this act and with the rules and regulations prescribed by the Secretary of Agriculture: Provided, That all meat and meat food products on hand on October first, nineteen hundred and six, at establishments where inspection has not been maintained, or which have been inspected under existing law, shall be examined and labeled under such rules and regulations as the Secretary of Agriculture shall prescribe, and then shall be allowed to be sold in interstate or foreign commerce.

Eighth paragraph of above act.

§ 485. **Transportation of Cattle from Quarantine Territory.**—Sec. 1. That the Secretary of Agriculture is authorized and directed to quarantine any state or territory or the District of Columbia, or any portion of any state or territory or the District of Columbia, when he shall determine the fact that cattle or other live stock in such state or territory or District of Columbia are affected with any contagious, infectious, or communicable disease; and the Secretary of Agriculture is directed to give written or printed notice of the establishment of quarantine to the proper officers of railroad, steamboat, or other transportation companies doing business in or through any quarantined state or territory or the District of Columbia, and to publish in such newspapers in the quarantined state or territory or the District of Columbia, as the Secretary of Agriculture may select, notice of the establishment of quarantine.

Sec. 2. That no railroad company or the owners or masters of any steam or sailing or other vessel or boat shall receive for transportation or transport from any quarantined state or territory or the District of Columbia, or from the quarantined portion of any state or territory or the District of Columbia, any cattle or other live stock, except as hereinafter provided; nor shall any person, company or corporation deliver for such transportation to any railroad company, or to the master or owner of any boat or vessel, any cattle or other live stock, except as

hereinafter provided; nor shall any person, company, or corporation drive on foot or cause to be driven on foot, or transport in private conveyance or cause to be transported in private conveyance, from a quarantined state or territory or the District of Columbia, or from the quarantined portion of any state or territory or the District of Columbia, into any other state or territory or the District of Columbia, any cattle or other live stock, except as hereinafter provided.

Sections 1 and 2 of act March 3, 1905. Statute discussed and demurrer to an indictment thereunder sustained. U. S. *v.* El Paso & N. E. R. Co., 178 Fed. 846.

CHAPTER XI.

TRUST AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

§ 486. Contracts, Combinations and Conspiracies in Restraint of Interstate Commerce Illegal.
487. Monopolies and Conspiracies and Combinations to Monopolize Interstate Trade Illegal.
488. Prohibition Applies to Territories and Between States and Territories.
489. Courts Given Jurisdiction to Enjoin Violations of Act.
490. Practice with Reference to Parties and Service of Subpœnas Thereon.
491. Property Owned under a Contract Violating This Act Being in Course of Interstate Transportation May Be Seized and Forfeited.
492. Measure of Damages in Favor of Person Injured.
493. Person Includes Corporation and Association.
494. Act of August 28, 1894, So Far as It Relates to Trusts and Combinations in Restraint of Trade.
495. Clayton Act. Definitions.
496. Price Discrimination Prohibited.
497. Lease or Sale of Patented Articles.
498. Damages May Be Recovered by Person Injured.
499. Effect of Final Judgments in Criminal Prosecutions.
500. Labor Not a Commodity.
501. Acquisition by a Corporation of Stock in Another Corporation, When Prohibited.
502. Interlocking Directorates, When Prohibited.
503. Punishment of Corporate Officers.
504. Certain Contracts of Common Carriers Must Be Let by Competitive Bids.
505. Authority to Enforce Certain Provisions of Act Vested in Interstate Commerce Commission—Federal Reserve Board and Federal Trade Commission.
506. Procedure for Hearings by Boards Vested with Jurisdiction under Act.
507. Effect of the Orders of Boards.
508. Judicial Proceedings to Enforce the Orders of the Boards.
509. Venue of Suits.
510. Attendance of Witnesses.
511. Guilt of Corporation Deemed Guilt of Officers.
512. District Courts Invested with Jurisdiction to Prevent Violations of the Act.
513. Private Persons May Obtain Injunctive Relief, When.

514. Procedure in the Issuance of Temporary Restraining Orders.
515. Security Before Issuing Restraining Orders When Required.
516. What Injunction Orders Shall Contain.
517. Injunctions in Suits Between Employer and Employee.
518. Disobedience of Orders of Court.
519. Same Subject. Procedure Prescribed.
520. Right to a Trial by Jury Provided for.
521. Review of Convictions for Violation of Court Orders.
522. Provision for Trial for Disobedience to Orders of Court Not Applicable to Contempt Committed in the Presence of the Court.
523. Limitation in Proceedings for Contempt.
524. That Part of the Act Invalid, Not to Affect Validity of Other Portions.

§ 486. **Contracts, Combinations and Conspiracies in Restraint of Interstate Commerce Illegal.**—Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section one of the act of July 2, 1890, known as the Sherman Anti-Trust Act.

Agreement between carriers to fix and maintain rates condemned. Freight Bureau of Cincinnati *v.* Cincinnati, N. O. & T. P. Ry. Co., 6 I. C. C. 195, 4 I. C. R. 592, 618. Commission has no authority to execute anti-trust law. Sprigg *v.* Baltimore & O. R. Co., 8 I. C. C. 443. A noncompetitive rate deprives it of value as a standard. Mayor of Wichita *v.* A. T. & S. F. Ry. Co., 9 I. C. C. 534, 552. Rates advanced by concert of action "must be presumed to be higher than rates which unrestrained competition would produce." Central Yellow Pine Asso. *v.* Ill. Cent. R. Co., 10 I. C. C. 505, 540, 541, 542. Order of Commission enforced. Ill. Cent. R. Co. *v.* Int. Com. Com., 206 U. S. 441, 51 L. Ed. 1128, 27 Sup. Ct. 700; Tift *v.* Southern Ry. Co., 10 I. C. C. 548, 579. Order enforced. 138 Fed. 753; So. Ry. Co. *v.* Tift, 148 Fed. 1021, 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. 709. Where "rates have been long in effect, and where the advance has been made by concerted action," the jus-

tification should be clear. Re Class and Commodity Rates from St. Louis to Texas Common Points, 11 I. C. C. 238, 268, 269, 270. Disappearance of competition given as one reason for holding an advance illegal. Cattle Raisers' Asso. *v.* Mo., Kan. & Tex. Ry. Co., 11 I. C. C. 296. A rate the result of an agreement is robbed of the presumption of reasonableness which it might otherwise possess. China and Japan Trading Co. *v.* Ga. R. Co., 12 I. C. C. 236, 241. But if the rate is reasonable, although illegally established, the Commission will so hold. Id. 241. Warren Mfg. Co. *v.* So. Ry. Co., 12 I. C. C. 381. Evidence of a violation of the Anti-Trust Act pertinent, and such evidence will be given due weight though it is not conclusive. Enterprise Mfg. Co. *v.* Ga. R. Co., 12 I. C. C. 451, 456; Board of Bristol, Tenn., *v.* Virginia & S. Ry. Co., 15 I. C. C. 453, 454. Equity will not aid a plaintiff to effect a combination in restraint of trade. Am. Biscuit & Mfg. Co. *v.* Klotz, 44 Fed. 721, 1 Fed. Anti-Trust Dec. 2. A combination between coal dealers in different states to control prices prohibited. United States *v.* Jellico Mountain Coal & Coke Co., 46 Fed. 432, 12 L. R. A. 753, 1 Fed. Anti-Trust Dec. 9. Control of railroads by stock ownership so as to prevent competition within the spirit, if not letter of law. Clarke *v.* Cent. R. Banking Co., 50 Fed. 338, 1 Fed. Anti-Trust Dec. 17. An owner of a patentable invention, though a party to a combination to limit its manufacture, may maintain suit for its infringement. Strait *v.* National Harrow Co., 51 Fed. 819. 1 Fed. Anti-Trust Dec. 52. Act does not include common carriers; an agreement to maintain reasonable rates not violative of either section one or section two. United States *v.* Trans-Missouri Freight Asso., 53 Fed. 440, 1 Fed. Anti-Trust Dec. 80. Affirmed. 58 Fed. 58, 7 C. C. A. 15, 24 L. R. A. 73, 1 Fed. Anti-Trust Dec. 186. Reversed. 166 U. S. 290, 41 L. Ed. 1007, 17 Sup. Ct. 540, 1 Fed. Anti-Trust Dec. 648. Combinations of laborers illegal. United States *v.* Workingman's Amalg. Council, 54 Fed. 994, 26 L. R. A. 158, 1 Fed. Anti-Trust Dec. 110; Waterhouse *v.* Comer, 55 Fed. 149, 1 Fed. Anti-Trust Dec. 119. All contracts and combinations in restraint of interstate trade illegal, but buying up by one corporation of all competing concerns not a violation of the statute. United States *v.* Knight, 60 Fed. 306, 1 Fed. Anti-Trust Dec. 250. Affirmed, same style case, 60 Fed. 934, 9 C. C. A. 297, 1 Fed. Anti-Trust Dec. 258, 24 L. R. A. 428, 156 U. S. 1, 11, 39 L. Ed. 325, 15 Sup. Ct. 249, 1 Fed. Anti-Trust Dec. 379, 387,

holding that a monopoly in manufacture is not prohibited by the act. A combination to compel carriers engaged in interstate transportation to accede to certain demands illegal, whether such demands be reasonable or unreasonable. United States *v.* Elliott, 62 Fed. 801, 64 Fed. 27, 1 Fed. Anti-Trust Dec. 262, 311. Labor boycott violates act. Thomas *v.* Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. 803, 1 Fed. Anti-Trust Dec. 266. Violence and intimidation for the purpose of preventing the moving of trains engaged in interstate commerce violates the act. Re Grand Jury, 62 Fed. 840, 1 Fed. Anti-Trust Dec. 301. Mentioned but not decided. Arthur *v.* Oakes, 63 Fed. 310, 329, 11 C. C. A. 209, 25 L. R. A. 414, 1 Fed. Anti-Trust Dec. 310. The word "conspiracy" broad enough to cover conspiracies of labor in restraint of trade or commerce. United States *v.* Debs, 64 Fed. 724, 1 Fed. Anti-Trust Dec. 322. Writ of *habeas corpus* denied. Re Debs, 158 U. S. 564, 39 L. Ed. 1092, 15 Sup. Ct. 900, 1 Fed. Anti-Trust Dec. 565. A corporation organized to secure assignments of all patents relating to a particular apparatus and to fix and regulate the prices thereof is illegal. National Harrow Co. *v.* Quick, 67 Fed. 130, 1 Fed. Anti-Trust Dec. 443, 608. Affirmed, same style case, 74 Fed. 236, 20 C. C. A. 410. National Harrow Co. *v.* Hench, 76 Fed. 667, 1 Fed. Anti-Trust Dec. 610. Affirmed, same style case, 83 Fed. 36, 27 C. C. A. 349, 39 L. R. A. 299, 1 Fed. Anti-Trust Dec. 742. See also same style case, 84 Fed. 226, 1 Fed. Anti-Trust Dec. 746. "A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself unlawful or criminal, by criminal or unlawful means, the common design being the essence of the charge." This case, which was a charge to a jury, defines trade and commerce and holds "that Pullman cars in use upon the roads are instrumentalities of commerce." United States *v.* Cassidy, 67 Fed. 698, 702, 1 Fed. Anti-Trust Dec. 449, 455, citing Pettibone *v.* United States, 148 U. S. 197, 203, 37 L. Ed. 419, 13 Sup. Ct. 542. Not applicable to a state which by its laws assumes a monopoly of the liquor traffic. Lowenstein *v.* Evans, 69 Fed. 908, 1 Fed. Anti-Trust Dec. 598. An interstate carrier may legally make an exclusive arrangement with another carrier for through transportation. Prescott & A. C. R. Co. *v.* Atchison, T. & S. F. R. Co., 73 Fed. 438, 1 Fed Anti-Trust Dec. 604. One having received the services of a tug can not escape payment therefor, al-

though the tug owners are members of an association illegal under the act. The Charles E. Wiswall, 74 Fed. 802, 1 Fed. Anti-Trust Dec. 608. Affirmed. Same style case, 86 Fed. 671, 30 C. C. A. 339, 1 Fed. Anti-Trust Dec. 850. The statute covers, and was intended to cover, common carriers by railroad, and prohibits all agreements and combinations in restraint of trade or commerce, regardless of the question whether or not such agreements were reasonable. United States *v.* Trans-Missouri Freight Asso., 166 U. S. 290, 327, 335, 41 L. Ed. 1007, 17 Sup. Ct. 540, 1 Fed. Anti-Trust Dec. 648. All restraints prohibited, whether reasonable or unreasonable, and whether or not the law is violated by the practical workings and results of the association alleged to be an illegal combination. United States *v.* Hopkins, 82 Fed. 529, 1 Fed. Anti-Trust Dec. 725, 748. Reversed because the business was not interstate commerce. Hopkins *v.* United States, 171 U. S. 578, 43 L. Ed. 290, 19 Sup. Ct. 40, 1 Fed. Anti-Trust Dec. 941. Followed. Anderson *v.* United States, 171 U. S. 604, 43 L. Ed. 300, 19 Sup. Ct. 50, 1 Fed. Anti-Trust Dec. 967. Any restraint illegal. United States *v.* Coal Dealers' Asso., 85 Fed. 252, 1 Fed Anti-Trust Dec. 749. A contract operating as a restraint in soliciting orders for and selling goods in one state to be delivered in another is within the act. The doctrine of the common law as well as the effect of the statute discussed. United States *v.* Addyston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122, 1 Fed. Anti-Trust Dec. 772. Affirmed. Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, 44 L. Ed. 136, 20 Sup. Ct. 96, 1 Fed. Anti-Trust Dec. 1009, but decree modified so as not to affect commerce wholly within a state. An independent dealer who, without knowledge of the intention of the buyer, sells all his product to one who makes the purchase as part of a general scheme of monopoly does not violate the law. Carter-Crume Co. *v.* Peurrung, 86 Fed. 439, 30 C. C. A. 174, 1 Fed. Anti-Trust Dec. 844. Allegations sufficient to bring case within the law. Lowry *v.* Tile, Mantel & Grate Asso., 98 Fed. 817, 1 Fed. Anti-Trust Dec. 995. Affirmed. Montague *v.* Lowry, 115 Fed. 27, 52 C. C. A. 621, 2 Fed. Anti-Trust Dec. 112, 193 U. S. 38, 48 L. Ed. 608, 24 Sup. Ct. 307, 2 Fed. Anti-Trust Dec. 327. A note payable to a corporation for goods can not be avoided because such corporation is a trust organized and operating in violation of the act. Union Sewer-Pipe Co. *v.* Connelly, 99 Fed. 354, 2 Fed. Anti-

Trust Dec. 1. Affirmed on the point annotated and also holding that the Illinois Anti-Trust Act was void because it exempted agricultural products and live stock from its provisions. Connelly *v.* Union Sewer-Pipe Co., 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. 431, 2 Fed. Anti-Trust Dec. 118. An infringer of a patent can not defend on the ground that the owner thereof is organized in violation of the act and procured the patent in pursuance of such illegal organization. National Folding Box & Paper Co. *v.* Robertson, 99 Fed. 985, 2 Fed. Anti-Trust Dec. 4; Otis Elevator Co. *v.* Geiger, 107 Fed. 131, 2 Fed. Anti-Trust Dec. 66; General Elec. Co. *v.* Wise, 119 Fed. 922, 2 Fed. Anti-Trust Dec. 205; United States Consolidated Seeded Raisin Co. *v.* Griffin, 126 Fed. 364, 61 C. C. A. 334, 2 Fed. Anti-Trust Dec. 288. If trade is restrained by a contract or combination, it is an illegal act, even though the public may be benefited thereby. United States *v.* Chesapeake & O. Fuel Co., 105 Fed. 93, 2 Fed. Anti-Trust Dec. 34. Affirmed. Chesapeake & O. Fuel Co. *v.* United States, 115 Fed. 610, 53 C. C. A. 256, 2 Fed. Anti-Trust Dec. 151. A combination of manufacturers and dealers, each member of which paid certain entrance fees and dues and the constitution of which prohibited its members from buying from other than members, illegal. Lowry *v.* Tile, Mantel & Grate Asso., 106 Fed. 38, 2 Fed. Anti-Trust Dec. 53. Affirmed. Montague *v.* Lowry, 115 Fed. 27, 52 C. C. A. 621, 2 Fed. Anti-Trust Dec. 112, 193 U. S. 38, 48 L. Ed. 608, 24 Sup. Ct. 307, 2 Fed. Anti-Trust Dec. 327. A pooling combination of carriers is illegal, and a carrier party thereto can not maintain a suit for injunction against a ticket broker who sells non-transferable tickets issued as part of the pooling agreement. Delaware, L. & W. R. Co. *v.* Frank, 110 Fed. 689, 2 Fed. Anti-Trust Dec. 81. Immunity act of Feb. 11, 1893, does not apply to this act. Foot *v.* Buchanan, 113 Fed. 156, 2 Fed. Anti-Trust Dec. 103. A private individual may successfully defend an action brought against him on a contract in violation of this act. A patentee may legally put restraint on a licensee of the patent, although such restraints are violative of commerce in the patented article. Bement *v.* National Harrow Co., 186 U. S. 70, 46 L. Ed. 1058, 22 Sup. Ct. 747, 2 Fed. Anti-Trust Dec. 169. But the contract extending beyond the protection of the patent is illegal. Indiana Mfg. Co. *v.* J. I. Case, Threshing Mch. Co., 148 Fed. 21. Reversed, same style case, 154 Fed. 365, 83 C. C. A. 343. A

paving contract limiting the material used to that manufactured by only one company is not illegal. Field *v.* Barber Asphalt Paving Co., 117 Fed. 925, 2 Fed. Anti-Trust Dec. 192. Affirmed, same style case, 194 U. S. 618, 48 L. Ed. 1142, 24 Sup. Ct. 784, 2 Fed. Anti-Trust Dec. 555. The statute includes all combinations which directly and substantially restrict interstate commerce, and applies to interstate carriers. The act is violated by a contract by which a majority of the stock of each of two competing roads is transferred to a corporation organized to vote such stock, the voting corporation issuing its stock to the holders of the stock of the two railroad corporations. United States *v.* Northern Securities Co., 120 Fed. 721, 2 Fed. Anti-Trust Dec. 215. Affirmed, reviewing and discussing former anti-trust decisions of the court. Northern Securities Co. *v.* United States, 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. 436, 2 Fed. Anti-Trust Dec. 338. A board of trade may sell its quotations to a telegraph company with the limitation that they shall not be furnished to a bucket shop. Board of Trade of Chicago *v.* Christie Grain & Stock Co., 121 Fed. 608, 2 Fed. Anti-Trust Dec. 233. Reversed on other grounds. Christie Grain & Stock Co. *v.* Board of Trade of Chicago, 125 Fed. 161, 61 C. C. A. 11. Circuit court of appeals reversed and circuit court affirmed same style case. Board of Trade of Chicago *v.* Christie Grain & Stock Co., 198 U. S. 236, 49 L. Ed. 1031, 25 Sup. Ct. 637, 2 Fed. Anti-Trust Dec. 717. A combination to restrain trade illegal, although prices resulting therefrom reasonable. United States *v.* Swift & Co., 122 Fed. 529, 2 Fed. Anti-Trust Dec. 237. Affirmed. Swift & Co. *v.* United States, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. 276, 2 Fed. Anti-Trust Dec. 641, holding that although the separate elements of a combination may be legal, if the common intent is to monopolize trade, it is illegal. The Minnesota Anti-Trust Act not violated under the facts pleaded. Minnesota *v.* Northern Securities Co., 123 Fed. 692, 2 Fed. Anti-Trust Dec. 246. Reversed because the federal court had no jurisdiction and remanded to the state court. Minnesota *v.* Northern Securities Co., 194 U. S. 48, 48 L. Ed. 870, 24 Sup. Ct. 598, 2 Fed. Anti-Trust Dec. 533. A combination to control prices in a local market and to refuse to sell to consumers who buy from non-members, some of whom live out of the state, is not within act. Ellis *v.* Inman, Poulsen & Co., 124 Fed. 956, 2 Fed. Anti-Trust Dec. 268. Reversed, holding that the federal law applied. Same

style case, 131 Fed. 182, 65 C. C. A. 488, 2 Fed. Anti-Trust Dec. 577. Sale of goods limiting the right of the vendor to go into business within fifty miles of the place of sale valid, and being within a state not violative of the federal act. Robinson *v.* Suburban Brick Co., 127 Fed. 804, 62 C. C. A. 484, 2 Fed. Anti-Trust Dec. 312. Booth & Co. *v.* Davis, 127 Fed. 875, 2 Fed. Anti-Trust Dec. 318. Affirmed. Davis *v.* Booth, 131 Fed. 31, 65 C. C. A. 269, 2 Fed. Anti-Trust Dec. 566. Writ of *certiorari* denied by Supreme Court. 195 U. S. 636. See also Camors-McConnell Co. *v.* McConnell, 140 Fed. 412, 2 Fed. Anti-Trust Dec. 817. Affirmed. McConnell *v.* Camors-McConnell Co., 140 Fed. 987, 72 C. C. A. 681, 2 Fed. Anti-Trust Dec. 825. Rehearing denied. Same case, 152 Fed. 321, 81 C. C. A. 429; American Brake Beam Co. *v.* Pungs, 141 Fed. 923, 73 C. C. A. 157, 2 Fed. Anti-Trust Dec. 826. Combination of carriers by which by concerted action rates are advanced violates act. Tift *v.* Southern Ry. Co., 138 Fed. Anti-Trust Dec. 753, 2 Fed. Anti-Trust 733. Affirmed. So. Ry. Co. *v.* Tift, 148 Fed. 1021, 206 U. S. 428, 51 L. Ed. 1124, 27 Sup. Ct. 709. After a copyrighted book has been sold, although with a statement printed therein that the purchaser could not sell except at a stated price, the purchaser can sell at any price he sees fit. Book trust declared illegal. Bobbs-Merrill Co. *v.* Straus, 139 Fed. 155, 2 Fed. Anti-Trust Dec. 755. Affirmed. Same style case, 147 Fed. 15, 77 C. C. A. 607, 15 L. R. A. 766, 210 U. S. 339, 52 L. Ed. 1086, 28 Sup. Ct. 722. The immunity act, act Feb. 19, 1903, applies to the Anti-Trust Act. Re Hale, 139 Fed. 496, 2 Fed. Anti-Trust Dec. 804. Affirmed. Hale *v.* Henkel, 201 U. S. 43, 50 L. Ed. 652, 26 Sup. Ct. 370, 2 Fed. Anti-Trust Dec. 874; McAlister *v.* Henkel, 201 U. S. 90, 50 L. Ed. 671, 26 Sup. Ct. 385, 2 Fed. Anti-Trust Dec. 919. Followed, Nelson *v.* United States, 201 U. S. 92, 50 L. Ed. 673, 26 Sup. Ct. 358, 2 Fed. Anti-Trust Dec. 920. A patentee may grant licenses to sell the patented article only on condition of selling at prices fixed by the patentee, but under the facts of this case license contract void as violative of Anti-Trust Act. Rubber Tire Wheel Co. *v.* Milwaukee Rubber Co., 142 Fed. 531, 2 Fed. Anti-Trust Dec. 855. Reversed, same style case, 154 Fed. 358, 83 C. C. A. 336. Good will contract valid. A purchaser of a river boat can not refuse to pay therefor because in the contract of purchase he agreed to maintain existing rates. Cincinnati, P. B. S. & P. P. Co. *v.* Bay, 200 U. S. 179, 50 L. Ed. 428, 26

Sup. Ct. 208, 2 Fed. Anti-Trust Dec. 867. An order directing a witness to answer questions relating to violations of the act is interlocutory and not appealable. Alexander *v.* United States, 201 U. S. 117, 50 L. Ed. 686, 26 Sup. Ct. 356. 2 Fed. Anti-Trust Dec. 945. Immunity does not apply to corporations whose officers may testify, it does apply to individuals who testify at hearings before the Commissioner of Corporations. United States *v.* Armour, 162 Fed. 808, 2 Fed. Anti-Trust Dec. 951. Act does not make void a collateral contract for the manufacture and sale of goods. Hadley, Dean Plate Glass Co. *v.* Highland Glass Co., 143 Fed. 242, 74 C. C. A. 462, 2 Fed. Anti-Trust Dec. 994. Followed, Chicago Wall Paper Mills *v.* General Paper Co., 147 Fed. 491, 78 C. C. A. 607, 2 Fed. Anti-Trust Dec. 1027. It is not unlawful for a manufacturer of a proprietary medicine to contract with the dealers who purchase such medicine from him, that they shall sell at a fixed price. Hartman *v.* John D. Park & Sons, 145 Fed. 358, 2 Fed. Anti-Trust Dec. 999. Reversed, holding contract unenforceable. John D. Park & Sons *v.* Martman, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 1135. Circuit Court followed Dr. Miles Medicine Co. *v.* Jaynes Drug Co., 149 Fed. 838. Circuit court of appeals followed. Dr. Miles Medical Co. *v.* John D. Park & Sons Co., 164 Fed. 803, 90 C. C. A. 599. Writ of error granted by Suprme Court. A carrier may enter into an exclusive contract with one to build up, develop and conduct a particular traffic business along its line. Delaware, L. & W. R. Co. *v.* Kutter, 147 Fed. 51, 77 C. C. A. 315, 2 Fed. Anti-Trust Dec. 1021. Petition for writ of certiorari denied, 203 U. S. 588, 51 L. Ed. 330. An agreement between publishers of copyrighted books, who control ninety per cent. of the book business, not to sell to any one who cuts prices, or who sells to one who cuts prices, is illegal. Mines *v.* Scribner, 147 Fed. 927, 2 Fed. Anti-Trust Dec. 1035. See case of Bobbs-Merrill Co. *v.* Straus, *supra*. The attempt of a labor union to compel, by a boycott, a manufacturer to unionize his factory not within act. Loewe *v.* Lawlor, 148 Fed. 924. See same case, 130 Fed. 633, 2 Fed. Anti-Trust Dec. 563, 142 Fed. 216, 2 Fed. Anti-Trust Dec. 854. Reversed, holding that such acts constituted a violation of the act. Loewe *v.* Lawlor, 208 U. S. 274, 52 L. Ed. 488, 28 Sup. Ct. 301. Purchase money of goods can not be recovered when the purchase was made as part of a combination in restraint of trade. Continental Wall Paper Co. *v.*

Lewis Voight & Sons Co., 148 Fed. 939, 78 C. C. A. 567. Affirmed, same style case, 212 U. S. 227, 53 L. Ed. 486, 29 Sup. Ct. 280. Act not affect a contract by which foreign ship owners endeavor to prevent dealing with their competitors. Thomson *v.* Union Castle Mail Steamship Co., 149 Fed. 933. Reversed, holding that when the combination was put in effect in the United States it violated its laws. Thomson *v.* Union Castle Mail Steamship Co., 166 Fed. 251, 32 C. C. A. 315. Trusts defined, quoting Coke's definition. Re Charge to Grand Jury, 151 Fed. 834. Though a rate is established in violation of Anti-Trust Act, application must first be made to the Interstate Commerce Commission to declare rate illegal. American Union Coal Co. *v.* Penn. R. Co., 159 Fed. 278; Meeker *v.* Lehigh V. R. Co., 162 Fed. 354. Mere agreement not effective does not violate law. The facts in the case show a violation. United States Tobacco Co. *v.* American Tobacco Co., 163 Fed. 701; Weisert Bros. Tobacco Co. *v.* American Tobacco Co., Larus & Bro. Co. *v.* Same, 163 Fed. 712. The American Tobacco Co. declared a trust. United States *v.* American Tobacco Co., 164 Fed. 700; People's Tobacco Co. *v.* American Tobacco Co., 170 Fed. 396, 95 C. C. A. 566. A patentee may legally limit the licensee in the manner of selling. Goshen Rubber Works *v.* Single Tube A. & B. Tire Co., 166 Fed. 431, 92 C. C. A. 183, but not so when the purpose of the contract is to enhance prices and not as an incident to the sale of the patent right. Blount Mfg. Co. *v.* Yale & Towne Mfg. Co., 166 Fed. 555. Facts not constituting a violation. Bigelow *v.* Calumet & Hecla Mining Co., 167 Fed. 704. Affirmed, same style case, 167 Fed. 721, 94 C. C. A. 13. A lease of a plant executed in pursuance of a plan to monopolize the cotton compressing business illegal. Shawnee Compress Co. *v.* Anderson, 209 U. S. 423, 52 L. Ed. 865, 28 Sup. Ct. 572. No judgment will be rendered for the purchase price of property when "such a judgment would, in effect, aid the execution of agreements which constituted" an illegal combination. Four judges dissent. Continental Wall Paper Co. *v.* Voight & Sons Co., 212 U. S. 227, 53 L. Ed. 29 Sup. Ct. 280.

Notes of Decisions Rendered Since 1909.

Monopoly defined as the concentration of business. National Fire Proofing Co. *v.* Masons' Builders' Ass'n, 169 Fed. 259, 94 C. C. A. 535. Charge to a jury defining monopoly and giving

the elements of the crime under the statute. U. S. *v.* American Naval Stores Co., 172 Fed. 455, affirming Nash *v.* U. S., 186 Fed. 489, see also U. S. *v.* American Naval Stores Co., 186 Fed. 592. A Coal Company may select its customers and refuse to sell others. Union Pac. Coal Co. *v.* U. S., 173 Fed. 737, 97 C. C. A. 578. That the holder of a patent is a party to an unlawful conspiracy in restraint of trade is no defense to a suit for an infringement of the patent. Johns-Pratt Co. *v.* Sachs Co., 176 Fed. 738; Northwestern Cons. M. Co. *v.* Callam & Son, 177 Fed. 786; Virtue *v.* Creamery Package Mfg. Co., 179 Fed. 115, 102 C. C. A. 413; Motion Picture Patent Co. *v.* Ullman, 186 Fed. 174; U. S. Fire Escape Co. *v.* Joseph Halstead Co., 195 Fed. 295; Fraser *v.* Duffey, 196 Fed. 900; Coco-Cola Co. *v.* Deacon-Brown Bottling Co., 200 Fed. 105; Coco-Cola Co. *v.* Gay-Ola Co., 200 Fed. 720; Motion Picture Patent Co. *v.* Eclair Film Co., 208 Fed. 416. The prohibition is of all restraint, not merely unreasonable restraint. Ware-Kramer Tobacco Co. *v.* Am. Tob. Co., 180 Fed. 160. A sale of corporate assets can not be enjoined under the anti-trust statute unless such sale furthers a conspiracy in violation of such statute. Bonney *v.* Cumberland-Ely Coffee Co., 183 Fed. 650. Sale of good will legal if made in good faith, otherwise if for the purpose of restraining trade. Darius Cole Transp. Co. *v.* White Star Line, 186 Fed. 63, 108 C. C. A. 165, writ of *certiorari* denied same styled case, 225 U. S. 704, 56 L. Ed. 1265, 32 Sup. Ct. 837. To the same effect see U. S. *v.* Great Lakes Towing Co., 208 Fed. 733, holding the contract there set out to be illegal. Sufficiency of indictment discussed. U. S. *v.* Swift, 188 Fed. 92; U. S. *v.* Patterson, 201 Fed. 697. Not all combinations illegal. U. S. *v.* E. I. DuPont De Nemours & Co., 188 Fed. 127. A railroad company can not legally give an exclusive right to one tug for the use of its pier. Baker-Whiteley Coal Co. *v.* B. & O. R. Co., 188 Fed. 405, 110 C. C. A. 234, reversing: same styled case, 176 Fed. 632. No defense to a condemnation proceeding that corporation seeking to condemn was an illegal combination. Oregon-Washington R. & Nav. Co. *v.* Wilkinson, 188 Fed. 363. Purchase of controlling stock in competitive corporation held invalid, but not to prevent a sale thereof in good faith. Steele *v.* United Fruit Co., 190 Fed. 631. Regulation of trade not the same as restraint of trade. U. S. *v.* John Reardon & Sons Co., 191 Fed. 454. Purchaser of goods can not defend against suit for purchase price

on the ground that the seller is engaged in violating the law. International Harvester Co. *v.* Oliver, 192 Fed. 59. As to Harvester Co., see U. S. *v.* International Harvester Co., 214 Fed. 987. A contract between a long distance telephone company and a local one for exclusive interchange of messages legal. Pacific Tel. & Tel. Co. *v.* Anderson, 196 Fed. 699. A holding to the contrary. U. S. Telephone Co. *v.* Central Union Tel. Co., 202 Fed. 66, 122 C. C. A. 86, affirming same styled case, 171 Fed. 130. A defendant convicted of violating the statute may nevertheless sell its trade-mark. Weyman-Bruton Co. *v.* Old Indian Snuff Mills, 197 Fed. 1075. The statute applies to international transportation. U. S. *v.* Hamburg-Amer. P.-F.-A. Gesellschaft, 200 Fed. 806. A contract between a corporation and a labor union by which union laborers were employed, but which did not prevent the employment of others than union men, legal. Post *v.* Buck's Stove & Range Co., 200 Fed. 918. "Restraint of trade" includes restraint of competition. U. S. *v.* Eastern States Retail L. D. Ass'n, 201 Fed. 581. The degree of restraint is immaterial. U. S. *v.* Patterson, 201 Fed. 697; same case and style, 205 Fed. 292. The enforcement in good faith by citizens of a municipality of an ordinance invalid under the statute does not subject such citizens to liability in damages. Citizens' Wholesale Supply Co. *v.* Snyder, 201 Fed. 907. Held that the United Mine Workers is an unlawful combination. Hitchman Coal & Coke Co. *v.* Mitchell, 202 Fed. 512. Coal carrying railroads enjoined. U. S. *v.* Lake S. & M. S. Ry. Co., 203 Fed. 295. The statute applies not only to those who initiate the monopoly, but also to those who prosecute the purpose. U. S. *v.* New Departure Mfg. Co., 204 Fed. 107. A license restriction not for the purpose of protecting the patient but to restrict trade is illegal. Robt. H. Ingersoll & Bro. *v.* McColl, 204 Fed. 147. Circumstantial evidence sufficient to go to the jury under the facts stated. Hale *v.* Hatch & North Coal Co., 204 Fed. 433. Not a monopoly for a pipe line company to pipe only its own oil. Prairie Oil & Gas Co. *v.* U. S., 204 Fed. 798, Opin. Com. Ct. Nos. 75 to 80, page 545, reversed without discussing this point. U. S. *v.* Ohio Oil Co., 234 U. S. 548, 58 L. Ed. 1454, 34 Sup. Ct. 956. A patentee may not resort to unfair methods to force a competitor out of business. The patent laws and the anti-trust laws must be construed together. U. S. *v.* Patterson, 205 Fed. 292, 201 Fed. 697. Combination held illegal though not unduly exercised to raise prices.

O'Halloran *v.* Am. Sea Green Slate Co., 207 Fed. 187. A contract between many engaged in the same business to refrain from selling an individual or a class is illegal. U. S. *v.* Southern Wholesale Grocers' Ass'n, 207 Fed. 434. Following cited cases from Supreme Court held that a patentee may not restrict the sale of a patented article after sale thereof to a dealer. Kellogg Toasted Corn Flakes Co. *v.* Buck, 208 Fed. 383. A conspiracy in relation to labor unions defined. Lawlor *v.* Loewe, 209 Fed. 721, for a history of this case see p. 723 of opinion. The restraint here found to be unreasonable. U. S. *v.* Whiting, 212 Fed. 466. A "boycott" not necessarily illegal, the test being the legality of the object and of the means used. Gill Engraving Co. *v.* Doerr, 214 Fed. 111. Elimination of competition by consolidation of competing corporations equally illegal as though such purpose was effected by an agreement. U. S. *v.* International Harvester Co., 214 Fed. 987. Acts done outside the United State in Costa Rica not within the statute. American Banana Co. *v.* United Fruit Co., 213 U. S. 347, 53 L. Ed. 826, 29 Sup. Ct. 511, affirming same styled case, 166 Fed. 261, 92 C. C. A. 325. "Conspiracy" defined. United States *v.* Kissell, 218 U. S. 601, 54 L. Ed. 1168, 31 Sup. Ct. 124, reversing on another point same styled case when definition is given, 173 Fed. 823. That a medicine is a proprietary one does not make a restraint of trade thereon otherwise than illegal. Dr. Miles Medical Co. *v.* John D. Park & Sons Co., 220 U. S. 373, 55 L. Ed. 502, 31 Sup. Ct. 376, affirming same styled case, 164 Fed. 803, 90 C. C. A. 579. "Rule of reason" stated and the statute fully discussed. Standard Oil Co. *v.* United States, 221 U. S. 1, 55 L. Ed. 619, 31 Sup. Ct. 502, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D 734, modifying, U. S. *v.* Standard Oil Co., 173 Fed. 177; U. S. *v.* Am. Tob. Co., 221 U. S. 106, 55 L. Ed. 663, 31 Sup. Ct. 632, reversing same styled case, 164 Fed. 700. Consolidation of railway terminal facilities at St. Louis held illegal, U. S. *v.* Terminal R. Ass'n, 224 U. S. 383, 56 L. Ed. 810, 31 Sup. Ct. 507. An agreement of 80 per cent of the jobbers in a particular business to buy only from certain persons illegal. Standard Sanitary Mfg. Co. *v.* U. S., 226 U. S. 20, 57 L. Ed. 107, 33 Sup. Ct. 9, affirming, U. S. *v.* Standard Sanitary Mfg. Co., 191 Fed. 172. The combination between the Union Pacific Railroad Co. and the Southern Pacific Co. held to be illegal. U. S. *v.* Union Pac. Co., 226 U. S. 61, 57 L. Ed. 124, 33 Sup. Ct. 53, modifying decisions in same

styled case, 188 Fed. 102. Combination of coalcarrying railroads held illegal. U. S. *v.* Reading Co., 226 U. S. 324, 57 L. Ed. 243, 33 Sup. Ct. 90, modifying decisions in same styled case, 183 Fed. 427, see same case, 228 U. S. 158, 57 L. Ed. 779, 33 Sup. Ct. 509. A conspiracy to run a corner in cotton illegal. United States *v.* Patten, 226 U. S. 525, 57 L. Ed. 333, 33 Sup. Ct. 141, reversing same styled case, 187 Fed. 664. An exclusive sales agent may be contracted for. Virtue *v.* Creamery Package Mfg. Co., 227 U. S. 8, 57 L. Ed. 393, 33 Sup. Ct. 202, affirming same styled case, 179 Fed. 115, 102 C. C. A. 413. A combination of manufacturers of different non-competing patented machines not illegal, though thereby a large part of the shoe machinery business is placed under a single control. U. S. *v.* Winslow, 227 U. S. 202, 57 L. Ed. 481, 33 Sup. Ct. 253, affirming same styled case, 195 Fed. 578. An agreement limiting through routes and joint rates to one wharfage company illegal. U. S. *v.* Pacific & Arctic Ry. & Nav. Co., 228 U. S. 87, 57 L. Ed. 742, 33 Sup. Ct. 433; the patent laws do not give the right to limit by notice the price at which patented articles shall be resold. Bauer & Cie *v.* O'Donnell, 229 U. S. 1, 57 L. Ed. 1041, 33 Sup. Ct. 616. The statute is not so vague as to be void; the legality of the charges given the jury by the trial judge discussed. Nash *v.* U. S., 229 U. S. 373, 57 L. Ed. 1232, 33 Sup. Ct. 780, reversing same styled case, 186 Fed. 489, 108 C. C. A. 467, and see U. S. *v.* Naval Stores Co., 172 Fed. 455, 186 Fed. 592. Copyright laws do not protect against the provisions of the anti-trust laws. Straus *v.* Am. Publishers' Ass'n, 231 U. S. 222, 58 L. Ed. 192, 34 Sup. Ct. 84, citing Bobbs-Merrill Co. *v.* Straus, 210 U. S. 339, 52 L. Ed. 1086, 28 Sup. Ct. 722 and other cases. For proceedings in the state court see: Straus *v.* Am. Publishers' Ass'n, 177 N. Y. 473, 64 L. R. A. 701, 101 Am. St. Rep. 819, 69 N. E. 1107; Straus *v.* Am. Publishers' Ass'n, 193 N. Y. 496, 86 N. E. 525; Straus *v.* Publishers' Ass'n, 144 N. Y. 548, 93 N. E. 1133. Reports sent out with the purpose of preventing the members of an association from dealing with certain persons constitute a violation of the statute. Eastern States Retail Lumber Dealers' Ass'n *v.* U. S., 234 U. S. 600, 58 L. Ed. 1490, 34 Sup. Ct. 951, affirming, U. S. *v.* same, 201, Fed. 581. A state anti-trust law sustained. Waters-Pierce Oil Co. *v.* Texas, 212 U. S. 86, 53 L. Ed. 417, 29 Sup. Ct. 220, affirming same styled case, 48 Tex. Civ. App. 163, 106 S. W. 918; Ham-

mond Packing Co. *v.* Arkansas, 212 U. S. 322, 53 L. Ed. 530, 29 Sup. Ct. 370, affirming same styled case, 81 Ark. 519, 126 Am. St. Rep. 1047, 100 S. W. 407; International Harvester Co. *v.* Missouri, 234 U. S. 199, 58 L. Ed. 1276, 34 Sup. Ct. 854, affirming same styled case, 237 Mo. 369, 141 S. W. 672.

State law void for uncertainty. International Harvester Co. *v.* Kentucky, 234 U. S. 216, 58 L. Ed. 1284, 34 Sup. Ct. 853, reversing, International H. Co. *v.* Kentucky, 147 Ky. 564, 144 S. W. 1064, 1068, 1070; International H. Co. *v.* Ky., 147 Ky. 795, 146 S. W. 12, 148 Ky. 572, 147 S. W. 1199; Collins *v.* Kentucky, 234 U. S. 634, 58 L. Ed. 1510, 34 Sup. Ct. 924, reversing same styled case, 141 Ky. 564, 133 S. W. 233. Judgment for damages sustained. Lawlor *v.* Loewe, 236 U. S. 522, 59 L. Ed. ——, 35 Sup. Ct. 170, affirming, Loewe *v.* Lawlor, 209 Fed. 721, 126 C. C. A. 445. The Anti-Trust Act and the Commodity Clause of the Interstate Commerce Act are "not concerned with the interests of the parties, but with the interest of the public." U. S. *v.* Delaware, L. & W. R. Co., 238 U. S. 516, 59 L. Ed. ——, 35 Sup. Ct. 873.

§ 487. **Monopolies and Conspiracies and Combinations to Monopolize Interstate Trade Illegal.**—Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section two of the act July 2, 1890, known as the Sherman Anti-Trust Law.

What an indictment for violation should state. United States *v.* Greenhut, 50 Fed. 469, 1 Fed. Anti-Trust Dec. 30. Re Corning, 51 Fed. 205, 1 Fed. Anti-Trust Dec. 33; Re Terrell, 51 Fed. 213, 1 Fed. Anti-Trust Dec. 46; United States *v.* Patterson, 59 Fed. 280, 1 Fed. Anti-Trust Dec. 244. Does not prevent a state corporation from acquiring title, control and disposition of property in the several states. Re Greene, 52 Fed. 104, 1 Fed. Anti-Trust Dec. 54. An agreement among a number of lumber dealers to raise the price fifty cents per thousand, not illegal unless it includes the entire traffic. 52 Fed. 646, 1 Fed. Anti-Trust Dec. 77. "Monopolize" is the basis of the statute

and merely injuring or restraining trade not prohibited. United States *v.* Patterson, 55 Fed. 605, 640, 641, 1 Fed. Anti-Trust Dec. 133, 176, 177. A purchaser of liquors from an illegal combination can not keep the goods and recover the price paid, even though it was excessive. Dennehy *v.* McNulta, 86 Fed. 825, 41 L. R. A. 609, 30 C. C. A. 422, 1 Fed. Anti-Trust Dec. 855. A contract with an association having a monopoly of the commerce in a particular commodity by which it agrees to pay a dividend to a company on condition that such company would close its factory for a year is contrary to public policy and unlawful. Cravens *v.* Carter-Crume Co., 92 Fed. 479, 34 C. C. A. 479, 1 Fed. Anti-Trust 983. Mere attempts to monopolize trade not punishable, combination the main purpose of which is to foster trade and which only indirectly or incidentally restricts competition not illegal. Whitwell *v.* Continental Tobacco Co., 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689, 2 Fed. Anti-Trust Dec. 271; Phillips *v.* Iola Portland Cement Co., 125 Fed. 593, 61 C. C. A. 19, 2 Fed. Anti-Trust Dec. 284. Petition for writ of certiorari denied. 192 U. S. 606, 48 L. Ed. 585, 24 Sup. Ct. 850. A demand for a "closed shop" illegal. Barnes & Co. *v.* Berry, 156 Fed. 72. "Monopoly" defined. Burrows *v.* Interurban Metropolitan Co., 156 Fed. 389. An agreement, however, between mine operators not to employ members of a certain union held not to be illegal. Goldfield Consolidated Mines Co. *v.* Goldfield Mines Union, 159 Fed. 500. Monopoly by efficiency is not illegal, but to conspire to prevent a single shipment by a competitor is. Patterson *v.* United States (Cash Register Case) 222 Fed. 599, —— C. C. A. ——. Illegal to fix price of resale. United States *v.* Kellogg Toasted Corn Flake Co., 222 Fed. 725. Photo-play films shipped in interstate commerce subject to the act. United States *v.* Motion Picture Patents Co., 225 U. S. 800. Kodak company decreed a trust. United States *v.* Eastman Kodak Co., 226 Fed. 62. Coal monopoly. United States *v.* Reading Co., 226 Fed. 229.

Notes of Decisions Rendered Since 1909.

See notes next preceding section.

§ 488. **Prohibition Applies to Territories and between States and Territories.**—Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or com-

merce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories and any state or states or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section three of the act July 2, 1890, known as the Sherman Anti-Trust Act.

Prosecution begun in a territorial court abates upon the admission of the territory as a state. Moore *v.* United States, 85 Fed. 465, 29 C. C. A. 269, 1 Fed. Anti-Trust Dec. 815.

§ 489. **Courts Given Jurisdiction to Enjoin Violation of Act.**—The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Section four of the act July 2, 1890, known as the Sherman Anti-Trust Act.

Preliminary injunction not granted when bill denied. United States *v.* Jellico Mountain Coke & Coal Co., 43 Fed. 898, 1 Fed. Anti-Trust Dec. 1. Right to injunction exists only in favor of the government, but to prevent a multiplicity of suits an individual may sue for and obtain an injunction. Blindell *v.* Hagan, 54 Fed. 40, 1 Fed. Anti-Trust Dec. 106. Affirmed. Hagan *v.*

Blindell, 56 Fed. 696, 6 C. C. A. 86, 1 Fed. Anti-Trust Dec. 182. Injunction may be granted against a combination of laborers. United States *v.* Workingman's Amalg. Council, 54 Fed. 994, 26 L. R. A. 158, 1 Fed. Anti-Trust Dec. 110. Affirmed. Workingman's Amalg. Council *v.* United States, 57 Fed. 85, 6 C. C. A. 258, 1 Fed. Anti-Trust Dec. 184. Injunction order binding on one not named in the bill or served with *subpœna* if served with injunction order. United States *v.* Agler, 62 Fed. 824, 1 Fed. Anti-Trust Dec. 294. May sue in any district where defendant found. Dueber Watch-Case Mfg. Co. *v.* Howard Watch & Clock Co., 66 Fed. 637, 14 C. C. A. 14, 1 Fed. Anti-Trust Dec. 421. Section not void. United States *v.* Elliott, 64 Fed. 27, 1 Fed. Anti-Trust Dec. 311. The combination described not illegal and federal courts can not enjoin an alleged violation of this act or the act to regulate commerce. United States *v.* Joint Traffic Asso., 76 Fed. 895, 1 Fed. Anti-Trust Dec. 615. Affirmed. 89 Fed. 1020, 32 C. C. A. 491, 45 U. S. App. 726, 1 Fed. Anti-Trust Dec. 869. Reversed on both points following the Trans-Missouri Freight Asso. Case *supra*. Same style case, 171 U. S. 505, 43 L. Ed. 259, 19 Sup. Ct. 25, 1 Fed. Anti-Trust Dec. 869. Applies only to suits by the government. Greer, Mills & Co. *v.* Stoller, 77 Fed. 1, 1 Fed. Anti-Trust Dec. 620. Suits by the United States rest only on the authority of the act. United States *v.* Addyston Pipe & Steel Co., 78 Fed. 712, 1 Fed. Anti-Trust Dec. 631. Reversed, holding a bill for injunction would lie in favor of either the government or a private individual. 85 Fed. 271, 46 L. R. A. 122, 1 Fed. Anti-Trust Dec. 772. Affirmed. Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, 44 L. Ed. 136, 20 Sup. Ct. 96, 1 Fed. Anti-Trust Dec. 1009. Restraining order may issue without notice. United States *v.* Coal Dealers' Asso., 85 Fed. 252, 1 Fed. Anti-Trust Dec. 749. Principles upon which injunction should be granted stated in a case growing out of United States *v.* Northern Securities Co. Case. Harriman *v.* Northern Securities Co., 132 Fed. 464, 2 Fed. Anti-Trust Dec. 587. Reversed. Northern Securities Co. *v.* Harriman, 134 Fed. 331, 67 C. C. A. 245, 2 Fed. Anti-Trust Dec. 618. Circuit court of appeals affirmed, holding that property delivered under an executed contract of sale can not be recovered by one in *pari delicto*. Harriman *v.* Northern Securities Co., 197 U. S. 244, 49 L. Ed. 739, 25 Sup. Ct. 493, 2 Fed. Anti-Trust Dec. 669.

Prior to Elkins Act, Feb. 19, 1903, a circuit court had no jurisdiction to enjoin the granting of rebates, although the giving of the rebate was alleged to be in violation of Anti-Trust Act. United States *v.* Atchison, T. & S. F. Ry. Co., 142 Fed. 176, 2 Fed. Anti-Trust Dec. 831. Private parties may obtain an injunction against a violation from which they suffer special injury. Bigelow *v.* Calumet & Hecla Mining Co., 155 Fed. 869, 167 Fed. 704. Affirmed, not discussing this point, 167 Fed. 721, 94 C. C. A. 13. Same rule under a state law. Continental Securities Co. *v.* Interborough R. T. Co., 165 Fed. 945.

Notes of Decisions Rendered Since 1909.

Violations of an injunction decree punished. U. S. *v.* Southern Wholesale Grocers' Ass'n, 207 Fed. 434. Injunctive relief can be granted only at the suit of the government. Irving *v.* Neal, 209 Fed. 471; National Fireproofing Co. *v.* Masons' Builders' Ass'n, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148; Greer *v.* Staller, 77 Fed. 1; Minnesota *v.* North Security Co., 194 U. S. 48, 48 L. Ed. 870, 24 Sup. Ct. 598; Paine Lumber Co. *v.* Neal, 212 Fed. 259; Paine Lumber Co. *v.* Neal, 214 Fed. 82, 130 C. C. A. 522, but said the court in 212 Fed. 259, 268 *supra*: "The courts have time and again extended the equity arm to prevent the Commission or continuance of injury directed against particular persons, and have protected employers against violence any sympathetic strikes." See also Jones *v.* Van Winkle, 131 Ga. 336, 62 S. E. 236, following Irving *v.* Neal & Lawler Co. *v.* Neal *supra*: Gill Engraving Co. *v.* Doerr, 214 Fed. 111, 118; Mitchell *v.* Hitchman Coal & Coke Co., 214 Fed. 685, 714. One who has in good faith withdrawn from the conspiracy not a proper party. U. S. *v.* E. I. Dupont De Nemours & Co., 188 Fed. 127. Proper parties to suit for injunction discussed. U. S. *v.* Reading Co., 226 U. S. 324, 57 L. Ed. 243, 33 Sup. Ct. 90, citing, Simpkins Fed. Suit 290 *et seq.* and modifying same styled case, 183 Fed. 427. See also same case, 228 U. S. 158, 57 L. Ed. 779, 33 Sup. Ct. 509, see also 188 Fed. 127 *supra*.

§ 490. **Practice with Reference to Parties and Service of Subpœna Thereon.**—Whenever it shall appear to the court before which any proceeding under section four of this act may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them

to be summoned, whether they reside in the district in which the court is held or not; and *subpœnas* to that end may be served in any district by the marshal thereof.

Section five of the act July 2, 1890, known as the Sherman Anti-Trust Act.

Injunction order may be enforced against defendants, within the scope of the order, though not named in the bill, such defendants being parties to the conspiracy. United States *v.* Elliott, 64 Fed. 27, 1 Fed. Anti-Trust Dec. 311. Can not bring in non-residents of the district at suit by others than the government. Greer, Mills & Co. *v.* Stoller, 77 Fed. 1, 1 Fed. Anti-Trust Dec. 620. Non-residents of the state may be brought in as defendants. United States *v.* Standard Oil Co. of New Jersey, 152 Fed. 290; United States *v.* Virginia-Carolina Chemical Co., 163 Fed. 66; Northern Pac. R. Co. *v.* Pacific C. L. Mfg. Asso., 165 Fed. 1, 9, 91 C. C. A. 39.

§ 491. **Property Owned under a Contract Violating This Act being in Course of Interstate Transportation May Be Seized and Forfeited.**—Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Section six of act July 2, 1890, known as the Sherman Anti-Trust Act.

No seizure can be had of goods at the suit of the United States except of property imported into the United States contrary to act. United States *v.* Addyston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122, 1 Fed. Anti-Trust Dec. 772. Affirmed, without discussion of the question. Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, 44 L. Ed. 136, 20 Sup. Ct. 96, 1 Fed. Anti-Trust Dec. 1009.

§ 492. **Measure of Damages in Favor of Persons Injured.**—Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district

in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Section seven of act July 2, 1890, known as the Sherman Anti-Trust Act.

A person who has sold his business to an illegal combination can not recover under this act. In suits for damages complaint must allege that the matters out of which the suit grows constitute interstate commerce. Bishop *v.* Am. Preservers' Co., 51 Fed. 272, 1 Fed. Anti-Trust Dec. 49. Must not only allege that the business damaged was interstate commerce but that the entire market was controlled. Dueber Watch Case Mfg. Co. *v.* Howard Watch & Clock Co., 55 Fed. 851, 1 Fed. Anti-Trust Dec. 178. Affirmed, same style case, 66 Fed. 637, 14 C. C. A. 14, 1 Fed. Anti-Trust Dec. 421. The private shipper can not obtain a mandatory writ to compel the carrier to grant a right, though a circuit court, as a court of equity, can afford preventative relief in addition to damages. Gulf C. & S. F. Ry. Co. *v.* Miami S. S. Co., 86 Fed. 407, 421, 30 C. C. A. 142, 1 Fed. Anti-Trust Dec. 823, 842, 843. Remedy for damages exclusive and a private person can not maintain equitable proceedings to enforce the law. So. Ind. Express Co. *v.* United States Express Co., 88 Fed. 659, 1 Fed. Anti-Trust Dec. 862. Affirmed. 92 Fed. 1022, 35 C. C. A. 172, 1 Fed. Anti-Trust Dec. 992; Block *v.* Standard Distilling and Distributing Co., 95 Fed. 978, 1 Fed. Anti-Trust Dec. 993. Limitation of time in which to bring suit is governed by the law of the state in which suit is brought. Atlanta *v.* Chattanooga Foundry & Pipe Co., 101 Fed. 900, 2 Fed. Anti-Trust Dec. 11. Reversed, same style case, 127 Fed. 23, 61 C. C. A. 387, 64 L. R. A. 721, 2 Fed. Anti-Trust Dec. 299. Affirmed. Chattanooga Foundry & Pipe Co. *v.* Atlanta, 203 U. S. 390. 51 L. Ed. 241, 27 Sup. Ct. 65. To recover must not only show illegal combination but that plaintiff has suffered damages, that a combination of dealers sent out circulars denouncing a dealer outside the combination who sold in other states whereby his business is injured authorized a recovery. Gibbs *v.* McNeely, 102 Fed. 594, 2 Fed. Anti-Trust Dec. 25. No recovery for sales in the state. Same case, 107 Fed. 210, 2 Fed. Anti-Trust Dec. 71. Reversed, same case, 118 Fed. 120, 55 C. C. A. 70, 60 L. R.

A. 152, 2 Fed. Anti-Trust Dec. 194, holding that though an agreement does not refer to interstate trade, it is within the act if its purpose and effect is to restrain such trade. A party to an illegal combination can not recover damages against the combination for acts growing out of the contract creating the combination. Bishop *v.* American Preservers' Co., 105 Fed. 845, 1 Fed. Anti-Trust Dec. 51. Damages recoverable and attorney's fees in discretion of trial court. Lowry *v.* Tile Mantel & Grate Asso., 106 Fed. 38, 2 Fed. Anti-Trust Dec. 53. Affirmed. Montague *v.* Lowry, 115 Fed. 27, 52 C. C. A. 621, 2 Fed. Anti-Trust Dec. 112, 193 U. S. 38, 48 L. Ed. 608, 24 Sup. Ct. 307, 2 Fed. Anti-Trust Dec. 327. A minority stockholder, alleging the corporation has transferred its property to an illegal combination, can not obtain an injunction against the transfer and damages in the same suit. Metcalf *v.* American School Furniture Co., 108 Fed. 909, 2 Fed. Anti-Trust Dec. 75. Affirmed. 113 Fed. 1020, 51 C. C. A. 599, 2 Fed. Anti-Trust Dec. 111. Bill dismissed. 122 Fed. 115, 2 Fed. Anti-Trust Dec. 234. Only actual damages can be recovered. Rule as to loss of profits stated. Central Coal & Coke Co. *v.* Hartman, 111 Fed. 96, 49 C. C. A. 244, 2 Fed. Anti-Trust Dec. 94. Damages can not be recovered because a company refuses to sell its goods, unless the purchaser refuses to deal with independent companies, the defendant owing no duty to sell its products to plaintiff. Whitwell *v.* Continental Tob. Co., 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689, 2 Fed. Anti-Trust Dec. 271. Petition for damages must definitely describe the combination and conspiracy. Rice *v.* Standard Oil Co., 134 Fed. 464, 2 Fed. Anti-Trust Dec. 633. Rule as to measure of damages and burden of proof. Loder *v.* Jayne, 142 Fed. 1010, 2 Fed. Anti-Trust Dec. 976. Reversed. Jayne *v.* Loder, 149 Fed. 21, 78 C. C. A. 653, 7 L. R. A. (N. S.) 984. In a suit for damages under this section, the allegations should be specific. Cilley *v.* United Shoe Mach. Co., 152 Fed. 726. One who is harmed in business or property may recover. Wheeler-Stenzel Co. *v.* National Window Glass Jobbers' Asso., 152 Fed. 864, 81 C. C. A. 658. A purchase of a competing refining company in order to monopolize the refining of sugar not illegal. Penn. Sugar Refining Co. *v.* American Sugar Refining Co., 160 Fed. 144. Reversed, same style case, 166 Fed. 254, 92 C. C. A. 318. No right of action when merely prevented from embarking

on a new business. American Banana Co. *v.* United Fruit Co., 160 Fed. 184. Affirmed, same style case, 166 Fed. 261, 92 C. C. A. 325, 213 U. S. 347, 53 L. Ed. 826, 29 Sup. Ct. 511. Allegation held sufficient. Monarch Tob. Works *v.* American Tob. Co., 165 Fed. 774. Limitation law of the state in which suit is brought applies. Chattanooga Foundry & Pipe Works *v.* Atlanta, 203 U. S. 390, 51 L. Ed. 241, 27 Sup. Ct. 65.

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Remedy of a private individual is by suit for damages. National Fire Proofing Co. *v.* Mason Builders' Ass'n, 169 Fed. 259, 94 C. C. A. 535 and cases following that case. Sec. 803 *supra*. Pleadings liberal in suits for damages. Ware-Kramer Tobacco Co. *v.* Am. Tob. Co., 178 Fed. 117; Hale *v.* O'Connor Coal Supply Co., 181 Fed. 267.

That one of the purposes of the conspiracy is to increase rates the reasonableness of which has not been passed on by the Interstate Commerce Commission is no defense. Meeker *v.* Lehigh Valley R. Co., 183 Fed. 548, 106 C. C. A. 94, reversing Meeker *v.* Lehigh V. R. Co., 175 Fed. 320. The right of action for causing bankruptcy of a corporation is in its trustee in bankruptcy, not in a stockholder. Loeb *v.* Eastman Kodak Co., 183 Fed. 704, 106 C. C. A. 142; Corey *v.* Independent Ice Co., 207 Fed. 459; Fleitmann *v.* United Gas Improvement Co., 211 Fed. 103.

Facts here pleaded state a cause of action and the remedy given by the act is a civil remedy. Strout *v.* United Shoe Machinery Co., 195 Fed. 313, same style case, 202 Fed. 602.

What must be alleged and proved. Buckeye Powder Co. *v.* E. I. Du Pont De Nemours Powder Co., 196 Fed. 514.

Alleging different things forbidden by Sections 1 and 2 does constitute duplicitous pleading. Cilley *v.* Shoe Mach. Co., 202 Fed. 598. Facts here sufficient to entitle a jury to pass thereon. Hale *v.* Hatch & North Coal Co., 204 Fed. 433, 122 C. C. A. 619. Specific injury must be proved. Motion Picture Patents Co. *v.* Eclair Film Co., 208 Fed. 416. Charge of the court to the jury discussed. Lawlor *v.* Loewe, 209 Fed. 721, 126 C. C. A. 445. Affirmed Loewe *v.* Lawlor, 236 U. S. 522, 59 L. Ed. —, 35 Sup. Ct. 170. Damages may be recovered although some of the business affected is intrastate commerce and although the parties to the conspiracy are not themselves engaged in interstate

commerce. Loewe *v.* Lawlor, 208 U. S. 274, 52 L. Ed. 488, 28 Sup. Ct. 301, and see Lawlor *v.* Loewe, 209 Fed. 721, 126 C. C. A. 445, same styled case, 187 Fed. 522, 109 C. C. A. 288, writ of certiorari denied. Loewe *v.* Lawlor, 223 U. S. 729, 56 L. Ed. 633, 32 Sup. Ct. 527, and notes in L. R. A. (N. S.) 97, 23 L. R. A. (N. S.) 1263, 26 L. R. A. (N. S.) 153, 1 Brit. Rul. Cas. 281.

§ 493. **Person Includes Corporation and Association.**—That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country.

Section eight of the act of July 2, 1890, known as the Sherman Anti-Trust Act.

Corporations may be indicted. United States *v.* MacAndrews & Forbes Co., 149 Fed. 823, 836.

§ 494. **Act of August 28, 1894, So Far as It Relates to Trusts and Combinations in Restraint of Trade.**—Sec. 73. That every combination, conspiracy, trust, agreement, or contract, is hereby declared to be contrary to public policy, illegal, and void, when the same is made by or between two or more persons or corporations either of whom as agent or principal is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and, on conviction thereof in any court of the United States, such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

Sec. 74. That the several circuit courts of the United States

are hereby invested with jurisdiction to prevent and restrain violations of section seventy-three of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petitions setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Sec. 75. That whenever it shall appear to the court before which any proceeding under the seventy-fourth section of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

Sec. 76. That any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section seventy-three of this act, imported into and being within the United States or being in the course of transportation from one state to another, or to or from a territory, or the District of Columbia, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Sec. 77. That any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

* * * * * * * * * * *

Received by the President, August 15, 1894.

(*Note by the Department of State.*—The foregoing act having been presented to the President of the United States for his approval, and not having been returned by him to the house of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.)

Act of July 24, 1897, § 34.

* * * * And provided further, that nothing in this act shall be construed to repeal or in any manner affect the sections numbered 73, 74, 75, 76 and 77 of an act entitled "An act to reduce taxation, to provide revenue for the government, and for other purposes," which became a law on the twenty-eighth day of August, 1894.

Section 73 and 76 quoted in the section above were amended by the act of Feb. 12, 1913, 37 Stat. 667, Chap. 40, by adding to Sec. 73 the words "as" agent or "principal" and to Sec. 76 the words "imported into and being within the United States." Section 11 of the Panama Canal Act, act Aug. 24, 1912, 37 Stat. 560, 567, Chap. 390, provides: "No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through said canal, if such ship is owned, chartered or operated, or controlled by any person or company which is doing business in violation of any of the anti-trust acts" and "The question of fact may be determined by the judgment of any court of the United States of competent jurisdiction in any cause pending before it to which the owners or operators of such ships are parties. Suit may be brought by any shipper or by the Attorney-General of the United States."

§ 495. **Clayton Act—Definitions.**—That "anti-trust laws," as used herein, includes the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an act entitled "an act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an act entitled "An act to amend sections seventy-three and seventy-six of the act of August twenty-seventh, eighteen hundred and ninety-four, entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes," approved February twelfth, nineteen hundred and thirteen; and also this act.

"Commerce," as used herein, means trade or commerce among the several states and with foreign nations, or between the District of Columbia or any territory of the United States and any state, territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any state or territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any territory or any insular possession or other place under the jurisdiction of the United States: *Provided,* That nothing in this act contained shall apply to the Phillippine Islands.

The word "person" or "persons" wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country.

Section one of Clayton Act approved Oct. 15, 1914, ——, Stat. ——, Public No. 212, 63rd Congress.

§ 496. **Price Discrimination Prohibited.**—That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided,* That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in *bona fide* transactions and not in restraint of trade.

Sec. 2 Clayton Act.

§ 497. **Lease or Sale of Patented Articles.**—That it shall

be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may substantially lessen competition or tend to create a monopoly in any line of commerce.

Sec. 3 Clayton Act.

§ 498. **Damages May Be Recovered by Person Injured.**—That any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Sec. 4 Clayton Act. Cited Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co., 223 Fed. 881, 884.

§ 499. **Effect of Final Judgments in Criminal Prosecution.**—That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be *prima facie* evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: *Provided further*, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced

but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the anti-trust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.

Sec. 5 Clayton Act.

§ 500. **Labor Not a Commodity.**—That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

Sec. 6 Clayton Act.

§ 501. **Acquisition by a Corporation of Stock in Another Corporation, When Prohibited.**—That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the anti-trust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Sec. 7 Clayton Act.

§ 502. **Interlocking Directorates, When Prohibited.**—That from and after two years from the date of the approval of this act no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company, organized or operating under the laws of the

United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than $5,000,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a state, having deposits, capital, surplus, and undivided profits aggregating more than $5,000,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The eligibility of a director, officer or employee under the foregoing provisions shall be determined by the average amount of deposits, capital, surplus, and undivided profits as shown in the official statements of such bank, banking association, or trust company filed as provided by law during the fiscal year next preceding the date set for the annual election of directors, and when a director, officer, or employee has been elected or selected in accordance with the provisions of this act it shall be lawful for him to continue as such for one year thereafter under said election or employment.

No bank, banking association or trust company, organized or operating under the laws of the United States, in any city or incorporated town or village of more than two hundred thousand inhabitants, as shown by the last preceding decennial census of the United States, shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association or trust company located in the same place: *Provided,* That nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares: *Provided further*, That a director or other officer or employee of such bank, banking association, or trust company may be a director or other officer or employee of not more than one other bank or trust company organized under the laws of the United States or any state where the entire capital stock of one is owned by stockholders in the other: *And provided further*, That nothing contained in this section shall forbid a director of class A of a federal reserve bank, as defined in the Federal Reserve Act from being an officer or director or both an officer and director in one member bank.

That from and after two years from the date of the approval of this act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged

in whole or in part in commerce, other than banks, banking associations, trust companies and common carriers subject to the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location or operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the anti-trust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected, and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

Sec. 8 Clayton Act.

§ 503. **Punishment of Corporate Officers.**—Every president, director, officer or manager of any firm, association or corporation engaged in commerce as a common carrier, who embezzles, steals, abstracts or wilfully misapplies, or wilfully permits to be misapplied, any of the moneys, funds, credits, securities, property or assets of such firm, association or corporation, arising or accruing from, or used in, such commerce, in whole or in part, or wilfully or knowingly converts the same to his own use or to the use of another, shall be deemed guilty of a felony and upon conviction shall be fined not less than $500 or confined in the penitentiary not less than one year nor more than ten years, or both, in the discretion of the court.

Prosecutions hereunder may be in the district court of the

United States for the district wherein the offense may have been committed.

That nothing in this section shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any state shall be a bar to any prosecution hereunder for the same act or acts.

Section 9 Clayton Act.

§ 504. **Certain Contracts of Common Carriers Must Be Let by Competitive Bids.**—That after two years from the approval of this act no common carrier engaged in commerce shall have any dealings in securities, supplies or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership or association when the said common carrier shall have upon its board of directors or as its president, manager or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent any one from bidding or shall do any act to prevent free and fair competition among the bidders or those desiring to bid shall be punished as prescribed in this section in the case of an officer or director.

Every such common carrier having any such transactions or making any such purchases shall within thirty days after making the same file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations

and the members of the firm or partnership bidding; and whenever the said Commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney-General.

If any common carrier shall violate this section it shall be fined not exceeding $25,000; and every such director, agent, manager or officer thereof who shall have knowingly voted for or directed the act constituting such violation or who shall have aided or abetted in such violation shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000, or confined in jail not exceeding one year, or both, in the discretion of the court.

Section 10 Clayton Act.

§ 505. **Authority to Enforce Certain Provisions of Act Vested in Interstate Commerce Commission, Federal Reserve Board and Federal Trade Commission.**—That authority to enforce compliance with sections two, three, seven and eight of this act by the persons respectively subject thereto is hereby vested; in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Par. 1, Sec. 11 Clayton Act.

§ 506. **Procedure for Hearings by Boards Vested with Jurisdiction under Act.**—Whenever the Commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the Commission or board, to intervene and appear in said proceeding by

counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or board. If upon such hearing the Commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the Commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

Par. 2, Sec. 11 Clayton Act.

§ 507. **Effect of the Orders of Boards.**—If such person fails or neglects to obey such order of the Commission or board while the same is in effect, the Commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission or board. The findings of the Commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the

Commission or board, the court may order such additional evidence to be taken before the Commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon *certiorari* as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the Commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the Commission or board be set aside. A copy of such petition shall be forthwith served upon the Commission or board, and thereupon the Commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or board as in the case of an application by the Commission or board for the enforcement of its order, and the findings of the Commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

Paragraphs 3 and 4 Section 11 Clayton Act.

§ 508. **Judicial Proceedings to Enforce the Orders of the Boards.**—The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the Commission or board shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the Anti-Trust Acts.

Complaints, orders, and other processes of the Commission or board under this section may be served by anyone duly author-

ized by the Commission or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of same.

Paragraphs 5 to 7 Sec. 11 Clayton Act.

§ 509. **Venue of Suits.**—That any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all processes in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

Section 12 Clayton Act.

§ 510. **Attendance of Witnesses.**—That in any suit, action, or proceeding brought by or on behalf of the United States subpœnas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the anti-trust laws may run into any other district: *Provided,* That in civil cases no writ of subpœnas shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without permission of the trial court being first had upon proper application and cause shown.

Sec. 13 Clayton Act.

§ 511. **Guilt of Corporation Deemed Guilt of Officers.**—That whenever a corporation shall violate any of the penal provisions of the anti-trust laws, such violation shall be deemed to be also that of the individual directors, officers or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction thereof of any such director, officer, or agent he shall be pun-

ished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, by both, in the discretion of the court.

Sec. 14 Clayton Act.

§ 512. **District Courts Invested with Jurisdiction to Prevent Violations of the Act.**—That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpœnas to that end may be served in any district by the marshal thereof.

Sec. 15 Clayton Act.

§ 513. **Private Persons May Obtain Injunctive Relief, When.**—That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections two, three, seven and eight of this act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the

provisions of the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

Sec. 16 Clayton Act.

§ 514. **Procedure in the Issuance of Temporary Restraining Orders.**—That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

Section two hundred and sixty-three of an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby repealed.

Nothing in this section contained shall be deemed to alter, repeal, or amend section two hundred and sixty-six of an act en-

titled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

Sec. 17 Clayton Act.

§ 515. **Security before Issuing Restraining Orders When Required.**—That, except as otherwise provided in section 16 of this act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

Sec. 18 Clayton Act.

§ 516. **What Injunction Orders Shall Contain.**—That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same.

Sec. 19 Clayton Act.

§ 517. **Injunctions in Suits between Employer and Employee.**—That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuad-

ing others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Sec. 20 Clayton Act.

It will be noted that this section is by its terms limited to cases between "employer and employees" or persons seeking employment, and then only when the case does not involve irreparable injury to property or to a property right. Par. 2 of the Section permits the doing of certain acts which some courts have held to be illegal. Sec. 486 *supra*.

§ 518. **Disobedience of Orders of Court.**—That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any state in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

Sec. 21 of Clayton Act.

§ 519. **Same Subject, Procedure Prescribed.**—That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein

sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however*, That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, of if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

Par. 1, Sec. 22 Clayton Act.

§ 520. **Right to a Trial by Jury Provided for.**—In all cases within the purview of this act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months: *Provided,* That in any case the court or a

judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance.

Paragraphs 2 and 3 Sec. 22 Clayton Act.

The use of the word demand would seem to give an absolute right of trial by jury, and the only discretion left to the judge is to decide whether the jury shall be impaneled from "jurors then in attendance" or from others "to be selected and summoned."

§ 521. **Review of Convictions for Violation of Court Orders.**—That the evidence taken upon the trial of any person so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge of any district court of the United States or any court of the District of Columbia.

Section 23 Clayton Act.

§ 522. **Provision for Trial for Disobedience to Orders of Court Not Applicable to Contempt Committed in the Presence of the Court.**—That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this act, may be punished in conformity to the usages at law and in equity now prevailing.

Sec. 24 Clayton Act.

§ 523. **Limitation in Proceedings for Contempt.**—That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this act.

Sec. 25 Clayton Act.

§ 524. **That Part of the Act Invalid, Not to Affect Validity of Other Portions.**—That if any clause, sentence, paragraph, or part of this act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Section 26 Clayton Act.

APPENDIX A.

[PUBLIC—No. 203—63d CONGRESS.]

[H. R. 15613.]

AN ACT to create a Federal Trade Commission, to define its power and duties, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a Commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the Commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the Commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The Commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the Commission shall not impair the right of the remaining commissioners to exercise all the powers of the Commission.

The Commission shall have an official seal, which shall be judicially noticed.

Sec. 2. That each commissioner shall receive a salary of $10,000 a year, payable in the same manner as the salaries of the judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive a salary of $5,000 a year, payable in like manner, and it shall have authority to employ and fix the compensation of such attorneys, special experts, examiners, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.

With the exception of the secretary, a clerk to each commissioner, the attorneys, and such special experts and examiners as the Commission may from time to time find necessary for the conduct of its work, all employees of the Commission shall be a part of the classified civil service, and shall enter the service under such rules and regulations as may be prescribed by the Commission and by the Civil Service Commission.

All of the expenses of the Commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Commission.

Until otherwise provided by law, the Commission may rent suitable offices for its use.

The Auditor for the state and other Departments shall receive and examine all accounts of expenditures of the Commission.

Sec. 3. That upon the organization of the Commission and election of its chairman, the Bureau of Corporations and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist; and all pending investigations and proceedings of the Bureau of Corporations shall be continued by the Commission.

All clerks and employees of the said bureau shall be transferred to and become clerks and employees of the Commission at their present grades and salaries. All records, papers, and property of the said bureau shall become records, papers, and property of the Commission, and all unexpended funds and appropriations for the use and maintenance of the said bureau, including any allotment already made to it by the Secretary of Commerce from the contingent appropriation for the Department of Commerce for the fiscal year nineteen hundred and fifteen, or from the departmental printing fund for the fiscal year nineteen hundred and fifteen, shall become funds and appropriations available to be expended by the Commission in the exercise of the powers, authority, and duties conferred on it by this act.

The principal office of the Commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The Commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

Sec. 4. That the words defined in this section shall have the following meaning when found in this act, to wit:

"Commerce" means commerce among the several states or with foreign nations, or in any territory of the United States or in the District of Columbia, or between any such territory and another, or between any such territory and any state or foreign nation, or between the District of Columbia and any state or territory or foreign nation.

"Corporation" means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnership, which is organized to carry on business for its own profit or that of its members.

"Documentary evidence" means all documents, papers, and correspondence in existence at and after the passage of this act.

"Acts to regulate commerce" means the act entitled "An act to regulate commerce," approved February fourteenth, eighteen hundred and eighty-seven, and all acts amendatory thereof and supplementary thereto.

"Anti-trust acts" means the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; also the sections seventy-three to seventy-seven, inclusive, of an act entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes," approved August twenty-seventh, eighteen hundred and ninety-four; and also the act entitled "An act to amend sections seventy-three and seventy-six of the act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen.

Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using

any unfair method of competition in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition in question is prohibited by this act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the Commission while the same is in effect, the Commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its orders, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the pro-

ceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission. The findings of the Commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon *certiorari* as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the Commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission as in the case of an application by the Commission for the enforcement of its order, and the findings of the Commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the Commission shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in

every way expedited. No order of the Commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the Anti-Trust Acts.

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

Sec. 6. That the Commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the act to regulate commerce, or any class of them, or any of them, respectively, to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe, unless additional time be granted in any case by the Commission.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the Anti-Trust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney-General it shall be its duty to make such investigation. It shall transmit to the Attorney-General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the Commission.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the Anti-Trust Acts by any corporation.

(e) Upon the application of the Attorney-General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the Anti-Trust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this act.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

Sec. 7. That in any suit in equity brought by or under the direction of the Attorney-General as provided in the Anti-Trust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the Commission, as a master in chan-

cery, to ascertain and report an appropriate form of decree therein. The Commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.

Sec. 8. That the several departments and bureaus of the Government when directed by the President shall furnish the Commission, upon its request, all the records, papers, and information in their possession relating to any corporation subject to any of the provisions of this act, and shall detail from time to time such officials and employees to the Commission as he may direct.

Sec. 9. That for the purposes of this act the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the Commission shall have power to require by subpœna the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpœnas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touch-

ing the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney-General of the United States, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this act or any order of the Commission made in pursuance thereof.

The Commission may order testimony to be taken by deposition in any proceeding or investigation pending under this act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the Commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the Commission or in obedience to the subpœna of the Commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the Commission in obedience to a subpœna issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Sec. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce

documentary evidence, if in his power to do so, in obedience to the subpœna or lawful requirement of the Commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this act, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the Commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any corporation required by this act to file any annual or special report shall fail so to do within the time fixed by the Commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Any officer or employee of the Commission who shall make public any information obtained by the Commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

Sec. 11. Nothing contained in this act shall be construed to prevent or interfere with the enforcement of the provisions of the Anti-Trust Acts or the act to regulate commerce, nor shall anything contained in the act be construed to alter, modify, or repeal the said Anti-Trust acts or the acts to regulate commerce or any part or parts thereof.

Approved, September 26, 1914.

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APPENDIX B.

SAFETY APPLIANCE ACTS.

AN ACT to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Sec. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

Sec. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not pro-

vided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

Sec. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

Sec. 6. (*As amended April 1, 1896.*) That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: *Provided*, That nothing in this act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does

not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

Sec. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

Sec. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

Public, No. 113, approved March 2, 1893, amended April 1, 1896.

NOTE.—Prescribed standard height of drawbars: Standard-gauge roads, 34½ inches; narrow-gauge roads, 26 inches; maximum variation between loaded and empty cars, 3 inches.

APPENDIX C.

An ACT to amend an act entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions and requirements of the act entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, or which are used upon street railways.

Sec. 2. That whenever, as provided in said act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their breaks so used

and operated; and, to more fully carry into effect the objects of said act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

Sec. 3. That the provisions of this act shall not take effect until September first, nineteen hundred and three. Nothing in this act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States district attorney from any of the provisions, powers, duties, liabilities, or requirements of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements, and liabilities of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this act, apply to this act.

Public, No. 133, approved March 2, 1903.

APPENDIX D

AN ACT To supplement "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes and for other purposes," and other safety appliance Acts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to every common carrier and every vehicle subject to the act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, commonly known as the "Safety Appliance Acts."

Sec. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this act to haul, or permit to be hauled or used on its line any car subject to the provisions of this act not equipped with appliances provided for in this act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: *Provided,* That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

Sec. 3. That within six months from the passage of this act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this act and section four of the act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this act by such means as the Commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said Commission shall remain as the standards of equip-

ment to be used on all cars subject to the provisions of this act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this act: *Provided,* That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this act. Said Commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the Commission.

Sec. 4. That any common carrier subject to this act using, hauling, or permitting to be used or hauled on its line any car subject to the requirements of this act not equipped as provided in this act shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six: *Provided,* That where any car shall have been properly equipped, as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this act or section six of the act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs can not be made except at such repair point; and such movement or hauling of such car shall be at

the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this act and the other acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or "perishable" freight.

Sec. 5 That except that, within the limits specified in the preceding section of this act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in this act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements of said act of March second, eighteen hundred and ninety-three, as amended by the acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three; and, except as aforesaid, all of the provisions, powers, duties, requirements, and liabilities of said act of March second, eighteen hundred and ninety-three, as amended by the acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, shall apply to this act.

Sec. 6. That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this act, and all powers heretofore granted to said Commission are hereby extended to it for the purpose of the enforcement of this act.

That the jurisdiction of the Interstate Commerce Commission to extend the period within which any common carrier shall comply with the provisions of section three of the act entitled "An act to supplement 'An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' and other safety-ap-

pliance acts, and for other purposes," approved April fourteenth, nineteen hundred and ten, shall apply to cars actually placed in service between the date of the passage of said act and the first day of July, nineteen hundred and eleven, in the same manner and to the same extent that it applies to cars actually in service upon the date of the passage of said act. [36 Stat. L., 1397.]

Public, No. 133, approved April 14, 1910; Public, No. 525, approved March 4, 1911.

Sundry civil act (appropriations) of June 28, 1902, authorizes Commission to employ "inspectors to execute and enforce the requirements of the safety-appliance act."

APPENDIX E

ACCIDENT REPORTS ACT.

AN ACT requiring common carriers engaged in interstate and foreign commerce to make full reports of all accidents to the Interstate Commerce Commission, and authorizing investigations thereof by said Commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be the duty of the general manager, superintendent, or other proper officer of every common carrier engaged in interstate or foreign commerce by railroad to make to the Interstate Commerce Commission, at its office in Washington, District of Columbia, a monthly report, under oath, of all collisions, derailments, or other accidents resulting in injury to persons, equipment, or roadbed arising from the operation of such railroad under such rules and regulations as may be prescribed by the said Commission, which report shall state the nature and causes thereof and the circumstances connected therewith: *Provided,* That hereafter all said carriers shall be relieved from the duty of reporting accidents in their annual financial and operating reports made to the Commission.

Sec. 2. That any common carrier failing to make such report within thirty days after the end of any month shall be deemed guilty of a misdemeanor, and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not more than one hundred dollars for each and every offense and for every day during which it shall fail to make such report after the time herein specified for making the same.

Sec. 3. That the Interstate Commerce Commission shall have authority to investigate all collisions, derailments, or other accidents resulting in serious injury to person or to the property of a railroad occurring on the line of any common carrier engaged in interstate or foreign commerce by railroad. The Commission, or any impartial investigator thereunto authorized by said Commission, shall have authority to investigate such collisions, derailments, or other accidents aforesaid, and all the attending facts, conditions, and circumstances, and for that pur-

pose may subpœna witnesses, administer oaths, take testimony, and require the production of books, papers, orders, memoranda, exhibits, and other evidence, and shall be provided by said carriers with all reasonable facilities: *Provided,* That when such accident is investigated by a Commission of the state in which it occurred, the Interstate Commerce Commission shall, if convenient, make any investigation it may have previously determined upon, at the same time as, and in connection with, the state Commission investigation. Said Commission shall, when it deems it to the public interest, make reports of such investigations, stating the cause of accident, together with such recommendations as it deems proper. Such reports shall be made public in such manner as the Commission deems proper.

Sec. 4. That neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation.

Sec. 5. That the Interstate Commerce Commission is authorized to prescribe for such common carriers a method and form for making the reports hereinbefore provided.

Sec. 6. That the act entitled "An act requiring common carriers engaged in interstate commerce to make full reports of all accidents to the Interstate Commerce Commission," approved March third, nineteen hundred and one, is hereby repealed.

Sec. 7. That the term "interstate commerce," as used in this act, shall include transportation from any state or territory or the District of Columbia to any other state or territory or the District of Columbia, and the term "foreign commerce," as used in this act, shall include transportation from any state or territory or the District of Columbia to any foreign country and from any foreign country to any state or territory or the District of Columbia.

Sec. 8. That this act shall take effect sixty days after its passage.

Public, No. 165, approved May 6, 1910.

APPENDIX F

MEDALS OF HONOR ACT.

AN ACT to promote the security of travel upon railroads engaged in interstate commerce, and to encourage the saving of life.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and he is hereby, authorized to cause to be prepared bronze medals of honor, with suitable emblematic devices, which shall be bestowed upon any persons who shall hereafter, by extreme daring, endanger their own lives in saving, or endeavoring to save, lives from any wreck, disaster, or grave accident, or in preventing or endeavoring to prevent such wreck, disaster, or grave accident, upon any railroad within the United States engaged in interstate commerce: *Provided,* That no award of said medal shall be made to any person until sufficient evidence of his deserving shall have been furnished and placed on file, under such regulations as may be prescribed by the President of the United States.

Sec. 2. That the President of the United States be, and he is hereby, authorized to issue to any person to whom a medal of honor may be awarded under the provisions of this act a rosette or knot, to be worn in lieu of the medal, and a ribbon to be worn with the medal; said rosette or knot and ribbon to be each of a pattern to be prescribed by the President of the United States: *Provided,* That whenever a ribbon issued under the provisions of this act shall have been lost, destroyed, or rendered unfit for use without fault or neglect on the part of the person to whom it was issued, a new ribbon shall be issued to such person without charge therefor.

Sec. 3. That the appropriations for the enforcement and execution of the provisions of the acts to promote the safety of employees and travelers upon railroads are hereby made available for carrying out the provisions of this act.

Public, No. 98, approved February 23, 1905.

REGULATIONS Governing the award of life-saving medals under the foregoing Act. Made by the Presidents of the United States on March 29, 1905.

1. Applications for medals under this act should be addressed to and filed with the Interstate Commerce Commission, at the city of Washington, D. C. Satisfactory evidence of the facts upon which the application is based must be filed in each case. This evidence should be in the form of affidavits made by eye-witnesses, of good repute and standing, testifying of their own knowledge. The opinion of witnesses that the person for whom an award is sought acted with extreme daring and endangered his life is not sufficient, but the affidavits must set forth the facts in detail and show clearly in what manner and to what extent life was endangered and extreme daring exhibited. The railroad upon which the incident occurred, the date, time of day, condition of the weather, the names of all persons present when practicable, and other pertinent circumstances should be stated. The affidavits should be made before an officer duly authorized to administer oaths and be accompanied by the certificate of some United States official of the district in which the affiants reside, such as a judge or clerk of United States court, district attorney, or postmaster, to the effect that the affiants are reputable and creditable persons. If the affidavits are taken before an officer without an official seal his official character must be certified by the proper officer of a court of record under the seal thereof.

2. Applications for medals, together with all affidavits and other evidence received in connection therewith, shall be referred to a committee of five persons, consisting of the secretary of the Commission, the chief inspector of safety appliances, two inspectors of safety appliances designated by the Commission, and the clerk of the safety-appliance examining board, who shall act as clerk of the committee. This committee shall carefully consider each application presented and, after thoroughly weighing the evidence, shall prepare an abstract or brief covering the case and file the same, together with the committee's recommendation, with the Commission, which brief and recommendation shall be transmitted by the Commission to the President for his approval. The committee may, with the approval of the Commission, direct any inspector of safety appliances in the employ of the Commission to proceed to the locality where the service was performed for which a medal is claimed, and make a personal investigation and report upon the facts of the case, which

report shall be filed and made a part of the evidence considered by the committee.

3. Upon final approval of the committee's recommendation by the President the Commission shall take such measures to carry the recommendation into effect as the President may direct.

4. The Commission shall cause designs to be prepared for the medal, rosette, and ribbon provided for by the act, which designs shall be submitted to the President for his approval.

APPENDIX G

HOURS OF SERVICE ACT.

AN ACT to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any territory of the United States, or from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.

Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: *Provided,* That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or

affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: *Provided further*, The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

SEC. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: *Provided*, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen: *Provided further*, That the provisions of this act shall not apply to the crews of wrecking or relief trains.

SEC. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this act, and all

powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act.

Sec. 5. That this act shall take effect and be in force one year after its passage.

Public, No. 274, approved March 4, 1907, 11.50 a. m.

APPENDIX H.

ASH-PAN ACT.

AN ACT to promote the safety of employees on railroads.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That on and after the first day of January, nineteen hundred and ten, it shall be unlawful for any common carrier engaged in interstate or foreign commerce by railroad to use any locomotive in moving interstate or foreign traffic, not equipped with an ash pan, which can be dumped or emptied and cleaned without the necessity of any employee going under such locomotive.

Sec. 2. That on and after the first day of January, nineteen hundred and ten, it shall be unlawful for any common carrier by railroad in any territory of the United States or the District of Columbia to use any locomotive not equipped with an ash pan, which can be dumped or emptied and cleaned without the necessity of any employee going under such locomotive.

Sec. 3. That any such common carrier using any locomotive in violation of any of the provisions of this act shall be liable to a penalty of two hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proped district attorneys information of any such violations as may come to its knowledge.

Sec. 4. That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this act, and all powers heretofore granted to said Commission are hereby extended to it for the purpose of the enforcement of this act.

Sec. 5. That the term "common carrier" as used in this Act shall include the receiver or receivers or other persons or cor-

porations charged with the duty of the management and operation of the business of a common carrier.

Sec. 6. That nothing in this act contained shall apply to any locomotive upon which, by reason of the use of oil, electricity, or other such agency, an ash pan is not necessary.

Public, No. 165, approved May 30, 1908.

APPENDIX I.

TRANSPORTATION OF EXPLOSIVES ACT.

AN ACT to promote the safe transportation in interstate commerce of explosives and other dangerous articles, and to provide penalties for its violation.

By an act entitled "An act to codify, revise, and amend the penal laws of the United States," approved March 4, 1909, to take effect and be in force on and after the first day of January, 1910, the act entitled "An act to promote the safe transportation in interstate commerce of explosives and other dangerous articles, and to provide penalties for its violation," approved May 30, 1908, is repealed, and the following sections of said Act to codify, revise, and amend the penal laws of the United States are substituted therefor:

Sec. 232. It shall be unlawful to transport, carry, or convey, any dynamite, gunpowder, or other explosives, between a place in a foreign country and a place within or subject to the jurisdiction of the United States, or between a place in any state, territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, and a place in any other state, territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, on any vessel or vehicle of any description operated by a common carrier, which vessel or vehicle is carrying passengers for hire: *Provided*, That it shall be lawful to transport on any such vessel or vehicle small arms ammunition in any quantity, and such fuses, torpedoes, rockets, or other signal devices, as may be essential to promote safety in operation, and properly packed and marked samples of explosives for laboratory examination, not exceeding a net weight of one-half pound each, and not exceeding twenty samples at one time in a single vessel or vehicle; but such samples shall not be carried in that part of a vessel or vehicle which is intended for the transportation of passengers for hire: *Provided further*, That nothing in this section shall be construed to prevent the transportation of military or naval forces with their accompanying munitions of war on passenger equipment vessels or vehicles.

Sec. 233. The Interstate Commerce Commission shall formulate regulations for the safe transportation of explosives, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives by land. Said Commission, of its own motion, or upon application made by any interested party, may make changes or modifications in such regulations, made desirable by new information or altered conditions. Such regulations shall be in accord with the best known practicable means for securing safety in transit, covering the packing, marking, loading, handling while in transit, and the precautions necessary to determine whether the material when offered is in proper condition to transport. Such regulations, as well as all changes or modifications thereof, shall take effect ninety days after their formulation and publication by said Commission and shall be in effect until reversed, set aside, or modified.

Sec. 234. It shall be unlawful to transport, carry, or convey, liquid nitroglycerin, fulminate in bulk in dry condition, or other like explosive, between a place in a foreign country and a place within or subject to the jurisdiction of the United States, or between a place in one state, territory, or District of the United States, or a place noncontiguous to but subject to the jurisdiction thereof, and a place in any other state, territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, on any vessel or vehicle of any description operated by a common carrier in the transportation of passengers or articles of commerce by land or water.

Sec. 235. Every package containing explosives or other dangerous articles when presented to a common carrier for shipment shall have plainly marked on the outside thereof the contents thereof; and it shall be unlawful for any person to deliver, or cause to be delivered, to any common carrier engaged in interstate or foreign commerce by land or water, for interstate or foreign transportation, or to carry upon any vessel or vehicle engaged in interstate or foreign transportation, any explosive, or other dangerous article, under any false or deceptive marking, description, invoice, shipping order, or other declaration, or without informing the agent of such carrier of the true character thereof, at or before the time such delivery or carriage is made. Whoever shall knowingly violate, or cause to be violated, any provision of this section, or of the three sections last preceding, or any

regulation made by the Interstate Commerce Commission in pursuance thereof, shall be fined not more than two thousand dollars, or imprisoned not more than eighteen months, or both.

Sec. 236. When the death or bodily injury of any person is caused by the explosion of any article named in the four sections last preceding, while the same is being placed upon any vessel or vehicle to be transported in violation thereof, or while the same is being so transported, or while the same is being removed from such vessel or vehicle, the person knowingly placing, or aiding or permitting the placing, of such articles upon any such vessel or vehicle, to be so transported, shall be imprisoned not more than ten years.

Public, No. 350, approved March 4, 1909.

APPENDIX J.

BOILER INSPECTION ACT.

AN ACT to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia, or in any territory of the United States, or from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this act shall include all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and the term "employees" as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.

Sec. 2. That from and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any common carrier, its officers or agents, subject to this act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless, the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

Sec. 3. That there shall be appointed by the President, by and with the advice and consent of the Senate, a chief inspector and

two assistant chief inspectors of locomotive boilers, who shall have general superintendence of the inspectors hereinafter provided for, direct them in the duties hereby imposed upon them, and see that the requirements of this act and the rules, regulations, and instructions made or given hereunder are observed by common carriers subject hereto. The said chief inspector and his two assistants shall be selected with reference to their practical knowledge of the construction and repairing of boilers, and to their fitness and ability to systematize and carry into effect the provisions hereof relating to the inspection and maintenance of locomotive boilers. The chief inspector shall receive a salary of four thousand dollars per year and the assistant chief inspectors shall each receive a salary of three thousand dollars per year; and each of the three shall be paid his traveling expenses incurred in the performance of his duties. The office of the chief inspector shall be in Washington, District of Columbia, and the Interstate Commerce Commission shall provide such stenographic and clerical help as the business of the offices of the chief inspector and his said assistants may require.

Sec. 4. That immediately after his appointment and qualification the chief inspector shall divide the territory comprising the several states, the territories of New Mexico and Arizona, and the District of Columbia into fifty locomotive boiler-inspection districts, so arranged that the service of the inspector appointed for each district shall be most effective, and so that the work required of each inspector shall be substantially the same. Thereupon there shall be appointed by the Interstate Commerce Commission fifty inspectors of locomotive boilers. Said inspectors shall be in the classified service and shall be appointed after competitive examination according to the law and the rules of the Civil Service Commission governing the classified service. The chief inspector shall assign one inspector so appointed to each of the districts hereinbefore named. Each inspector shall receive a salary of one thousand eight hundred dollars per year and his traveling expenses while engaged in the performance of his duty. He shall receive in addition thereto an annual allowance for office rent, stationery, and clerical assistance, to be fixed by the Interstate Commerce Commission, but not to exceed in the case of any district inspector six hundred dollars per year. In order to obtain the most competent inspectors possible, it shall be the

duty of the chief inspector to prepare a list of questions to be propounded to applicants with respect to construction, repair, operation, testing, and inspection of locomotive boilers, and their practical experience in such work, which list, being approved by the Interstate Commerce Commission, shall be used by the Civil Service Commission as a part of its examination. No person interested, either directly or indirectly, in any patented article required to be used on any locomotive under supervision or who is intemperate in his habits shall be eligible to hold the office of either chief inspector or assistant or district inspector.

Sec. 5. That each carrier subject to this act shall file its rules and instructions for the inspection of locomotive boilers with the chief inspector within three months after the approval of this act, and after hearing and approval by the Interstate Commerce Commission, such rules and instructions, with such modifications as the Commission requires, shall become obligatory upon such carrier: *Provided, however,* That if any carrier subject to this act shall fail to file its rules and instructions the chief inspector shall prepare rules and instructions not inconsistent herewith for the inspection of locomotive boilers, to be observed by such carrier; which rules and instructions, being approved by the Interstate Commerce Commission, and a copy thereof being served upon the president, general manager, or general superintendent of such carrier, shall be obligatory, and a violation thereof punished as hereinafter provided: *Provided also,* That such common carrier may from time to time change the rules and regulations herein provided for, but such change shall not take effect and the new rules and regulations be in force until the same shall have been filed with and approved by the Interstate Commerce Commission. The chief inspector shall also make all needful rules, regulations, and instructions not inconsistent herewith for the conduct of his office and for the government of the district inspectors: *Provided, however,* That all such rules and instructions shall be approved by the Interstate Commerce Commission before they take effect.

Sec. 6. That it shall be the duty of each inspector to become familiar, so far as practicable, with the condition of each locomotive boiler ordinarily housed or repaired in his district, and if any locomotive is ordinarily housed or repaired in two or more districts, then the chief inspector or an assistant shall make such

division between inspectors as will avoid the necessity for duplication of work. Each inspector shall make such personal inspection of the locomotive boilers under his care from time to time as may be necessary to fully carry out the provisions of this act, and as may be consistent with his other duties, but he shall not be required to make such inspections at stated times or at regular intervals. His first duty shall be to see that the carriers make inspections in accordance with the rules and regulations established or approved by the Interstate Commerce Commission, and that carriers repair the defects which such inspections disclose before the boiler or boilers or appurtenances pertaining thereto are again put in service. To this end each carrier subject to this Act shall file with the inspector in charge, under the oath of the proper officer or employee, a duplicate of the report of each inspection required by such rules and regulations, and shall also file with such inspector, under the oath of the proper officer or employee, a report showing the repair of the defects disclosed by the inspection. The rules and regulations hereinbefore provided for shall prescribe the time at which such reports shall be made. Whenever any district inspector shall, in the performance of his duty, find any locomotive boiler or apparatus pertaining thereto not conforming to the requirements of the law or the rules and regulations established and approved as hereinbefore stated, he shall notify the carrier in writing that the locomotive is not in serviceable condition, and thereafter such boiler shall not be used until in serviceable condition: *Provided,* That a carrier, when notified by an inspector in writing that a locomotive boiler is not in serviceable condition because of defects set out and described in said notice, may, within five days after receiving said notice, appeal to the chief inspector by telegraph or by letter to have said boiler re-examined, and upon receipt of the appeal from the inspector's decision the chief inspector shall assign one of the assistant chief inspectors or any district inspector other than the one from whose decision the appeal is taken to reexamine and inspect said boiler within fifteen days from date of notice. If upon such reexamination the boiler is found in serviceable condition, the chief inspector shall immediately notify the carrier in writing, whereupon such boiler may be put into service without further delay; but if the reexamination of said boiler sustains the decision of the district inspector, the chief in-

spector shall at once notify the carrier owning or operating such locomotive that the appeal from the decision of the inspector is dismissed, and upon the receipt of such notice the carrier may, within thirty days, appeal to the Interstate Commerce Commission, and upon such appeal, and after hearing, said Commission shall have power to revise, modify, or set aside such action of the chief inspector and declare that said locomotive is in serviceable condition and authorize the same to be operated: *Provided further,* That pending either appeal the requirements of the inspector shall be effective.

Sec. 7. That the chief inspector shall make an annual report to the Interstate Commerce Commission of the work done during the year, and shall make such recommendations for the betterment of the service as he may desire.

Sec. 8. That in the case of accident resulting from failure from any cause of a locomotive boiler or its appurtenances, resulting in serious injury or death to one or more persons, a statement forthwith must be made in writing of the fact of such accident, by the carrier owning or operating said locomotive, to the chief inspector; whereupon the facts concerning such accident shall be investigated by the chief inspector or one of his assistants, or such inspector as the chief inspector may designate for that purpose. And where the locomotive is disabled to the extent that it can not be run by its own steam, the part or parts affected by the said accident shall be preserved by said carrier intact, so far as possible, without hindrance or interference to traffic until after said inspection. The chief inspector or an assistant or the designated inspector making the investigation shall examine or cause to be examined thoroughly the boiler or part affected, making full and detailed report of the cause of the accident to the chief inspector.

The Interstate Commerce Commission may at any time call upon the chief inspector for a report of any accident embraced in this section, and upon the receipt of said report, if it deems it to the public interest, make reports of such investigations, stating the cause of accident, together with such recommendations as it deems proper. Such reports shall be made public in such manner as the Commission deems proper. Neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or

action for damages growing out of any matter mentioned in said report or investigation.

Sec. 9. That any common carrier violating this act or any rule or regulation made under its provisions or any lawful order of any inspector shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such attorneys, subject to the direction of the Attorney-General, to bring such suits upon duly verified information being lodged with them, respectively, of such violations having occurred; and it shall be the duty of the chief inspector of locomotive boilers to give information to the proper United States attorney of all violations of this act coming to his knowledge.

Sec. 10. That the total amounts directly appropriated to carry out the provisions of this act shall not exceed for any one fiscal year the sum of three hundred thousand dollars.

Public, No. 383, approved February 17, 1911.

APPENDIX K.

EMPLOYER'S LIABILITY ACT.

An ACT relating to the liability of common carriers by railroad to their employees in certain cases.

(Act of 1908, as amended by the Act of April 5, 1910.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia, or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents, and if none, then to the next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment.

Sec. 2. That every common carrier by railroad in the territories, the District of Columbia, the Panama Zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or in case of the death of such employee, to his or her personal representatives, for the benefit of the surviving widow or husband and chidlren of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its

cars, engines, appliances, machinery, track, road-bed, works, boats, wharves or other equipment.

SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of the provisions of this act to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided, however*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employees shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, or relief benefit, or indemnity that may have been paid to the injured employee, or the person entitled thereto, on account of the injury or death for which said action was brought.

"SEC. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

"Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States

under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

Sec. 7. That the term "common carrier" as used in this act shall include the receiver or receivers, or other persons or corporations charged with the duty of the management of the business of a common carrier.

Sec. 8. That nothing in this act shall be held to limit the duty or liability of common carriers or impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress, entitled "An act relating to liability of common carriers in the District of Columbia and territories, and to common carriers engaged in commerce between the states and between the states and foreign nations to their employees," approved June 11, 1906.

"Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

Section 6 amended and Section 9 added by Amendment of 1910.

APPENDIX L.

[PUBLIC—No. 6.]

[s. 2517.]

AN ACT providing for mediation, conciliation, and arbitration in controversies between certain employers and their employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to any common carrier or carriers and their officers, agents, and employees, except masters of vessels and seamen, as defined in section forty-six hundred and twelve, Revised Statutes of the United States, engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, for a continuous carriage or shipment from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States.

The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

The term "employees" as used in this act shall include all persons actually engaged in any capacity in train operation or train service of any description, and notwithstanding that the cars upon or in which they are employed may be held and operated by the carrier under lease or other contract: *Provided, however*, That this act shall not be held to apply to employees of street railroads and shall apply only to employees engaged in railroad train service. In every such case the carrier shall be responsible for the acts and defaults of such employees in the same manner and to the same extent as if said cars were owned by it and said employees directly employed by it, and any provi-

sions to the contrary of any such lease or other contract shall be binding only as between the parties thereto and shall not affect the obligations of said carrier either to the public or to the private parties concerned.

A common carrier subject to the provisions of this act is hereinafter referred to as an "employer," and the employees of one or more of such carriers are hereinafter referred to as "employees."

Sec. 2. That whenever a controversy concerning wages, hours of labor, or conditions of employment shall arise between an employer or employers and employees subject to this act interrupting or threatening to interrupt the business of said employer or employers to the serious detriment of the public interest, either party to such controversy may apply to the Board of Mediation and Conciliation created by this act and invoke its services for the purpose of bringing about an amicable adjustment of the controversy; and upon the request of either party the said board shall with all practicable expedition put itself in communication with the parties to such controversy and shall use its best efforts, by mediation and conciliation, to bring them to an agreement; and if such efforts to bring about an amicable adjustment through mediation and conciliation shall be unsuccessful, the said board shall at once endeavor to induce the parties to submit their controversy to arbitration in accordance with the provisions of this act.

In any case in which an interruption of traffic is imminent and fraught with serious detriment to the public interest, the Board of Mediation and Conciliation may, if in its judgment such action seems desirable, proffer its services to the respective parties to the controversy.

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this act either party to the said agreement may apply to the Board of Mediation and Conciliation for an expression of opinion from such board as to the meaning or application of such agreement and the said board shall upon receipt of such request give its opinion as soon as may be practicable.

Sec. 3. That whenever a controversy shall arise between an employer or employers and employees subject to this act, which can not be settled through mediation and conciliation

in the manner provided in the preceding section, such controversy may be submitted to the arbitration of a board of six, or, if the parties to the controversy prefer so to stipulate, to a board of three persons, which board shall be chosen in the following manner: In the case of a board of three, the employer or employers and the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; and the two arbitrators thus chosen shall select the third arbitrator; but in the event of their failure to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Board of Mediation and Conciliation. In the case of a board of six, the employer or employers and the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators, and the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators; but in the event of their failure to name the two arbitrators within fifteen days after their first meeting the said two arbitrators, or as many of them as have not been named, shall be named by the Board of Mediation and Conciliation.

In the event that the employees engaged in any given controversy are not members of a labor organization, such employees may select a committee which shall have the right to name the arbitrator, or the arbitrators, who are to be named by the employees as provided above in this section.

Sec. 4. That the agreement to arbitrate—

First. Shall be in writing;

Second. Shall stipulate that the arbitration is had under the provisions of this act.

Third. Shall state whether the board of arbitration is to consist of three or six members;

Fourth. Shall be signed by duly accredited representatives of the employer or employers and of the employees;

Fifth. Shall state specifically the questions to be submitted to the said board for decision;

Sixth. Shall stipulate that a majority of said board shall be competent to make a valid and binding award;

Seventh. Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board, as provided for in the agreement, within which the said board shall commence its hearings;

Eighth. Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: *Provided,* That this period shall be thirty days unless a different period be agreed to;

Ninth. Shall provide for the date from which the award shall become effective and shall fix the period during which the said award shall continue in force;

Tenth. Shall provide that the respective parties to the award will each faithfully execute the same;

Eleventh. Shall provide that the award and the papers and proceedings, including the testimony relating thereto, certified under the hands of the arbitrators, and which shall have the force and effect of a bill of exceptions, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arises or the arbitration is entered into, and shall be final and conclusive upon the parties to the agreement unless set aside for error of law apparent on the record;

Twelfth. May also provide that any difference arising as to the meaning or the application of the provisions of an award made by a board of arbitration shall be referred back to the same board or to a subcommittee of such board for a ruling, which ruling shall have the same force and effect as the original award; and if any member of the original board is unable or unwilling to serve another arbitrator shall be named in the same manner as such original member was named.

Sec. 5. That for the purposes of this act the arbitrators herein provided for, or either of them, shall have power to administer oaths and affirmations, sign subpœnas, require the attendance and testimony of witnesses, and the production of such books, papers, contracts, agreements, and documents material to a just determination of the matters under investigation as may be ordered by the court; and may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as is provided for in the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, and the amendments thereto.

Sec. 6. That every agreement of arbitration under this act shall be acknowledged by the parties thereto before a notary

public or a clerk of the district or the circuit court of appeals of the United States, or before a member of the Board of Mediation and Conciliation, the members of which are hereby authorized to take such acknowledgments; and when so acknowledged shall be delivered to a member of said board or transmitted to said board to be filed in its office.

When such agreement of arbitration has been filed with the said board, or one of its members, and when the said board, or a member thereof, has been furnished the names of the arbitrators chosen by the respective parties to the controversy, the board, or a member thereof, shall cause a notice in writing to be served upon the said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the board, and advising them of the period within which, as provided in the agreement of arbitration, they are empowered to name such arbitrator or arbitrators.

When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Board of Mediation and Conciliation; and in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this act they shall, at the expiration of such period, notify the Board of Mediation and Conciliation of the arbitrators selected, if any, or of their failure to make or to complete such selection.

If the parties to an arbitration desire the reconvening of a board to pass upon any controversy arising over the meaning or application of an award they shall jointly so notify the Board of Mediation and Conciliation, and shall state in such written notice the question or questions to be submitted to such reconvened board. The Board of Mediation and Conciliation shall thereupon promptly communicate with the members of the board of arbitration or a subcommittee of such board appointed for such purpose pursuant to the provisions of the agreement of arbitration, and arrange for the reconvening of said board or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the board will meet for hearings upon the matters in controversy to be submitted to it.

SEC. 7. That the board of arbitration shall organize and select its own chairman and make all necessary rules for conducting

its hearings; but in its award or awards the said board shall confine itself to findings or recommendations as to the questions specifically submitted to it or matters directly bearing thereon. All testimony before said board shall be given under oath or affirmation, and any member of the board of arbitration shall have the power to administer oaths or affirmations. It may employ such assistants as may be necessary in carrying on its work. It shall, whenever practicable, be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may adjourn for its deliberations. The board of arbitration shall furnish a certified copy of its awards to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the testimony taken at the hearings, certified under the hands of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as provided in paragraph eleven of section four of this act. And said board shall also furnish a certified copy of its award, and the papers and proceedings, including the testimony relating thereto, to the Board of Mediation and Conciliation, to be filed in its office.

The United States Commerce Court, the Interstate Commerce Commission, and the Bureau of Labor Statistics are hereby authorized to turn over to the Board of Mediation and Conciliation upon its request any papers and documents heretofore filed with them and bearing upon mediation or arbitration proceedings held under the provisions of the act approved June first, eighteen hundred and ninety-eight, providing for mediation and arbitration.

Sec. 8. That the award, being filed in the clerk's office of a district court of the United States as hereinbefore provided, shall go into practical operation, and judgment shall be entered thereon accordingly at the expiration of ten days from such filing, unless within such ten days either party shall file exceptions thereto for matters of law apparent upon the record, in which case said award shall go into practical operation, and judgment be entered accordingly, when such exceptions shall have been finally disposed of either by said district court or on appeal therefrom.

At the expiration of ten days from the decision of the district court upon exceptions taken to said award as aforesaid judg-

ment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said exceptions and to be decided.

The determination of said circuit court of appeals upon said questions shall be final, and, being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

If exceptions to an award are finally sustained, judgment shall be entered setting aside the award in whole or in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

Nothing in this act contained shall be construed to require an employee to render personal service without his consent, and no injunction or other legal process shall be issued which shall compel the performance by any employee against his will of a contract for personal labor or service.

Sec. 9. That whenever receivers appointed by a Federal court are in possession and control of the business of employers covered by this act the employees of such employers shall have the right to be heard through their representatives in such court upon all questions affecting the terms and conditions of their employment; and no reduction of wages shall be made by such receivers without the authority of the court therefor, after notice to such employees, said notice to be given not less than twenty days before the hearing upon the receivers' petition or application, and to be posted upon all customary bulletin boards along or upon the railway or in the customary places on the premises of other employers covered by this act.

Sec. 10. That each member of the board of arbitration created under the provisions of this act shall receive such compensation as may be fixed by the Board of Mediation and Conciliation, together with his traveling and other necessary expenses. The sum of $25,000, or so much thereof as may be necessary, is hereby appropriated, to be immediately available and to continue available until the close of the fiscal year ending June thirtieth, nineteen hundred and fourteen, for the necessary and proper ex-

penses incurred in connection with any arbitration or with the carrying on of the work of mediation and conciliation, including per diem, traveling, and other necessary expenses of members or employees of boards of arbitration and rent in the District of Columbia, furniture, office fixtures and supplies, books, salaries, traveling expenses, and other necessary expenses of members or employees of the Board of Mediation and Conciliation, to be approved by the chairman of said board and audited by the proper accounting officers of the Treasury.

Sec. 11. There shall be a Commissioner of Mediation and Conciliation, who shall be appointed by the President, by and with the advice and consent of the Senate, and whose salary shall be $7,500 per annum, who shall hold his office for a term of seven years and until a successor qualifies, and who shall be removable by the President only for misconduct in office. The President shall also designate not more than two other officials of the Government who have been appointed by and with the advice and consent of the Senate, and the officials thus designated, together with the Commissioner of Mediation and Conciliation, shall constitute a board to be known as the United States Board of Mediation and Conciliation.

There shall also be an Assistant Commissioner of Mediation and Conciliation, who shall be appointed by the President, by and with the advice and consent of the Senate, and whose salary shall be $5,000 per annum. In the absence of the Commissioner of Mediation and Conciliation, or when that office shall become vacant, the assistant commissioner shall exercise the functions and perform the duties of that office. Under the direction of the Commissioner of Mediation and Conciliation, the assistant commissioner shall assist in the work of mediation and conciliation and when acting alone in any case he shall have the right to take ackowledgments, receive agreements of arbitration, and cause the notices in writing to be served upon the arbitrators chosen by the respective parties to the controversy, as provided for in section five of this act.

The act of June first, eighteen hundred and ninety-eight, relating to the mediation and arbitration of controversies between railway companies and certain classes of their employees is hereby repealed: *Provided*, That any agreement of arbitration which, at the time of the passage of this act, shall have been executed in

accordance with the provisions of said act of June first, eighteen hundred and ninety-eight, shall be governed by the provisions of said act of June first, eighteen hundred and ninety-eight, and the proceedings thereunder shall be conducted in accordance with the provisions of said act.

Approved, July 15, 1913.

APPENDIX M

[PUBLIC—No. 377.]

[H. R. 16450.]

AN ACT to punish the unlawful breaking of seals of railroad cars containing interstate or foreign shipments, the unlawful entering of such cars, the stealing of freight and express packages or baggage or articles in process of transportation in interstate shipment, and the felonious asportation of such freight or express packages or baggage or articles therefrom into another district of the United States, and the felonious possession or reception of the same.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whoever shall unlawfully break the seal of any railroad car containing interstate or foreign shipments of freight or express, or shall enter any such car with intent, in either case, to commit larceny therein; or whoever shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, steamboat, vessel, or wharf, with intent to convert to his own use any goods or chattels moving as, or which are a part of or which constitute, an interstate or foreign shipment of freight or express, or shall buy, or receive, or have in his possession any such goods or chattels, knowing the same to have been stolen; or whoever shall steal or shall unlawfully take, carry away, or by fraud or deception obtain, with intend to convert to his own use, any baggage which shall have come into the possession of any common carrier for transportation from one state or territory or the District of Columbia to another state or territory or the District of Columbia, or to a foreign country, or from a foreign country to any state or territory or the District of Columbia, or shall break into, steal, take, carry away, or conceal any of the contents of such baggage, or shall buy, receive, or have in his possession any such baggage or any article therefrom of whatsoever nature, knowing the same to have been stolen, shall in each case be fined not more than five thousand dollars or imprisoned not more than ten years, or

both, and prosecutions therefor may be instituted in any district wherein the crime shall have been committed. The carrying or transporting of any such freight, express, baggage, goods, or chattels from one state or territory or the District of Columbia into another state or territory or the District of Columbia, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties above described for unlawful taking, and prosecutions therefor may be instituted in any district into which such freight, express, baggage, goods, or chattels shall have been removed or into which they shall have been brought by such offender.

SEC. 2. That nothing in this act shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any state shall be a bar to any prosecution hereunder for the same act or acts.

Approved, February 13, 1913.

APPENDIX N

Act March 1, 1913

AN ACT Divesting intoxicating liquors of their interstate character in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited. Fed. Stat. Ann. 1914 Supp. 208.

EXPLANATORY NOTE.

That the conference rulings of the Interstate Commerce Commission are important to shippers and carriers and are not always available, make proper their insertion here. These are copied just as issued by the Commission.

The rulings of the Commission in conference are announced from time to time through the public press and are later gathered and issued officially by the Commission in the form of bulletins. This is done for the information of shippers and carriers and others interested in transportation matters. They express the views of the Commission on informal inquiries involving special facts or requiring interpretation and construction of the law, and are to be regarded as precedents governing similar cases.

This bulletin contains all the rulings in conference promulgated by the Commission since it adopted the practice of publishing its rulings, and takes the place of previous bulletins. The numbers assigned to the several rulings as reported in previous bulletins have been retained.

It will be observed that some rulings, in the light of a wider knowledge of the subjects involved, have been overruled while others have been modified or withdrawn. To avoid confusion and for historical and other more practical reasons, it has been found desirable to retain all such rulings in this bulletin in their original form and under the numbers previously assigned to them. In such cases the modification or other subsequent expression by the Commission on the subject matter of the ruling is shown by the annotations.

For convenience of reference it is suggested that conference rulings be cited in briefs and correspondence in this form: "Conf. Ruling —," giving the number of the ruling, it being unnecessary to refer also to this bulletin by its number; where the ruling consists of lettered paragraphs, as for example Ruling 78, the particular paragraph may be referred to in this form: "Conf. Ruling 78-*a*."

CONFERENCE RULINGS BULLETIN NO. 6.

Conference Rulings of the Interstate Commerce Commission

Issued April 1, 1913.

November 4, 1907.

1. PASSES TO CARETAKERS.—An employee of a produce company was granted a pass for the purpose of going to a point on the carrier's lines and returning as caretaker of a carload of bananas. He was not able to secure a return shipment: *Held,* That the carrier must collect the full fare. (See Ruling 37.)

2. TARIFFS DISTINGUISHING BETWEEN SHIPMENTS HANDLED BY STEAM AND ELECTRICAL POWER.—An amendment to tariff provided: "The above rates will only apply on shipments handled by steam power and will not apply when handled by electrical power:" *Held,* That the limitation of the rates to shipments handled by steam power is unlawful and must be eliminated from the tariff. (See Ruling 34.)

3. COLLECTION OF UNDERCHARGES.—The Commission adheres to its previous ruling that carriers must exhaust their legal remedies to collect undercharges from consignees. (Construed and amended by Ruling 187; superseded by Ruling 314; see also Rulings 16 and 156.)

November 11, 1907.

4. RATES ON NEW LINES.—Rule 44 of Tariff Circular No. 14—A, providing that rates may be established in the first instance on "new lines" without notice, was intended to apply to *newly constructed lines only.* (See Rule 57, Tariff Circular 18—A.)

5. FREE STORAGE CREATING DISTRIBUTING POINT FOR PRIVATE INDUSTRY.—Its attention being

called to a tariff which, in effect, created a distributing point for a special industry by granting it free storage at that point, either in its own or the carrier's warehouses, and practically without limit as to time, the merchandise when shipped out to go on balance of through rate, the Commission expressed its disapproval.

6. RECONSIGNMENT RULE WILL NOT BE GIVEN RETROACTIVE EFFECT.—A shipment consigned to one point was reconsigned en route to another, the tariff containing no reconsignment privilege. As a consequence local rates to and from the reconsigning point were applied and made higher than the through rate: *Held,* Under subsequent tariff that did not reduce rates, but incorporated a reconsignment privilege, that the benefit of such privilege could not be applied retroactively to a previous shipment, and can not be accepted as the basis for a refund on special reparation docket. (Extended in application by Rulings 77 and 166.)

November 18, 1907.

7. COMMISSIONS ON IMPORT TRAFFIC.—The granting by carriers of commissions to persons acting as consignees on import traffic is a practice that can not be sanctioned. (See Ruling 221-*a*.)

8. DEMURRAGE CHARGES RESULTING FROM STRIKES.—The Commission has no power to relieve carriers from the obligations of tariffs providing for demurrage charges, on the ground that such charges have been occasioned by a strike. (See note to Ruling 242, and Ruling 358.)

9. FREE TRANSPORTATION BY CARRIERS FOR ONE ANOTHER.—Where stock in one railway company is owned by another railway company, but both maintain separate organizations and report separately to the Commission, they may not lawfully carry freight free for each other. (See Ruling 225.)

December 2, 1907.

10. STATUTE OF LIMITATIONS.—Claims filed with the Commission since August 28, 1907, must have accrued within

two years prior to the date when they are filed, otherwise they are barred by the statute. Claims filed on or before August 28, 1907, are not affected by the two years' limitation in the act. (See Ruling 220-*j*.)

11. REDUCTION OF RATE WHEN FORMAL COMPLAINT AGAINST IT IS PENDING.—When after complaint made and before hearing a rate is reduced to the sum demanded by the complainant, the order disposing of the proceeding shall require the maintenance of that rate as a maximum for not less than two years. (Extended in application by Ruling 14.)

12. TARIFF THAT FAILS TO STATE THE DATE OF ITS EFFECTIVENESS IS UNLAWFUL.—A tariff was filed without naming a date on which it was to take effect. Does it ever become effective, and if so, when? *Held*, That the tariff was unlawful and has never taken effect. (See Rulings 73 and 100.)

13. TARIFFS NOT CONCURRED IN ARE UNLAWFUL.—A properly accredited chairman of a tariff committee published tariffs for certain carriers for which he was the duly constituted attorney-in-fact for that purpose. A carrier declining to concur in his tariffs put a new cover on them and filed them as its own tariffs without securing the concurrences of the other carriers named therein: *Held*, That the tariffs so adopted were unlawful and could not be used by the carrier.

January 6, 1908.

14. MAINTENANCE OF RATE REDUCED AFTER COMPLAINT FILED.—On December 2, 1907, it was decided that when a rate is reduced after answer has been made and before hearing, the report disposing of the proceeding shall carry with it an order directing the defendant to maintain that rate as a maximum for not less than two years. On December 6 it was decided that orders in special reparation cases shall include a clause providing that the new rate or regulation upon the basis of which reparation is granted shall be maintained for a period of at least one year. (See Ruling 11.)

It is now agreed that the two years so required in orders upon formal complaints and the one year in orders in special repara-

tion cases shall run from the date of the order and not from the date when the reduced rate or new regulation became effective. (See Rulings 130, 200-*a*, and 220-*c*.)

15. DELIVERING CARRIER MUST INVESTIGATE BEFORE PAYING CLAIMS.—A delivering carrier can not accept the authority of a connecting line, and thus shield itself from responsibility in paying claims, but must investigate and ascertain the lawful rates and allow the claims or not upon the basis of its own investigations. (Reaffirmed by Rulings 68 and 236.)

16. DELIVERING CARRIER MUST COLLECT UNDERCHARGES.—Even though an undercharge results from an error in billing by the initial carrier or a connection, the delivering carrier must collect the undercharge. The legal expense attending its efforts to collect undercharges in such cases would seem to be a valid claim against the carrier through whose fault the mistake was made. (Reaffirmed by Ruling 156; see also Rulings 187 and 314.)

17. FEEDING AND GRAZING IN TRANSIT.—In connection with the published privilege of feeding and grazing in transit a carrier may lawfully provide in its tariffs that it will furnish feed at current market prices, and bill the cost thereof, together with an addition of 10 per cent or other reasonable percentage to cover the value of its services, as advance charges.

18. FREE TRANSPORTATION OF DEAD BODY OF EMPLOYEE.—When an employee of a carrier has been killed or has died in service at a distant point, the carrier may, free of charge and as a general incident to the relation between it and its employees, lawfully transport the body to the home of the deceased for burial. (See Rulings 173 and 193.)

NOTE.—Under the amendatory act of April 13, 1908, it is lawful for a carrier to give free transportation to the remains of a person killed in its employ, and also to his family.

19. EXPENSES INCURRED IN PREPARING CARS FOR SHIPMENTS CAN NOT BE PAID BY CARRIER IN THE ABSENCE OF TARIFF PROVISION THEREFOR.—Not having box cars available for the movement of machinery, cattle cars were supplied at the request of the shipper, who lined

them with tar paper and felt in order to protect his shipments from weather conditions: *Held*, That in the absence of tariff authority the carrier can not lawfully reimburse the shipper for the expense so incurred. (See Rulings 78, 132, 292, and 360.)

20. SPECIAL UNDERSTANDINGS BETWEEN SHIPPERS AND CARRIERS, NOT PUBLISHED IN THEIR TARIFFS, OF NO VALID EFFECT.—A shipper had an understanding with agents of carriers that when he delivered shipments to them consigned to stations at which there were no agents the carriers would so advise him and hold the shipments for further direction. In a given case a carrier neglected to so advise him and to hold the shipment, but billed it and sent it forward to a nonagency station as a prepaid shipment: *Held*, That the shipper must pay the charges, and that no understanding of that nature, not incorporated in the published tariffs of the carrier, will operate to relieve the carrier from the duty of collecting the lawful charges. (See Ruling 235.)

21. CARETAKERS OF MILK.—The provision of law relating to the free transportation of necessary caretakers of livestock, poultry, and fruit can not be construed to include caretakers of shipments of milk.

NOTE.—Under the amendatory act of June 18, 1910, free transportation may be accorded to caretakers of milk.

22. FREE CARRIAGE OF COMPANY MATERIAL.—It is not unlawful for a carrier to return its own property free of charges, to the manufacturers thereof situated on its own line, for exchange or repair.

23. EXTENSION OF TIME ON THROUGH PASSENGER TICKETS.—A through rate must be recognized as a unit, and an extension of time granted on a through ticket under a tariff regulation of a carrier whose line is a part of that route is sufficient to cover the transportation over the lines of other carriers in the route. The proper practice is for the carrier so granting the extension to indorse it upon the portion of the ticket to be taken up by the last carrier, and also upon the coupon of each carrier. (Overruled by the Commission on March 2, 1908, see Ruling 43.)

24. CANADIAN FARES.—A Canadian carrier having joint through fares from a point in the United States to points on its own line may not depart from those fares by the device of placing an agent at such point in the United States with authority to sell tickets from the first station on its line north of the Canadian boundary to other points on its line in Canada at the rate of 1 cent a mile, "to be sold only to such persons as produce a certificate of the immigration agent of the Canadian government." Besides being a device, tickets so limited to particular persons operate as a discrimination. But in the absence of such joint through fares from a point in the United States to points on its own lines this Commission has no jurisdiction over the fares actually charged and collected for the separate transportation between points in Canada. (See Ruling 98.)

25. REFUND OF DRAYAGE CHARGES CAUSED BY MISROUTING.—Where a shipment was routed contrary to the express directions of the shipper and the consignee was compelled to move the shipment by dray from the station of delivering carrier to the destination to which it would have been switched if properly routed, the carrier may, under the particular circumstances of the case, be authorized by the Commission to refund to the shipper the reasonable actual cost of the drayage. (Overruled by Rulings 234, 283, and 286-*d*.)

26. USE OF INTRASTATE COMMUTATION TICKET IN INTERSTATE JOURNEY.—In the absence of a provision in the commutation contract forbidding it, a commutation ticket may be used between the points named on it in connection with an interstate journey on trains that stop at such points.

January 13, 1908.

27. EXCURSION TICKET INVALIDATED THROUGH FAILURE OF CARRIER TO MAKE CONNECTION.—A passenger traveling on a special limited excursion ticket with stop-over privilege, leaves a stop-over point in ample time to make all connections and meet conditions of ticket; but through successive delays to trains misses connections at a certain junction, making the ticket twenty-four hours out of date. Regular fare was collected for the balance of the return trip: *Held*,

That the carriers ought to make the ticket good, it having become invalid through their fault.

28. TICKETS FOR TRANSPORTATION AND MEALS, HOTEL ACCOMMODATIONS, ETC.—A carrier publishes a tariff offering certain transportation fares and rates for personally conducted tours with tickets to cover meals, hotel accommodations, etc., and declines to sell the transportation ticket to anyone who does not also purchase the ticket covering meals and hotel accommodations: *Held,* That the two matters must be kept separate, and carriers may not decline to sell such transportation without tickets for meals and hotel accommodations.

29. QUOTATIONS FROM CORRESPONDENCE OF THE COMMISSION.—The Commission requests that if extracts from its correspondence are sent out by carriers, such extracts be made sufficiently full, or that sufficient of the correspondence be presented, to give a complete view and understanding of the meaning of the ruling and of the circumstances discussed, or of the inquiry answered therein.

January 15, 1908.

30. CARRIERS' MONTHLY REPORTS TO BE FURNISHED IN DUPLICATE.—Beginning as of January 1, 1908, monthly reports of revenues and expenses, as provided for in the order of the Commission, bearing date July 10, 1907, shall be filed in duplicate, and on or before the last day of the month immediately following the month covered by the report shall be deposited in the United States Post-Office, postage prepaid, and plainly addressed to the Bureau of Statistics and Accounts, Interstate Commerce Commission, Washington, D. C.

31. DEMURRAGE CHARGES ON ASTRAY SHIPMENTS.—An astray shipment of perishable merchandise was not rebilled to its proper destination, but was sold by the consignee at the point where he found it. The delivering carrier at that point had assessed demurrage charges before the shippers were able to locate the car. That carrier expressed its willingness to waive the demurrage if the Commission permits: *Held,* That demurrage charges stand in the same light as transporta-

tion charges and may be adjusted under Ruling 217 of this Bulletin, formerly published as Rule 74 of Tariff Circular 15--A.

February 3, 1908.

32. DEMURRAGE CHARGES.—The delivering carrier is under obligation to collect demurrage charges assessed by it, although such charges may have accrued as the result of error on the part of another carrier. (See Ruling 220-*f*; see also note to Ruling 242.)

The shipper should pay the lawfully published rate via the route over which the shipment moved, pending dispute, and then make claim for refund. The Commission, in the adjustment of misrouting claims, will not ordinarily include demurrage charges. (See Ruling 220-*e*.)

When the delivering carrier demands more than the lawful rate, the consignee is released from the obligation to pay demurrage charges accruing during the pendency of the dispute as to the lawful rate.

33. REDUCED RATE TRANSPORTATION FOR FEDERAL, STATE, AND MUNICIPAL GOVERNMENTS.—Under section 22 of the act to regulate commerce, carriers may grant reduced rates for the transportation of property for the United States or for state or municipal governments, under arrangements made directly with such government and in which no contractor or other third person intervenes, without filing or posting the schedule of such rates with the Commission. (See Rulings 36, 65, 208-*e*, 218, 244, and 311.)

34. COAL USED FOR STEAM PURPOSES NOT ENTITLED TO REDUCED RATES.—A tariff providing for reduced rates on coal used for steam purposes, or that the carrier will refund part of the regular tariff charges on presentation of evidence that the coal was so used, is improper and unlawful. That is to say, the carrier has no right to attempt to dictate the uses to which commodities transported by it shall be put in order to enjoy a transportation rate. (See Ruling 2.)

35. USE OF STATE PASSES IN INTERSTATE JOURNEYS UNLAWFUL.—Passes granted to state railroad commissioners can not lawfully be used in interstate journeys.

February 4, 1908.

36. RATES ON SHIPMENTS FOR THE FEDERAL GOVERNMENT.—If title to property, such as postal cards, passes to the Government at the point of manufacture, the carrier may agree upon a rate to be applied for transporting it for the Government to another point, without filing a tariff with the Commission. But if the manufacturer under his contract is required to deliver to the Government at such other point, the transportation must be under the published tariff rate. In other words, if the shipment is made directly by the Government, this rate may be fixed by the carrier without posting and filing the tariff, but not otherwise. (See Ruling 33, and Ruling 244 rescinding Ruling 65.)

37. PASSES TO CARETAKERS.—Passes to caretakers must be in the form of trip passes limited to the journey on which the person to whom the pass runs acts as a caretaker. It may also cover the return journey. Annual or time passes to caretakers are unlawful. (See Ruling 1.)

38. REPARATION ON INFORMAL COMPLAINTS.—The phrase "within a reasonable time," on page 2 of Special Circular No. 1, relating to "Special reparation on informal complaints," is now defined as a period of time not exceeding six months. And reparation will not be authorized by the Commission, except in cases involving special circumstances, unless the rate upon the basis of which adjustment is sought has been actually established by published tariffs within six months after the date of the shipment in question, or unless the claim is filed with the Commission within six months after the shipment moved. (Special Circular No. 1, as subsequently amended, appears as Ruling 220 of this bulletin.)

March 3, 1908.

39. ACCRUED DEMURRAGE CHARGES.—A shipper who had customarily paid his freight charges in checks was called upon, under a general order issued by the carrier, to pay his freight charges in cash during the recent financial disturbances. While the local agent was endeavoring to get authority from the home office of the carrier to continue to accept checks from this shipper demurrage charges accrued: *Held,* That they could not lawfully be refunded. (See note to Ruling 242.)

40. PRINTING OF BRIEFS.—Rule XIV of the Rules of Practice is amended by the following paragraph, to be inserted between the first and second paragraphs as they now stand:

"Briefs shall be printed in twelve-point type, on antique finish paper 5⅞ inches wide by 9 inches long, with suitable margins, double-leaded text and single-leaded citations." (Same as Ruling 149-*b*.)

41. DIVISION OF PROCEEDS OF SALE OF SHIPMENT TO PAY FREIGHT CHARGES.—A shipment refused by the consignee and upon which demurrage had accrued was sold by the delivering carrier, but did not realize the amount of the transportation charges and the amount paid for unloading. Upon the request of the carrier the Commission declined to express its views as to the manner in which the proceeds of the sale should be divided among the several carriers participating in the movement, that being a matter to be determined by the interested carriers for themselves. (See Ruling 145.)

42. RATES ON RETURN MOVEMENTS.—A shipment of mining machinery went to destination over the lines of one carrier and was subsequently returned for repairs over the lines of another carrier. The published tariff, to which all carriers participating in both movements were parties, provided for half rates on such return movements when over the same route as the original out-bound movement. A portion of the route of the return movement was over the line of a carrier which also formed a part of the through route over which the out-bound shipment moved: *Held,* That the regular tariff rate was properly applied on the return movement; that the return movement under through billing must be treated as a unit; and that there could be no refund on the basis of the half rates for any portion of such through return movement.

43. EXTENSION OF TIME ON THROUGH PASSENGER TICKETS.—The ruling heretofore announced under this head to the effect that an extension of time on a through ticket by a carrier whose line is a part of that route is binding on the lines of other carriers in the route, is now withdrawn. (See Ruling 23.)

44. LIMITATIONS OF PASSENGER TICKETS.—A passenger traveling on a round-trip ticket containing the provision

that "This ticket will be good for return trip to starting point prior to midnight of date punched by selling agent in column 2. Final limit;" did not reach the last connecting carrier before the date punched on the ticket. The passenger was required to pay full fare on the last connecting line: *Held,* That a refund could not lawfully be made.

45. PASSENGERS ON FREIGHT TRAINS.—Upon inquiry made by a carrier the Commission holds that it may not confine the right to travel on freight trains to a particular class, such as drummers and commercial agents, but if the privilege is permitted to one class of travelers it must be open to all others on equal terms and conditions.

46. REPARATION ON INFORMAL PLEADINGS—PASSENGER TICKETS.—The rulings of the Commission relating to reparation on informal complaints do not extend to passenger traffic, but are limited to freight traffic only. The Commission will not entertain applications for authority to refund on passenger tickets on the ground that the fare was reduced shortly after the ticket was sold. (But see Rulings 113, 247, 266, 277, and 385.)

March 9, 1908.

47. TARIFF TAKING EFFECT ON SUNDAY.—Under a tariff schedule regularly filed, showing a change in published rates, it happened that the thirty days' notice required by law expired on Sunday: *Held,* That the tariff is lawful.

March 10, 1908.

48. MAY A SHIPPER OFFSET A CLAIM AGAINST A CARRIER BY DEDUCTING FROM FREIGHT CHARGES ON SHIPMENT?—A shipper having a money demand against an interstate carrier sought to offset it against the amount of a freight bill which he owed the carrier upon a shipment of merchandise. May this lawfully be done? *Held,* That the two transactions have no relation one to the other, and that such a deduction from the lawful charges on the shipment could not be made. Superseded by Ruling 323. (Compare Ruling 133.)

49. BENEFIT OF REPARATION ORDERS EXTENDS TO ALL LIKE SHIPMENTS.—No carrier may pay any refund from its published tariff charges save with the specific authority of the Commission. When an informal or formal reparation order has been made by the Commission, the principle upon which it is based extends to all like shipments, but no refunds may be made by the carrier upon such like shipments except upon specific authority from the Commission therefor. (See Rulings 200-*c* and 220-*d*.)

50. WHEN JOINT AGENT PUBLISHES A NEW RATE BETWEEN TWO POINTS, WITHOUT CANCELING THE OLD-RATE DULY PUBLISHED BY ONE OF THE CARRIERS, THE OLD RATE ON THAT LINE REMAINS IN EFFECT.—The published tariffs of an interstate carrier named a rate of 20 cents on a given commodity between specified points. On October 1, 1907, under a proper power of attorney, a joint agent of all carriers serving those two points published a rate of 22 cents. He failed to cancel the 20-cent rate and it was not formally canceled by the carrier that published it until January 14, 1908: *Held*, That because of the failure of the joint agent and of the carrier that published it to cancel that rate in the manner required by section 6 of the act, and rule 8 of Tariff Circular 14—A, the 20-cent rate remained the lawful rate of that carrier until formally canceled on January 14, 1908. (See Ruling 104. Rule 8 of Tariff Circular 14—A is now published as Rule 8 of Tariff Circular 18—A.)

March 11, 1908.

51. THE USE OF PULLMAN CARS AT STOP-OVER POINTS CAN NOT BE LIMITED TO MEMBERS OF A PARTICULAR CLUB.—A carrier desiring to make excursion rates to a point where a convention is to be held wishes to accord to members of certain clubs the privilege of occupying the sleeping cars while the convention is in session: *Held*, That the carrier may lawfully arrange an excursion rate to such point and return, the rate to include sleeping-car accommodations to and from that point with the privilege of occupying the car at that point during the convention; but that the Commission does not understand that the carrier may limit the privilege to the members of any particular club.

52. RATE EASTBOUND CAN NOT BE APPLIED WESTBOUND UNLESS SO PUBLISHED.—A mixed carload of meat eastbound was diverted at the Ohio River on account of a flood, and, by order of the shipper, was taken by a roundabout route to a point east of its destination and was thence hauled westbound to destination. The mixed-carload rate applied on eastbound shipments, but the tariffs provided no mixed-carload rate on westbound shipments: *Held*, That such interruption of the eastbound movement would not justify the application of a mixed-carload rate on the westbound movement to destination.

53. TRANSIT PRIVILEGE NOT AVAILED OF CAN NOT BE RENEWED AFTER THE EXPIRATION OF THE TIME ALLOWED IN THE TARIFFS.—A consignor of sheep, which were being grazed in transit, was unable because of a severe snowstorm to get the sheep to the station before the grazing privilege expired according to the published time limit. Upon inquiry of the carrier it was held that it can not lawfully take the sheep forward on the rates which would have been applicable under the tariff had the sheep been shipped within the time limit.

March 16, 1908.

54. DEMURRAGE OF INTERSTATE SHIPMENTS.—Questions of demurrage and car service on interstate shipments are within the jurisdiction of the Interstate Commerce Commission, which does not concur in the view suggested by certain state commissions that such matters, even when pertaining to interstate shipments, are within their control. (Reaffirmed by Ruling 223-*b*.)

55. FREE PASS TO RAILWAY EMPLOYEE ON LEAVE OF ABSENCE.—An employee who has not been suspended or dismissed from the service, but is on leave of absence and is still carried on the roll of employees of the carrier, is still an employee and as such may lawfully use free transportation.

NOTE.—This ruling was made by the Commission on March 16, 1908; by the amendatory act of April 13, 1908, carriers were given the right to give free transportation to "furloughed, pensioned, and superannuated employees."

April 7, 1908.

56. HOURS-OF-SERVICE LAW—STREET-CAR COMPANIES.—Upon inquiry whether the hours-of-service law applies to electric street car lines which are interstate carriers: *Held,* That it applies to all railroads subject to the provisions of the act to regulate commerce, as amended, including street railroads when engaged in interstate commerce. (See Ruling 287.)

57. RESHIPPING RATE FROM PRIMARY GRAIN MARKETS.—May a carrier lawfully cancel its local, reconsigning, proportional, and other rates, on outbound shipments of grain from a primary market like Kansas City, where no grain originates upon which the local rate would be applicable, and substitute for them a reshipping rate applicable on all outbound grain?

Responding to the inquiry the Commission approved the suggestion, but declines in advance to express approval of such reshipping rate when it makes less than the published rate from an intermediate point.

58. DECLARING A FALSE VALUATION IN VIOLATION OF SECTION 10.—Upon an inquiry from a banking house whether it may lawfully declare a value of $5,000 upon a package of negotiable bonds of the market value of $10,000 and pay the express charges on the basis of the declared value, upon the understanding that in case of the loss of the bonds the express company will be responsible only for the amount so declared, it was held that a shipper falsely declaring the value of a package delivered to an express company for transportation violates section 10 of the act. (See Ruling 295.)

59. CARRIERS MUST SEND CAR THROUGH OR TRANSFER SHIPMENT EN ROUTE.—Where connecting lines have united in publishing a joint through rate between two points it is the sense of the Commission that it is the duty of the carriers in the route to provide the car and permit it to go through to destination or to transfer the property en route to another car at their own expense. (Affirmed in Ruling 339.)

60. NO REFUND TO PASSENGER WHO EXCEEDED STOPOVER LIMIT.—A passenger, while availing himself of a stopover privilege at a certain point in his journey, was sub-

poenaed as a witness in a proceeding in a civil court, and obeying the process was not able to proceed on his journey within the time limit of the stopover. As a result he was compelled to pay an additional fare from that point to destination: *Held,* That a refund could not lawfully be made.

61. STORAGE CHARGES ON TRUNK ACCRUING BECAUSE OF INJURY TO PASSENGER.—The Pullman car in which a passenger was traveling was derailed and went over an embankment, resulting in an injury to a passenger, who in consequence was detained for some time. His trunk was taken on to destination and storage charges accrued on it until claimed by him: *Held,* That the storage charges might lawfully be refunded.

April 14, 1908.

62. BOATS THAT ARE NOT COMMON CARRIERS.—Certain carriers have been in the habit of advancing the charges of sailing vessels, boats, and barges bringing vegetables to their terminals to be forwarded to interstate destinations, and of entering the amount on waybills as charges in addition to their tariff rates. Upon inquiry whether the carriers may lawfully continue this practice it was held that if the boats are common carriers, making regular trips and offering their services to the general public, they must file tariffs and the practice must be discontinued until they do so.

63. SERVANTS MAY NOT USE FREE PASSES.—The word family, as used in the antipass provision of the act, does not include servants. (Amended by Rulings 92 and 95-*c*.)

64. ABSORPTION OF SWITCHING CHARGES.—The tariff of a carrier provided for the absorption of switching charges. Upon inquiry it was agreed that the Commission could not sanction a practice under which switching charges are paid by the consignee, the carrier deducting the amount of the switching charges from the published rates and collecting the balance from the consignee. In all cases the carrier must collect the full tariff rates. Where its tariffs provide for absorptions of switching charges the carrier must pay the switching company for its services and not leave that to be done by the shipper.

April 18, 1908.

65. SPECIAL RATES FOR UNITED STATES, STATE, OR MUNICIPAL GOVERNMENTS.—Section 22 of the act authorizes the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments. As has before been decided, such transportation can be granted without the publishing and filing of a tariff therefor only in instances where the arrangement is directly between such government and the carrier; but it is considered permissible for carriers to incorporate in their lawful tariffs special rates for the United States, State, or municipal governments applicable only to traffic consigned to such United States, State, or municipal government by name, in care of a recognized officer thereof. (Overruled and withdrawn by the Commission. See Ruling 244; see also Ruling 36 and 311.)

May 4, 1908.

66. JOINT RATES BETWEEN A WATER AND A RAIL CARRIER SUBJECTS THE FORMER TO THE PROVISIONS OF THE ACT.—A steamboat line agreed upon joint rates with a rail line for certain passenger and freight traffic: *Held,* That it could not unite with a railroad company in making a through route and joint rate on a particular traffic without subjecting all its interstate traffic to the provisions of the law and to the jurisdiction of the Commission.

In the matter of jurisdiction over water carriers, opinion No. 787, the Commission decided January 7, 1909, that carriers of interstate commerce by water are subject to the act to regulate commerce only in respect of traffic transported under a common control, management, or arrangement with a rail carrier, and in respect of traffic not so transported they are exempt from its provisions.

67. HANDHOLDS—SAFETY-APPLIANCE LAW.—The law makes no distinction between passenger and freight cars, and handholds must, therefore, be placed on the ends of passenger cars and cabooses.

68. ADJUSTMENT OF CLAIMS.—It is not a proper practice for railroad companies to adjust claims immediately on presentation and without investigation. The fact that shippers may

give a bond to secure repayment in case, upon subsequent examinations, the claims prove to have been improperly adjusted does not justify the practice. (Reaffirmed by Ruling 236; see also Ruling 15.)

69. ERROR BY TICKET AGENT.—A station agent inadvertently failed to indorse "colonist ticket" on a regular ticket sold upon a published colonist rate: *Held*, That the connecting carriers must be paid their full proportion of the first-class rate, but that the Commission would not intervene between the initial carrier and its agent. (Reaffirmed by Ruling 277; see also Ruling 105.)

May 5, 1908.

70. EFFECT OF A FAILURE IN A NEW TARIFF NAMING HIGHER RATES TO CANCEL THE SAME RATES IN PRIOR TARIFF.—A carrier's tariff effective January 1, 1903, named certain rates between two points. By a joint tariff, effective February 1, 1908, higher rates were named between the same points, but without reference to the previous tariffs or cancellation of the lower rates therein. On March 26, 1908, a supplement was filed, naming the same higher rates and canceling the rates named in the tariff of January 1, 1903: *Held*, That until March 26, 1908, when the original rates were canceled, they remained in effect and were the lawful rates. (See Rulings 50 and 104; compare Ruling 239.)

71. DIFFERENT FARES TO DIFFERENT SOCIETIES UNLAWFUL.—A tariff covering daily picnic excursions between certain points for the season named fares for Sunday and day schools and different fares for "societies:" *Held*, That the tariff is discriminatory and that the fares for the school picnics should be the same as for society picnics.

72. RECONSIGNMENT PRIVILEGES AND RULES.—(*a*) Usually the combination of intermediate rates is higher than the through rate. Frequently a shipper desires to forward a shipment to a certain point and have the privilege of changing the destination or consignee while shipment is in transit, or after it arrives at destination to which originally consigned, and to forward it under the through rate from point of origin to final

destination. Many carriers grant such privilege and generally make a charge therefor.

(*b*) The privilege is of value to the shipper, and in order to avoid discrimination it is necessary for carrier that grants such privilege to publish in its tariff that fact, together with the conditions under which it may be used and the charge that will be made therefor. Such rules should be stated in terms that are not open to misconstruction.

(*c*) Some carriers do not count a change of consignee which does not involve a change of destination as a reconsignment, while others do consider it a reconsignment and charge for it as such. The Commission holds the view that without specific qualifications the term "reconsignment" includes changes in destination, routing, or consignee. If carrier wishes to distinguish between such changes in its privileges or charges it must so specify in its tariff rules. Reconsignment rules and charges must be reasonable, and a charge that would be reasonable for a diversion or change of destination might be unreasonable when applied to a simple change in consignee which did not involve change in destination or more expensive delivery. (This rule is the same as rule 74 of Tariff Circular 18—A.)

73. EFFECTIVE DATE OF TARIFF FILED BY A CARRIER WHEN FIRST COMING UNDER THE LAW.—A carrier, under its arrangements for the first time to participate in interstate transportation, failed to note an effective date on its first tariff schedule: *Held*, That being that carrier's first tariff it became effective as soon as filed. (See Rulings 12 and 100-*b*.)

74. HOURS-OF-SERVICE LAW.—Employees deadheading on passenger trains or on freight trains and not required to perform, and not held responsible for the performance of, any service or duty in connection with the movement of the train upon which they are deadheading, are not while so deadheading "on duty" as that phrase is used in the act regulating the hours of labor. (See Ruling 287-*b*.)

May 12, 1908.

75. VALIDATION OF TICKETS.—The condition that a round-trip passenger ticket shall be validated for the original purchaser by carrier's agent at a given point is one of the con-

ditions which affects the value of the service rendered the passenger and one of the conditions that must be observed the same as the rate under which the ticket is sold, which must therefore be stated in the tariff under which it is sold. The tariff may provide for validation at numerous points, and it may provide for validation at any point intermediate to the original destination named in the ticket. The conditions stated upon the ticket should not conflict with the tariff provisions, but if in any case there should inadvertently be conflict between the tariff provisions and the conditions stated on the ticket the tariff rule must govern. (See Rulings 125 and 167.)

76. REDEMPTION OF PASSENGER TICKETS.—The unused portion of a passenger ticket, when presented by the original holder to the carrier that issued it, may lawfully be redeemed by the carrier by paying to the holder the difference between the value of the transportation furnished on the ticket at the full tariff rates and the amount originally paid for the ticket. (See Rulings 115, 228, 238, 265, and 303.)

May 14, 1908.

77. TRANSIT PRIVILEGES NOT RETROACTIVE.—Ruling 6, providing that the benefit of reconsignment privileges can not be given retroactive effect, is held to include cleaning, milling, concentration, and other transit privileges. (See Ruling 166.)

June 1, 1908.

78. GRAIN DOORS.—(*a*) A carrier may not lawfully reimburse shippers for the expense incurred in attaching grain doors to box cars unless expressly so provided in its tariff. There is a material difference between the furnishing of service or facilities to carriers by one who is not a shipper and the furnishing of the same facilities or services by one who is a shipper. (See Rulings 19, 292, and 360.)

(*b*) The Commission now decides that its ruling above and the requirements of the law thereunder will, for the present at least, be satisfied if the carriers that propose to pay shippers for grain doors furnished by such shippers provide in their tariffs

that where grain doors are necessary and are furnished by the shipper the carriers will pay the actual cost of such doors, with stated maximum allowances per grain door and per car. (Affirmed by Ruling 267.)

(*c*) Such maximum allowances per door and per car must be reasonable, and where carrier pays for such doors on the basis of actual cost certified statement from shipper, verified, as to the number of doors furnished and the cars for which furnished, by carrier's agent, should in every instance be required. (Reaffirmed by Ruling 267; See also Ruling 132.)

June 2, 1908.

79. "PRIVATE SIDE TRACKS" AND "PRIVATE CARS" DEFINED.—(*a*) A private side track, as this expression is used in the opinion In the Matter of Demurrage Charges on Privately Owned Tank Cars, is one which is not owned by the railroad, is outside the carrier's right of way, yards, or terminals, and to which the railroad has no right of use superior to the right of the shipper. This definition is based, as we think it should be based, upon consideration of the carrier's right to the use of the track rather than the ownership of the land or rails. (See modification of definition, Ruling 121.)

(*b*) A private car is defined in the opinion as "a car owned and used by an individual, firm, or corporation for the transportation of the commodities which they produce or in which they deal." It will include also cars owned and leased to shippers by private corporations. (Qualified by Ruling 122.)

(*c*) The ruling as to demurrage charges on private tank cars is applicable to all other private cars used by the railroads and paid for on a mileage basis.

(*d*) It is not the intention of the Commission that its ruling shall be given a retroactive effect. The demurrage question has been in a state of great confusion, and the desire of the Commission is to establish a uniform, fair, and practicable system for the future. Claims for refund of demurrage charges previously collected in accordance with regular tariff rules will not be entertained with favor. (See Rulings 123, 128, 222, and note to Ruling 242; See also Rule 75 of Tariff Circular 18—A.)

June 9, 1908.

80. SHIPMENT THAT MOVED IN UNDER A FORMER TARIFF DOES NOT LOSE THE BENEFIT OF TRANSIT PRIVILEGE CANCELLED PENDING THE OUT MOVEMENT.—A tariff enabled shippers to concentrate commodities on local rates at a certain point for shipment within a named period in carload lots, the in-bound billing to be surrendered and through rates from point of original shipment to apply. Before the period for taking advantage of this privilege had expired a new tariff made a new arrangement: *Held*, That with respect to shipments that had moved to the concentrating point under the old tariff and which moved out within the period therein allowed, the old rate should apply.

81. SUPPLEMENTING MILEAGE BOOKS BY PAYING REGULAR LOCAL MILEAGE RATES.—The practice under a published tariff rule which permits the holder of a mileage book which does not contain enough coupons to enable him to complete his journey to pay for the balance of the journey at the regular local rate per mile, as published by the carrier, is not unlawful. (See Ruling 382.)

82. CHARTERING TRAINS.—It is not unlawful for a railroad company to publish a tariff under which a locomotive and train of cars may be chartered at a named rate, tickets for the journey on that train to be sold by the person chartering the train.

83. BLOCKADE BY FLOOD.—A carrier accepted a carload shipment for movement to a point beyond its line. After delivering the shipment to a connection at a junction point it was advised that the connecting line had been closed by floods. The initial carrier accepted the return of the car from that line and ordered it forward to destination via another route carrying higher rates, taking this action without instructions from the shipper: *Held*, That the initial line was responsible to the shipper for the resulting increase in the transportation charges. (See Rulings 146, 147, and 213-*a*.)

84. A COMMODITY RATE TAKES THE COMMODITY OUT OF THE CLASSIFICATION.—A carrier having a high class rate on furniture with a low minimum also had a lower

commodity rate with a higher minimum. In response to an inquiry whether they are privileged to use either rate as they desire: *Held,* That the only purpose of making a commodity rate is to take the commodity out of the classification. The commodity rate is, therefore, as stated in Rule 7, Tariff Circular 15-A, the lawful rate. And if the carrier does not desire to apply it on all shipments it must be canceled. (See also Rule 7 of Tariff Circular 18-A.)

June 25, 1918.

85. SUBSTITUTING TONNAGE AT TRANSIT POINT.—A milling, storage, or cleaning-in-transit privilege is established on the theory that the commodity may be stopped en route for the enjoyment of such privilege, and the commodity or its product be forwarded under the application of the through rate from original point of shipment. It is not expected that the identity of each carload of grain, lumber, salt, etc., can or will be preserved, but in the opinion of the Commission it is unlawful to substitute at the transit point, or forward under the transit rate, tonnage or commodity that does not move into that point on that same rate. (Overruled by Ruling 203; See also Ruling 181.)

86. POSTING TARIFFS AT STATIONS.—Under the order of the Commission of June 2, 1908, entitled "In the Matter of Modification of the Provisions of Section Six of the Act with Regard to Posting Tariffs at Stations," if a subsidiary or small connecting line has authorized the parent company, or principal connecting line, to publish and file for it all of its tariffs, tariffs so issued and filed on its behalf will be included in the complete public tariff files of the parent or issuing line, and it will not be necessary for such subsidiary or small line to maintain an additional complete public file.

87. TRANSPORTATION FOR EATING HOUSES OPERATED BY OR FOR CARRIERS.—Carriers subject to the act may provide at points on their lines eating houses for passengers and employees of such carriers, and property for use of such eating houses may properly be regarded as necessary and intended for the use of such carriers in the conduct of their business. Such

eating houses, however, must not serve the general public, or any portion thereof, with food prepared from commodities which have been carried at less than the full published rate, and no utensils, fuel, or servants at all employed in serving others than passengers and employees of the carrier as such should be carried at less than tariff rates. Such privileges as may be extended under this rule shall be applied only as to points local to the line on which the eating house is situated. (Compare Ruling 124.)

88. HOURS-OF-SERVICE LAW.—(*a*) The specific proviso of the law in regard to hours of service is:

"That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week."

These provisions apply to employees in towers, offices, places, and stations, and do not include train employees who, by the terms of the law, are permitted to be or remain on duty sixteen hours consecutively or sixteen hours in the aggregate in any twenty-four hour period, and who may occasionally use telegraph or telephone instruments for the receipt or transmission of orders affecting the movement of trains. (See Ruling 287.)

(*b*) Section 3 of the law provides that:

"The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."

Any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip. (See Ruling 287.)

June 29, 1908.

89. JURISDICTION OF ACT OVER LOCAL BELT OR SWITCHING LINES.—The question is asked, "Is a belt line owned by a municipality, which participates in interstate movements, subject to the jurisdiction of the act and of the Commission?" *Held,* That it is subject to such jurisdiction. (Compare Ruling 162.)

90. MISROUTING VIA LINE THAT HAS NO TARIFF ON FILE.—A shipment was misrouted and passed over a route via a part of which no rate was filed with the Commission, and was thus subjected to a higher charge than the through rate via the proper route: *Held,* That misrouting carrier may be authorized to make refund on account of its error in misrouting shipment, and that carrier which participated in the transportation without lawful tariff applicable thereto should be dealt with through the Division of Prosecutions. (See Ruling 93.)

91. A MUCH LONGER AND MORE INDIRECT ROUTE NOT A REASONABLE ROUTE.—A shipment was tendered destined to a certain point, the direct route to which was over the lines of two carriers, a distance of 358 miles, the rate via that route being 22 cents. It was possible to send the shipment around over the lines of three carriers, a distance of 617 miles, and secure a combination rate of only 19 cents. Application for refund was made on account of the difference between the rates: *Held,* That the claim for refund should be denied on the ground that the much longer and indirect route is not a reasonable route. (See Ruling 214.)

92. USE OF PASSES BY SERVANTS.—Opinion expressed on April 14, 1908, on the subject of use of passes by servants, is modified: *Held,* That a household servant when traveling with a member of the family entitled to a pass is included within the term "family" as used in the act. (Amending Ruling 63; see also Ruling 95-*c*.)

June 30, 1908.

93. MISROUTING INVOLVING CARRIERS NOT SUBJECT TO THE ACT.—A shipment was tendered to a carrier in North Carolina, destined to California. Shipper requested that

it be sent via New York and the Isthmus of Panama. Shipment was forwarded all rail under a rate alleged to be higher than would have applied via the route indicated: *Held,* That the Commission can not authorize refund because no tariffs are on file with the Commission via the route over which the shipper directed the shipment moved, and there is therefore no official measure of the accuracy of the claim for overcharge or the amount thereof. (See Rulings 90 and 214.)

94. LEASING CARRIER'S PROPERTY IN CONSIDERATION OF LESSEE'S SHIPMENTS.—A carrier leases a part of its property to a certain industry under a contract which contains the obligation on part of the lessee industry to make all of its shipments by the line of the lessor carrier. Such a provision plainly implies that the traffic so furnished by the lessee and so secured by the lessor is an important and substantial consideration which might amount to a concession in the rates for transportation, and, therefore, be an unlawful device or discrimination. The Commission expressed doubt as to the propriety of the practice.

95. NOTICE AS TO THE ISSUANCE OF PASSES.—It appearing that the ruling issued by the Commission on the 9th day of June, A. D. 1908, relative to the issuance and use of passes, should be modified in certain respects relating to the forms of passes to persons eligible to receive free transportation under the act to regulate commerce, it is ordered that said ruling shall be amended to read as follows:

(*a*) Many abuses in the issuance and uses of passes have been discovered by the Commission which it is desired to correct, and to this end, and because of the misinterpretation of the law by carriers generally, the Commission at this time makes announcement that it will recommend the indictment and prosecution of all carriers and persons issuing passes to, or allowing the use of passes by, any persons not included within the designated classes to whom free transportation may be given by carriers subject to the act to regulate commerce as set forth in said act. Among those not included under the provisions referred to are the following:

1. Officers or employees of news companies other than newsboys.
2. Officers or employees of telegraph or telephone companies, ex-

cepting when personally engaged in operation, extension, repair, or inspection of lines upon or along the railroad right of way and used in connection with the operation of the railroad. (The amendatory act of June 18, 1910, brings telephone or telegraph companies within the jurisdiction of the Commission; see Ruling 305; see also Rulings 161 and 219.)

3. Officers or employees of surety, transfer, and baggage companies, except baggage agents. (See Ruling 216.)
4. Officers or employees of carriers not subject to the act to regulate commerce, including officers and agents of steamship and stage lines not subject thereto. (See Ruling 196; also 95-*c*.)
5. Officers or employees of subsidiary corporations engaged in business other than transportation subject to the act to regulate commerce, save that such officers and employees may be granted free transportation when attending to business imposed upon a carrier subject to the act. (See Rulings 169, 208, and 263.)
6. Families of local attorneys, surgeons, and others who are not regularly employed by carriers. (See Ruling 208-*a*.)

(*b*) Each pass issued must bear upon its face the name of some person belonging to a class named in section 1 of the act as eligible to receive free transportation. In addition to such person so named a pass may also carry not to exceed a specified number of unnamed persons of any class eligible to receive free transportation; the number and the class to which such person belongs being specified upon the face of the pass—that is to say, passes in the following forms will be recognized by the Commission as legal:

"Pass John Smith, President, car, and five officers and employees of the X. Y. & Z. Railway."

"Pass J. R. Barner and six linemen, foreman, and force of the Western Union Telegraph Company. Good only when traveling in connection with the construction, maintenance, or operation of the lines of the Western Union Telegraph Company on the right of way of this A. B. C. Railway Company."

"Pass one extra messenger of the Southern Express Company when presented with letter signed by Superintendent, Assistant Superintendent, or Route Agent of said Express Company, authorizing use and giving name of person to be passed."

"Pass John Smith, section foreman, and six employees of X. Y. & Z. Railway."

(*c*) The Commission holds that the word "family," as used in section 1 of the act to regulate commerce, includes those who are members of, and who habitually reside in, the household of the person eligible to receive family passes, including household servants when traveling with the family or with any member thereof, and relatives who are in fact dependent upon such person, although not actually residing in his household. (See Rulings 92 and 174.) The Commission will, therefore, view passes in the following form as lawful:

"Pass John Smith, wife, two sons, three daughters, and two servants."

"Pass Mrs. John Smith and daughter, account John Smith, Agent X. Y. & Z. Railroad Company at Washington, D. C."

(*d*) The name of the person presenting the pass must appear upon it. Passes intended to be used in the absence of the head of the family whose occupation makes the issuance of passes lawful must, in addition to the name of said head, show the name of the person using the same. (See Ruling 290.) For instance, a pass to be used by John Smith, his wife, or his daughter, separately, should read:

"Pass John Smith, Mrs. John Smith and Miss Mary Smith, account C. & O. Agent at Richmond, Va."

(*e*) Every pass to an officer or employee of a carrier other than the one issuing the pass, shall indicate the name and rank of the person to, or on behalf of whom, such pass is issued, as well as the name of the carrier employing him.

(*f*) The Commission construes the act, so far as it relates to railway-mail service employees, as giving such employees the right to receive free transportation when on duty in their cars, or when traveling under orders from a superior officer. The Commission does not now undertake to say how far this portion of the act to regulate commerce is modified or controlled as regards railway-mail service employees by other statutes or by contracts between carriers and the Post-Office Department. (See Ruling 377.)

(*g*) The Commission will recognize any rail or water carrier filing a tariff, joint or local, with the Commission, as a carrier subject to the act so far as the issuance of passes to its officers and employees may be concerned. Where a carrier has no tariffs

on file with the Commission, and does not acknowledge itself subject to the Commission's jurisdiction, the Commission will regard the issuance of passes to its officers or employees as unlawful, without, however, thereby passing upon the question of the jurisdiction of the act over such carrier in so far as it may be necessary to assert such jurisdiction. In this regard reference is made to *Cosmopolitan Shipping Co.* v. *Hamburg-American Packet Co. et al.*, 13 I. C. C. Rep., 266, and *In re Petition Frank Parmelee Co.*, 12 I. C. C. Rep., 46. By reference to these decisions it will be seen that among the carriers not subject to the act are ocean carriers to nonadjacent foreign countries and domestic carriers by wagon, stage, or automobile. Carriers covered by these decisions are not eligible to file tariffs or receive passes. (See Rulings 196, 216, 263, and 355.)

(*h*) The Commission reaffirms Rule 63 of Tariff Circular 15—A, now reported as Ruling 208 of this Bulletin.

(*i*) The Commission can not undertake, in any case, to determine whether or not individuals are within any of the classes mentioned in section 1 of the act as eligible to receive free transportation.

(*j*) The Commission will not regard as unlawful allowance of use, or the use of passes merely irregular in form, under this ruling, during the present calendar year. Passes, however, issued to persons not eligible to receive the same must be called in at once, as well as passes so loosely framed that persons not eligible to receive free transportation may be carried upon them—that is to say, a pass to "John Smith, family, and household servants," although irregular in form, will not be regarded by the Commission as unlawful prior to January 1, 1909. A pass, however, to "John Smith, car, and party," being susceptible of use for the transportation of persons not within the act, should be immediately corrected.

(*k*) Carriers are enjoined against the destruction of records or memoranda touching the issuance of passes, and the passes themselves, coming into the hands of the carriers after use, must, until further order of the Commission, be retained for a period of not less than five years.

NOTE.—On June 10, 1910, the Commission entered a formal order respecting the preservation and destruction of records of steam roads, including pass records; see periods there provided.

October 12, 1908.

96. DEMURRAGE ON F. O. B. SHIPMENTS.—A purchased a carload of lumber f. o. b. at the milling point. Demurrage accrued on account of the failure of B, the mill owner, to promptly load the car. Carrier inadvertently delivered the car to A without collecting the demurrage. Upon its inquiry as to whether to demand the demurrage from A or B: *Held,* That the demurrage must be collected by the carrier either from the vendor or the vendee, but that the Commission can not undertake to investigate the facts and determine for the carrier whether the vendor or the vendee is liable for the charges. (See note to Ruling 242.)

97. COLLECTION BY CARRIER L. C. L. SHIPMENTS.—The Commission condemns as unlawful a practice under which a carrier provides an empty car at factory sidings, in which the shipper may load L. C. L. shipments, which the carrier then moves to its regular freight station where the shipments are assorted and placed in other cars to be forwarded to their respective destinations. Such practice is lawful only under definite and clear tariff authority, non-discriminatory in terms and in its application.

98. LOCAL BILLING TO AVOID HIGHER THROUGH RATE.—A lawful through rate existed between two points, applicable over two routes, one of which was indirect, and therefore not ordinarily used by the carrier for through movements. The shipper billed locally to a point on the latter route, and rebilled to destination without taking either constructive or actual possession of the shipment at the local point, but making his rebilling arrangements with the agent of the carrier at a distant point. Upon arrival of the shipment at destination, the carrier collected the balance of the through rate: *Held,* That the local billing was not in good faith, but was a device between the shipper and the carrier's agents to avoid the higher through rate, by having the carrier's agents act as the forwarding agents of the shipper; therefore the through rate is the only rate lawfully applicable. Affirmed in Ruling 337. (See also Rulings 24 and 365.)

99. REGULATIONS GOVERNING COMMUTATION TICKETS MUST NOT DISCRIMINATE AS BETWEEN CLASSES OF PERSONS.—(*a*) A carrier offers a 46-trip

monthly commutation ticket and provides that it shall be issued only to pupils, without regard to age, who are in attendance on schools of a certain kind or class, and specifically provides for the exclusion of pupils attending various other kinds of schools: *Held*, That this regulation is unjustly discriminatory, and therefore unlawful, but that carriers may lawfully offer and use a commutation ticket limited in its sale and use to children or young persons between certain stated ages (as, for instance, from 12 to 21 years of age).

(*b*) Such arrangement will provide desired rates for school pupils and will not exclude other children traveling under substantially similar circumstances but for the purpose of securing other lines of instruction or on other missions. It will also protect against the use of such ticket by adults. The carrier may not inquire into the mission, errand, or business of the passenger as a condition of fixing the transportation rate which such passenger shall pay.

100. EFFECTIVE DATE OF TARIFF THAT WAS USED BEFORE AUGUST 28, 1906, BUT WAS NOT FILED UNTIL AFTER THAT DATE.—(*a*) Prior to the effective date of the amended act some carriers used the car-service rules of car-service associations under which to assess demurrage and other terminal charges, but did not file those rules with the Commission until after the amended act became effective. Such publications bore effective dates antedating their filing, but indicated no specific date subsequent to the date of filing upon which the schedule should become effective. The question is raised as to whether such publications so filed became effective on date of filing or thirty days subsequent thereto: *Held*, That prior to August 28, 1906, as well as subsequent to that date, the law required carriers amenable to its provisions to file with the Commission and post to the public schedules containing their terminal charges "and any rules or regulations which in any wise change, affect, or determine any part or the aggregate" of their rates, fares, and charges. The amended act prohibits carrier from engaging or participating in transportation of passengers or property, as defined in the act, unless the rates, fares, and charges upon which the same are transported have been filed and published in accordance with the provisions of the act.

(*b*) The Commission has decided that, excepting the first tariff under which a carrier engages in interstate transportation, a tariff that is filed without naming date on which it is to take effect is unlawful and never becomes effective, and now decides that publications that were used prior to the effective date of the amended act, that were filed subsequent to that date and which bore effective dates antedating the date of filing thereof, became effective thirty days subsequent to the date of filing the same. (See Rulings 12 and 73.)

101. CANCELLATIONS IN TARIFFS MUST BE SPECIFIC AND COMPLETE.—Carrier's tariff contains certain rates. Joint agent's tariff canceled certain of those rates, but the carrier did not issue any corresponding amendment to its tariff, as is required by Rule 8, Tariff Circular 15-A. It is essential that when one tariff cancels a part of another tariff, specific reference to the tariff so affected and to the part thereof so canceled shall be given, and that, effective on the same date, supplement to the tariff so canceled in part shall show that the specific parts are canceled by, and that the rates will thereafer be found in ——— tariff, I. C. C. No. ———. In no other way can discriminations and complaints be avoided. The carrier knows that such parts of its tariff are to be canceled and that superseding rates are to be shown in another tariff. There is, therefore, no difficulty about arranging its supplement and furnishing it to the proper party to be filed with the issue that contains the superseding rates. (See Ruling 50; Rule 8, Tariff Circular 15-A, amended accordingly; see Rule 8 of Tariff Circulars 17-A and 18-A.)

October 13, 1908.

102. FREE PASSES TO EX-EMPLOYEES.—Under the recent amendment to the antipass provision of section 1: *Held,* That a pass may be issued to a *bona fide* ex-employee of any carrier subject to the act, who is traveling for the purpose of entering the service of any such common carrier, whether such service has or has not previously been arranged for. (See Ruling 158.)

October 16, 1908.

103. FREE PASSES TO FAMILIES OF EMPLOYEES.—Upon an inquiry involving an interpretation of the recent

amendment to the antipass provision of section 1 providing that free transportation may be given to the families of employees killed in the service of common carriers: *Held,* That the provision does not include the families of employees who died a natural death while in the service of common carriers. (See Rulings 103, 173, and 193.)

NOTE.—The amendatory act of June 18, 1910, authorizes free transportation to widows and minor children of deceased employees, the former during widowhood and the latter during minority.

November 9, 1908.

104. CONFLICT IN PASSENGER TARIFFS.—Certain fares of a carrier had been published in a joint agent's tariff and also in its own tariff. The carrier issued a new tariff canceling the fares in its own tariff, but did not secure their cancellation in the joint agent's tariff: *Held,* That the new tariff was unlawful because in conflict with the uncanceled tariff of the joint agent. (See Rulings 50 and 70.)

105. PASSENGER TICKET HONORED BY WRONG LINE.—A coupon reading over one line was honored through error by the conductor of another line running between the same points, and the latter called upon its conductor to make good the amount: *Held,* That the matter was one of discipline between the company and its conductor, and was not cognizable by the Commission. (See Rulings 69 and 277.)

106. TARIFFS FOR THE TRANSPORTATION OF EXPLOSIVES.—Under a special act of Congress the Commission prescribed certain regulations governing the transportation of explosives. Such regulations are law to the carriers as well as to the shippers, and they can not be changed except by act of Congress or by this Commission. It is therefore not considered necessary for each carrier to file with the Commission copy of such regulations as a tariff issue, but it is considered necessary that each tariff which contains rates for the transportation of explosives shall also contain notice that such rates are applicable in connection and in compliance with the regulations fixed by the Interstate Commerce Commission. This provision must be in

every such tariff issued hereafter and must be incorporated in existing tariffs by reissue or supplement as early as practicable.

If tariff is governed by classification it will be sufficient to include the notice in the classification referred to as governing the tariff. (Rule 4, Tariff Circular 15-A, amended accordingly; see also Rule 65 of Tariff Circular 18-A.)

November 10, 1908.

107. REDUCED FARES FOR THE DEPORTATION OF CHINESE NOT PERMISSIBLE.—Special fares can not lawfully be accorded by carriers for the transportation of Chinese to the ports for deportation, even though the expense is paid by the Government.

Provisions for the subsistence and care in transit of Chinese being deported are matters of contract between the carrier and the Government, and need not be published in the tariffs.

108. HOURS-OF-SERVICE LAW—FERRY EMPLOYEES.—The hours-of-service law does not apply to employees on a ferry, even though the ferry be owned by a railroad company. The law applies to employees connected with the movement of trains, and hence does not embrace employees engaged only in the operation of a ferry. This ruling does not apply to car ferries. (See Ruling 287.)

109. TRANSPORTATION OF HOUSEHOLD GOODS OF AN EX-EMPLOYEE.—A carrier gave free transportation to an employee and his household effects to the point where he was to be employed, and later dismissed him: *Held,* That the Commission can not require the carrier to return the household effects free of charge to the point from which they were first moved. (Reaffirmed by Ruling 255; see also Ruling 208-*b*.)

110. REPAYMENT BY CARRIER ON ACCOUNT OF SWITCH TRACK.—A shipper in 1895 paid $200 to a carrier as part of the cost of constructing a spur track to its warehouse. Upon application of the carrier for permission to repay the amount to the shipper: *Held,* That the repayment would be unlawful unless the shipper had some equity or ownership in the track which he could transfer to the carrier in consideration of the payment.

November 12, 1908.

111. CHANGE OF RATE WHILE SHIPMENT WAS ON THE OCEAN.—A shipment of linoleum left Hamburg on July 4, at which time there was in effect a published through rate to San Francisco via New Orleans of $1.10. When the shipment reached New Orleans the through rate had been canceled, leaving in effect a local rate from New Orleans to San Francisco of 90 cents. Upon application for permission to refund down to the $1.10 through rate: *Held*, That the application must be denied.

112. CARETAKERS FOR BEES IN HIVES.—Upon inquiry from a classification committee it was agreed that tariffs may lawfully provide for free transportation of caretakers of bees in hives.

113. ERRORS OF CARRIER'S AGENTS.—Agents of carriers sometimes misroute passengers or by other error cause passengers to pay additional and unnecessary transportation charges. In the view of the Commission such cases are governed by the principles announced in Rule 70, Tariff Circular 15-A. (Reaffirmed by Ruling 167; see also Rulings 247, 266, and 277. Rule 70 of Tariff Circular 15-A is now published as Ruling 214 of this Bulletin.)

114. RECONSIGNMENT OF REFUSED SHIPMENTS.—It appears that in some instances carriers are willing to reconsign refused shipments to points beyond the first destination and to apply the tariff rate from point of origin to final destination, even though it be lower than the rate to first destination, but they do not feel at liberty to do so in view of paragraph 2 of Rule 78, Tariff Circular 15-A. It is optional with the carrier whether or not it will grant reconsigning privilege. If granted, the conditions governing it must be in tariff, and if charges for back haul or out-of-line haul are to be assessed, rule must so state.

It is of course understood that satisfactory showing of genuine transaction and actual refusal by consignee will be required. (Rule 78, Tariff Circular 15-A, amended accordingly; now published as Rule 67 of Tariff Circular 18-A.)

115. REDEMPTION OF UNUSED PASSENGER TICKETS.—Because of illness or other compelling reason a passenger

sometimes abandons a trip short of destination to which fare has been paid, or returns from a point short of that to which he has purchased a round-trip ticket. On the question of the right of the carrier to refund fare in such a case the Commission decides that when the passenger has paid more than lawful tariff fares for the journey actually made the carrier may lawfully redeem unused ticket and make refund on the basis of lawful tariff fare for the service actually rendered, when investigation develops clear identity between purchaser of ticket and the one to whom refund is made. (Amending Ruling 76; see also Rulings 265 and 303.)

November 13, 1908.

116. REFUND OF UNUSED PORTION OF ROUND-TRIP TICKET.—Because of a washout of a portion of its tracks a carrier was unable to operate trains and thus return a passenger over that route within the time limited in a round-trip ticket which she held. A circuitous route was open to her, but on account of her age and the condition of her health she did not think it safe to take so long a journey, and therefore, waiting until the tracks had been repaired, which was after the expiration of the limit of the ticket, she purchased a one-way ticket back to her home: *Held,* That as the carrier was not able to furnish the service which it undertook to furnish within the time limited in the round-trip ticket, it might lawfully refund the extra return fare so paid by the passenger. (See Ruling 266.)

117. DEMURRAGE WAIVED UNDER SPECIAL CIRCUMSTANCES.—A sidetrack to an industry upon which a carrier had delivered 18 heavily loaded cars sank because of the marshy character of the roadbed: *Held,* That the carrier may refund demurrage collected for the necessary detention of the cars while the sidetrack was being rebuilt. (See note to Ruling 242.)

118. REDUCED RATES FOR MUNICIPAL GOVERNMENTS IN FOREIGN COUNTRIES ADJACENT.—Upon inquiry: *Held,* That the reduced-rate transportation for municipal governments permitted under section 22 of the act does not apply to municipal governments in foreign countries adjacent.

119. RESHIPPING OF GRAIN.—Upon inquiry whether a proposed tariff rule providing that "the rate to be applied on all outbound transit grain of record shall be the specific rate that is lawfully in effect from Chicago at the time the grain is reshipped" may lawfully be incorporated in a tariff: *Held,* That the Commission can not sanction the rule, and that the grain can move only as a through movement on the through rate in effect at the time it starts, or as a local movement.

120. RESPONSIBILITY OF CARRIER FOR FAILURE TO FURNISH PROPER CARS UNDER RATE CONFINED TO CARS OF A CERTAIN CLASS.—Certain rates on coal published by a carrier to points on a connecting line were expressly limited to shipments "loaded in box or stock cars only," because the connection refused to handle coal shipments in open cars. Upon demand for cars for a shipment to such points the carrier, instead of furnishing box cars to which the rate applied, furnished coal cars, which carried a higher rate: *Held,* That the carrier having issued the tariff itself, and having furnished cars that did not comply with the tariff requirements, was responsible for the excess charges.

November 14, 1908.

121. A PRIVATE SIDE TRACK DEFINED.—A private sidetrack is one that is outside the carrier's right of way, yard, and terminals, and of which the railroad does not own either the rails, ties, roadbed, or right of way. (Modifying Ruling 79-*a*; see note to Ruling 242.)

122. A PRIVATE CAR OWNED BY ONE SHIPPER BUT USED BY ANOTHER.—A private car owned by one shipper but used with his consent by another shipper dealing in a different commodity is not a private car as that phrase has been defined by the Commission in connection with demurrage charges. (Qualifying Ruling 79-*b*; see also Ruling 128.)

123. DEMURRAGE ON PRIVATE CARS TEMPORARILY OUT OF SERVICE STANDING ON CARRIERS' STORAGE TRACKS.—Demurrage is a charge for detention to cars that have been set by carrier for loading or unloading. Private cars are subject to demurrage rules the same as is the carriers' equipment except when the private car is standing on the

private sidetrack. It is not necessary to charge demurrage either on carriers' equipment or private cars when same are temporarily out of service and standing idle upon the storage tracks of the carrier unless provision for such charge is included in carriers' demurrage rules. (See Rulings 79, 222, 270 and note to Ruling 242; see also Rule 75 of Tariff Circular 18-A.)

December 7, 1908.

124. FREE TRANSPORTATION OF MATERIAL AND WORKMEN.—A carrier, not being able to obtain ice for refrigeration purposes at a division point, entered into a contract under which a private company there undertook to build a plant and manufacture ice. The contract provided that in case it was necessary to enlarge the plant to meet the increasing needs of the carrier, the carrier would transport free of charge the materials and mechanics necessary to make the enlargement. An enlargement was required and made, and upon application by the carrier for permission to refund the freight charges on the materials used and the passenger fares paid by the mechanics employed on the work: *Held,* That the application must be denied, it appearing that the ice plant also sold ice commercially in the community in question. (Compare Ruling 87.)

December 8, 1908.

125. FAILURE TO VALIDATE PASSENGER TICKET.—Upon inquiry: *Held,* That a carrier might lawfully incorporate in its tariff a rule providing that when a passenger is compelled to pay the regular return fare because of his failure to have his round-trip ticket validated at the return starting point, the carrier will refund the extra fare upon the filing with it of an affidavit by the holder of the round-trip ticket, certifying that the ticket had been used in accordance with all the conditions of the tariff and the contract on the ticket except as to the matter of validation. (See Ruling 75.)

126. REFUND OF OVERCHARGE ON SHIPMENT TO FOREIGN COUNTRY ADJACENT.—An overcharge was collected on a shipment of tobacco to a point in Mexico. On application of the American carriers, in which the Mexican lines re-

fused to join: *Held,* That the American lines might refund such part of the total overcharge as their division of the through rate bears to the entire through rate.

127. DAMAGE TO FRUIT BY DELAYED NOTICE OF ARRIVAL AT DESTINATION.—An express company undertook to notify the consignee of the arrival at destination of a shipment of strawberries, but failed for some days to effect notice partly because of an erroneous address on a postal card: *Held,* That the damage resulting from the delay was not due to any violation of the act to regulate commerce and therefore was not cognizable by the Commission. (See Ruling 366.)

December 10, 1908.

128. INCORPORATION IN TARIFFS OF AMENDED DEFINITION OF A PRIVATE CAR.—On June 2, 1908, the Commission amended its definition of a private car as used in the opinion "In the Matter of Demurrage Charges on Privately Owned Tank Cars" to include also cars owned and leased to shippers by private corporations. It is held that this amendment shall be incorporated in all new car-service rules dealing with this subject, and that all rules shall be so amended as to include leased cars on or before the next fiscal year, July, 1909. The Commission rules, however, that upon the amendment of tariffs as indicated, such leased cars, under the conditions dealt with in case No. 933, may be treated as private cars and be exempt from demurrage when standing on private tracks. (See Rulings 79-*b*, 122, and 222; see also note to Ruling 242.)

January 4, 1909.

129. SIGNATURE TO APPLICATIONS FOR SPECIAL REPARATION.—In case of the absence, illness, or disability of the executive or general officer of a carrier by whom special reparation applications are customarily made to the Commission, such applications may be signed in the name of such executive or general officer by his chief clerk, provided the executive or general officer has previously filed with the Commission written authority for the chief clerk to append his signature in such cases.

130. MAINTENANCE OF RELATIVE ADJUSTMENT IN ISSUING TARIFFS TO CONFORM WITH FORMAL ORDER OF THE COMMISSION.—In establishing rates or regulations under an order of the Commission in a formal case, carrier or carriers that are actually and on the record parties to the case, or that are lawful parties to a joint tariff in which the rate or regulation that is prescribed is published by some carrier that is party to the case, may include in the change or changes made in compliance with the Commission's order commodity or commodities that are grouped with that or those which are specified in the order; and may also include adjustment at other points in order to preserve established grouping or relation of points, and may also include adjustment of rates to same points on other commodities for the purpose of maintaining established relation of rates between commodities. *Provided,* all such changes made by authority of this rule shall be effected by reductions in rates or charges.

If carrier that is not so party to the case or to the joint tariff desires to make on less than statutory notice the same changes that are made under the order by carrier that is party to the same, it must secure special permission so to do.

131. "GROSS TON" AND SIMILAR PHRASES, AS USED IN TARIFFS, DEFINED.—The term "per ton" and "net ton," when used in tariffs, will, in the absence of qualifying words, be held to mean a ton of 2,000 pounds. The terms "gross ton" and "long ton" and "ton of 2,240 pounds" will be held to mean a ton of 2,240 pounds.

January 5, 1909.

132. REFUND ON GRAIN DOORS.—Where a carrier has established a tariff provision in conformity with the Commission's rule with respect to the payment by carriers of the cost of grain doors, and it appears that prior to the publication of such a tariff it had been the practice of carrier to pay for grain doors furnished by shippers: *Held,* That applications may be made on the special reparation docket for authority to refund on the basis of the tariff provision for grain doors furnished within six months prior to the effective date of the tariff rule. (See Rulings 19, 78, 267, 292 and 360.)

January 7, 1909.

133. OVERCHARGE ON ONE SHIPMENT OFFSET AGAINST UNDERCHARGE ON ANOTHER.—Before it had returned an overcharge on one shipment the carrier discovered that it had inadvertently made an undercharge on another shipment by the same shipper, which he refused to pay. Upon inquiry by the carrier whether it could lawfully offset the overcharge against the undercharge: *Held,* That the Commission has no authority to control the disposition of an overcharge so long as the amount is passed by the carrier to the credit of the shipper. Superseded by Ruling 323. (Compare Ruling 48.)

134. FREE TRANSPORTATION WHEN TAKING MEASUREMENTS OF EMPLOYEES FOR UNIFORMS.—A carrier requires that certain of its employees shall wear uniforms made from goods of texture and color and according to specifications prescribed by the carrier. The carrier employs a certain firm to make such uniforms for any and all of its employees at agreed-upon prices. A man is sent over the line to take the measures and orders of employees for such uniforms. The employee generally gives an order on the carrier for the amount of his order, which amount the carrier deducts in whole or in part from wages due the employee and the carrier pays the firm for the uniform.

We are asked if the carrier may lawfully continue granting free transportation to man so taking measures and orders for uniform: *Held,* That having its employees properly uniformed is a duty of the carrier in the interest of the carrier and of its patrons, and therefore the man so sent over its lines for the purpose named is, for that purpose and while engaged in that work, performing a duty devolving upon that carrier and may lawfully be given free transportation to the extent necessary for the performance of that duty, provided he does not in the same connection receive any orders from or sell any goods to persons who are not bona fide employees of that carrier. (See Rulings 208-*b* and 346.)

January 27, 1909.

135. DEMURRAGE ON INTERSTATE SHIPMENTS.—Rule in Supplement No. 2 to Tariff Circular 15-A, entitled "De-

murrage on interstate shipments," is amended by adding thereto the following:

"It is not permissible to provide that demurrage *may* be refunded or waived in case of inclement weather and leave it to the judgment of some person to determine what constitutes inclement weather. It is permissible to provide that demurrage charges *shall* be waived or refunded in case of weather interference of such severity as to damage the freight in handling it into or from the car, or when shipment is frozen so as to prevent or seriously hinder unloading, or when because of flood or high water, or snowdrifts which it is the carrier's duty to remove, it is impracticable to get to car for loading or unloading."

(Amending Ruling 223. See Ruling 358 and see also important note to Ruling 242. Rule in Supplement No. 2, referred to, is now reported as Rule 75 of Tariff Circular 18-A.)

136. ACCRUED CLAIMS NOT INVALIDATED BY SUBSEQUENT CANCELLATION OF ABSORPTION RULE.—A tariff providing for the absorption of inbound switching charges on certain traffic also provided that they would not be absorbed when the expense bills therefor were presented more than six months after their date. Within six months after certain switching services had been performed bills therefor were presented, but the carrier refused payment on the ground that during the interval the absorption rule referred to had been canceled: *Held*, That the subsequent cancellation could not invalidate a claim already accrued.

February 2, 1909.

137. INITIAL CARRIER LIABLE FOR MISROUTING.—An initial carrier delivered a shipment to a connection, but did not give it any routing instructions beyond noting on the waybill the through rate via the cheaper of two available routes. The connecting carrier sent it over the route yielding it the greater revenue, but carrying the higher through rate: *Held*, That the initial carrier is liable for the misrouting. (Construed and amended by Ruling 286-*c*.)

138. CHARGES FOR MOVING PRIVATE CAR.—A tariff provided for the movement of a private car or sleeper at the regular fare for each occupant with a minimum of 20 adults fares and a minimum collection of $25 for each movement.

Its direct line being blockaded by a washout, a carrier sent individual passengers around a longer route over its lines at the short-line fare, but charged the occupants of such a private car then on its lines the full mileage rates for the longer haul: *Held,* That under the tariff rule the car and party should have moved as the individual passengers were moved under the same circumstances; and that the short-line fare ought also to have been applied to the private car and party. (See Ruling 213.)

139. STATUTE OF LIMITATION.—Upon inquiry the Commission declines to express any opinion as to the jurisdiction of the courts over a claim for damages arising out of the negligent misrouting of a shipment by a carrier, the claim having been presented to the Commission more than two years after it had accrued and when the Commission's power to award relief had been barred by the statute. (Construed and amended by Ruling 286.)

140. MISROUTING SHIPMENT THAT COULD MOVE INTRASTATE.—A shipment destined to another point in the same state was delivered to a carrier without routing instructions. It was sent by a route which took it outside the state lines, and required the payment of an interstate rate higher than the state rate which would have applied on an available intrastate route: *Held,* That the Commission recognizes the right of the shipper to route his shipment, which in this instance the shipper neglected to do; that the shipment moved interstate, and that the Commission can not say that the interstate line can apply any other than its lawfully published tariff rate except under special permission or order of the Commission. (See Rulings 214 and 251.)

141. TARIFF IS NOT GOVERNED BY CLASSIFICATION EXCEPT WHEN SO SPECIFIED.—A tariff naming commodity rates on strawberries in carloads fixed a certain rate on a minimum of 100 crates, and a lower rate on a minimum of 200 crates. The classification in that territory provided that carload rates would apply only when the carload is shipped from one station in one day by one shipper to one consignee and destination. The shipments in question belonged to different owners, but with the knowledge and consent of the carrier and under the

admitted intent of the tariff, were loaded and forwarded as carload shipments. They were loaded to or beyond the minimum of 200 crates per car: *Held,* That they were entitled to the application of the lower rate on the basis of the 200-crate minimum.

February 8, 1909.

142. BUNCHING CARS IN TRANSIT.—Upon an informal complaint that cars were delayed in transit and delivered by a carrier in such number as to exceed the shipper's facilities for unloading within the free time: *Held,* That tariffs ought to contain a rule providing that when, by fault of the carrier, cars are bunched in excess of the shipper's or consignee's ability to handle them within the free time, demurrage will not accrue. In the absence of such a rule the Commission can determine the reasonableness of such a practice only upon complaint filed. (See note to Ruling 242.)

143. MISROUTING OF COMPANY MATERIAL.—The initial carrier, disregarding instructions to route a shipment through a particular junction, moved it to destination over its own lines, the rates over the two routes being the same. Although the shipment was consigned to a private person, it was in fact the property of the connecting line, which therefore could have hauled it free of charge from the junction point to destination. Notwithstanding the fact that the initial carrier had no notice and was not chargeable with notice that it was company material: *Held,* That the initial line is liable for the additional charges on the ground that a carrier exercising the right, under Rule 70 of Tariff Circular 15-A, to dictate intermediate routing must make its election at the time it accepts the shipment, and that if the carrier accepts the shipment with specific instructions it must so move the traffic or bear the damages arising out of its departure from the instructions. (Rule 70 is reported as Ruling 214 of this Bulletin.)

144. SWITCHING SHIPMENTS UPON WHICH TRANSPORTATION CHARGES HAVE NOT BEEN PAID.—A shipment was forwarded with instructions to give delivery on a certain road. The car moved over the proper route to destination, and was tendered for switching to the road indicated in delivery directions. Under long-established custom, it declined to

assume responsibility for charges on the shipment and refused to accept the car until transportation charges had been paid. The carrier that brought the car in mailed a notice to the address of consignee, who was not known, and before the difficulty was straightened out demurrage accrued: *Held,* That the demurrage charges lawfully accrued and should stand.

145. A TARIFF RULE THAT IS UNLAWFUL *PER SE* CAN NOT BE USED.—A tariff contained a rule providing that:

"When freight can not be disposed of at point held for sufficient amount to realize by sale both freight and car service, or storage charges, demurrage charges may be refunded, waived, or canceled."

Held, That the performance of a transportation service determines the obligation of the carrier to collect and of the shipper to pay the published rates therefor and no subsequent fact, having no relation to the service, can lawfully be made the basis for a refund or other departure from such rates. The provision is therefore unlawful *per se* and can not be accepted as authority for a waiver, refund, or cancellation of the tariff charges even as to a shipment made while the provision was contained in the published tariff. (See note to Ruling 242; compare Ruling 41.)

146. IMPROPER AND UNLAWFUL TARIFF PROVISION.—A carrier's tariff contained the following rule:

"The ——— Railway reserves the right to route through to destination property delivered to it for transportation at the through rates shown in this tariff; and every carrier participating in such transportation shall have the right, in cases of necessity, including floods, embargoes, and blockades, to forward said property by any carrier between the point of shipment and the point to which the rate is given. All additional risks and increased expense incurred by reason of change in route in cases of necessity, including floods, embargoes, and blockades, shall be borne by the owner of the goods and be a lien thereon."

Held, That this rule is improper and unlawful. (Compare Ruling 183; see also Ruling 83.)

February 9, 1909.

147. RATE MUST APPLY ACCORDING TO MOVEMENT.—Upon the arrival of a shipment at the junction desig-

nated in the consignor's routing instructions it appeared that, because of a washout on its lines, the connecting carrier could not accept the movement. The shipper thereupon assumed custody of the shipment and forwarded it by a water line: *Held,* That the carrier must collect its local rate to the junction point and can not apply its proportion of the through rate. (See Ruling 83.)

148. SIDE TRIPS MUST BE SHOWN IN THROUGH TARIFFS.—*Held,* That side trips for passengers at free or reduced rates limited to holders of through tickets are not lawful, unless the tariff under which the through ticket is sold states that such side trips will be furnished. (Modified by Ruling 177.)

149. AMENDED RULE 14 OF THE RULES OF PRACTICE.—(*a*) Unless otherwise specially ordered printed briefs shall be filed on behalf of the parties in each case. The brief for complainant and the brief or briefs for the defendants, or interveners, shall contain an abstract of the evidence relied upon by the parties filing the same, and in such abstract reference shall be made to the pages of the record wherein the evidence appears. The abstract of evidence should follow the statement of the case and precede the argument.

(*b*) Briefs shall be printed in 12-point type on antique-finished paper 5⅞ inches wide by 9 inches long, with suitable margins, double-leaded text and single-leaded citations. (Same as Ruling 40.)

(*c*) At the close of the taking of testimony in each case the Commissioner or examiner before whom such testimony is taken shall fix the specific dates on or before which the briefs of the respective parties must be filed with the Commission and served on the adverse parties. The dates so fixed, unless otherwise ordered at said time, shall allow to the respective parties the following periods of time within which to file with the Commission and serve their respective briefs on the adverse parties, to wit: To the complainant, thirty days from the date of the conclusion of the testimony; to the defendants and interveners, fifteen days after the specific date fixed for the complainant; and to complainant for reply brief, ten days after the date fixed for defendants or interveners. If the briefs of the respective parties are not filed and served on the date for each, the case will stand

submitted without briefs on the date that defendants' or interveners' briefs are due. Briefs of parties not filed as aforesaid, and served on the respective parties on or before the specific dates fixed therefor, will not be received or considered by the Commission.

(*d*) All briefs shall be filed with the secretary and shall be accompanied by notice showing service upon the adverse parties, and 15 copies of each brief shall be filed for the use of the Commission.

(*e*) The parties will be required to comply strictly with this rule, and, except for good cause shown, no extension of time will be allowed. Applications for extension of time in which to file brief shall be by petition in writing, stating the facts on which the application rests, and must be filed with the Commission at least five days before the time for filing such briefs has expired.

(*f*) Applications for oral argument may be made by any party at the close of the taking of the testimony or at the time of the filing of his brief. Such application can be granted only by the Commission.

February 11, 1909.

150. CARETAKERS UNDER SECTION 22 OF THE ACT.—Section 22 of the act provides—

"That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, state, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation."

Held, That the words "and necessary agents employed in such transportation" modify the entire preceding part of the section, and that the necessary caretakers of property transported for the United States, state, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, may legally be carried free or at reduced rates by carriers subject to the act, as well as the caretakers of destitute and homeless persons transported by charitable societies. The words "necessary agents" as used in this section are interpreted to mean those persons necessary to the safe and proper care of the prop-

erty during the period of transportation, and may not properly be extended to cover any persons other than those who actually accompany, such property and are actually necessary to its care. (Compare Ruling 171.)

March 1, 1909.

151. RELIEF OF AGENT DOES NOT RELIEVE CARRIER.—Through error an agent inserted a route in a round-trip ticket over which the published fare was $10 in excess of the amount actually collected from the passenger. Upon the request of the carrier for permission to relieve its agent of the uncollected undercharge: *Held,* That the collection of the amount from the agent would not in any way relieve the carrier of its responsibility for failing to collect the full tariff fare from the passenger.

152. RIGHT OF SHIPPER TO PAY FREIGHT CHARGES ON FICTITIOUS WEIGHT IN ORDER TO RECEIVE FREE ICING.—A consignor having a shipment of dressed poultry weighing 9,910 pounds offered to pay freight charges on the basis of 10,000 pounds in order to have the advantage of free icing under a tariff rule providing that the cost of icing would not be assumed by the carrier when the weight in each car was less than 10,000 pounds; but the carrier refused to accept the 77 cents additional freight charges and compelled the shipper to pay $5.25 for the icing: *Held,* In analogy to the common practice of carriers to apply the carload rate and minimum on shipments of less weight where the application of the less-than-carload rate would result in higher charges, that such a tariff rule, if susceptible of the construction placed upon it by the carrier, is unreasonable and ought to be amended.

April 5, 1909.

153. CARRIER WHEN A SHIPPER CAN NOT EVADE PAYMENT OF LAWFUL RATES OF A CONNECTION BY SECURING TRACKAGE RIGHTS OVER ITS LINE.—An interstate carrier desiring stone for ballast on its right of way, leased a trackage right over a short connecting line leading to a quarry, and proposed to purchase the stone at the quarry and haul it to its own line with its own crews and equipment: *Held,*

That the Commission must decline to sanction the arrangement for the reason that the carrier under the circumstances is a shipper and the proposed arrangement is a mere device to evade the payment of the lawful rates and would result in unlawful discrimination. (See Ruling 225.)

154. TICKETS PURCHASED AT THE REGULAR PUBLISHED FARE MAY BE GIVEN BY A LAND COMPANY TO PROSPECTIVE PURCHASERS.—A land company having no relations, direct or indirect with a carrier has a lawful right to pay all or any part of the carrier's lawful transportation charges for such persons as it may choose to supply with tickets.

155. MOVEMENT BETWEEN PORTS IN CONNECTION WITH RAIL HAULS TO AND FROM INLAND POINTS SUBJECT TO THE ACT.—Traffic moving by rail from an inland point to a port and thence by water to another port, or moving by water from one port to another port and from the latter port to an inland point by rail, and which does not pass into the possession or custody of the owner or his agent at the port, is, when interstate traffic, subject to the act and under the jurisdiction of the Commission. (See Ruling 201.)

156. DELIVERING CARRIER MUST COLLECT LAWFUL CHARGES UPON PREPAID SHIPMENTS.—Upon inquiry: *Held,* That it is the duty of the delivering carrier to collect the lawful rates on prepaid shipments and to correct any errors that may have been made by the agents of the initial carrier in billing or in the collection by the initial carrier of the prepaid charges. (See Rulings 16, 187, and 311.)

April 6, 1909.

157. FREE TRANSPORTATION FOR OFFICERS AND AGENTS OF EXPRESS COMPANIES AND THEIR FAMILIES.—Upon inquiry it was *Held,* That a carrier subject to the act may lawfully give free or reduced rate transportation to the officers and agents, and their families, of express companies that are subject to the act. The Commission's decision in formal case No. 1985. *In the Matter of Contracts of Express Companies for Free Transportation of Their Men and Material over Railroads,* 16 I. C. C. Rep., 246, is not to be understood as contradicting or rescinding this ruling. (See Ruling 361.)

158. FREE TRANSPORTATION TO FAMILIES OF EX-EMPLOYEES.—Free transportation may lawfully be accorded to members of the family accompanying an ex-employee traveling for the purpose of entering the service of any common carrier subject to the act. (See Ruling 102.)

159. BILL OF LADING SPECIFYING A ROUTE, BUT NAMING A RATE APPLICABLE OVER ANOTHER ROUTE.—A bill of lading showed both a rate and a route, but the rate did not apply over the route named: *Held,* That in all such cases the shipment should be forwarded via the route over which the stated rate applies unless the rate via the specified route makes lower, in which event the specified routing must be followed. (Reaffirmed and amended by Ruling 286-*f*.)

160. HIGHER RATES WHEN SHIPMENTS ARE TENDERED WITH OTHER THAN UNIFORM BILL OF LADING.—A carrier's tariff provided higher rates on shipments not tendered with a uniform bill of lading: *Held,* That the tender of a shipment accompanied by other than a uniform bill of lading may not be taken by the carrier as evidence of the shipper's election to use the higher rate. The carrier must direct his attention to the fact that a lower rate is available under the uniform bill of lading. (Compare Ruling 226.)

April 12, 1909.

161. TELEPHONE AND TELEGRAPH LINEMEN NOT ENTITLED TO FREE TRANSPORTATION.—Upon inquiry as to whether a rail carrier has the right to issue free transportation to lineman of telephone and telegraph companies not employed on its line: *Held,* That the Commission adheres to its former decision that linemen are not entitled to free transportation except upon the line of railway on which they are actually employed, and only when so engaged. (See Ruling 305; see also Rulings 95-*a*, par. 2, and 219.)

NOTE.—Telegraph and telephone companies are brought within law by the amendatory act of June 18, 1910; see anti-pass provisions of section one.

162. MUNICIPAL FERRIES SUBJECT TO THE ACT WHEN PARTICIPATING IN TRANSPORTATION DEFINED BY THE STATUTE.—The city of New York operates

a municipal ferry between St. George and the foot of Whitehall street. The Staten Island Rapid Transit Company sells commutation tickets from Perth Amboy to the Whitehall street pier, and files a tariff of local and joint passenger fares to cover such transportation. Upon inquiry from the commissioner of docks: *Held,* That the municipality must join in the tariffs. (Compare Ruling 89.)

163. REFUND ON ACCOUNT OF FULL-FARE TRANSPORTATION USED BY A BOY UNDER 12 YEARS OF AGE NOT PERMISSIBLE.—A purchaser of two full-fare tickets called upon the initial carrier for a refund, after they had been used, on the ground that he had asked for a ticket and a half, and that he had used one of the full-fare tickets for his son, who was under 12 years of age. The agent of the carrier denied that a half-fare ticket had been requested, and the fact appeared that the father had accepted and paid for two full fares: *Held,* That the Commission would not authorize a refund.

164. A CARRIER MUST PUBLISH FARES AND OFFER TO THE PUBLIC RAILROAD TICKETS INDEPENDENT OF OMNIBUS ARRANGEMENTS.—A carrier under a tariff provision sells excursion tickets to a point on its line to which is attached a coupon for carriage from that point to Luray Caverns and return on the omnibuses of a designated transfer company: *Held,* That this is not a discrimination under the act against another transfer company. But the Commission holds that while such tickets may lawfully be sold, the carrier must publish the railroad fare to the point in question and separately show bus fare beyond, and must also have on sale tickets to that point at the rate named without bus coupons attached.

165. OFFICERS AND EMPLOYEES OF A RAILROAD RECEIVER ENTITLED TO FREE TRANSPORTATION.—Upon inquiry from a receiver duly appointed by the court to manage the property and assets of a railroad company: *Held,* That officers and employees engaged under the receiver in the operation of the railroad occupy the same position under the anti-pass provision of the act as do the officers and employees of any other railroad.

April 13, 1909.

166. RETROACTIVE APPLICATION OF RECONSIGNING PRIVILEGE NOT PERMISSIBLE.—Adhering to Ruling 6, the Commission will not sanction the application, retroactively, of a reconsigning privilege, even though it had long been the custom of the carrier to permit reconsignment without tariff authority. (See Ruling 77.)

167. A PASSENGER WRONGFULLY DEPRIVED OF THE BENEFIT OF RETURN COUPON OF A ROUND-TRIP EXCURSION TICKET MAY HAVE REPARATION.—A passenger holding a round-trip ticket on the certificate plan, or a round-trip ticket requiring validation, was, through ignorance or fault of a carrier's agent, deprived of the benefit of the reduced fare on the return journey and was compelled to purchase a full-fare ticket: *Held,* That such cases are analogous to the misrouting of freight and ought to be adjusted on the general principle underlying Rule 70 of Tariff Circular 15-A (Ruling 214 of this bulletin). The Commission, therefore, authorizes carriers in such cases, without a special permissive order, to refund to the passenger the difference between the total fare paid by him and the reduced rate which he would have enjoyed except for the carrier's error; and the carrier at fault must bear the full burden without recourse upon any other road participating in the carriage. (Reaffirming Ruling 113. See also Rulings 75, 125, 247, 266, and 277.)

168. EFFECT OF TRACKAGE ARRANGEMENTS UNDER THE ACT TO REGULATE COMMERCE WITH RESPECT TO SHIPMENTS ROUTED BY SHIPPER.—The Mineral Point & Northern Railway Company has trackage arrangements with the Chicago, Milwaukee & St. Paul for the joint use of the latter's tracks between Highland Junction and Mineral Point, Wis. Upon inquiry from the general manager of the first-named road as to whether the St. Paul rightfully may refuse to turn shipments over to it at Highland Junction, when so routed, and retain possession of the revenue for the haul from that station to Mineral Point: *Held,* On the understanding that the shipments in either case would be delivered at the same warehouse and at the same rate, that under the act to regulate commerce no obligation rests on the Chicago, Milwaukee & St. Paul to turn

over shipments to the Mineral Point & Northern Railway at Highland Junction for transportation to Mineral Point.

169. FREE PASSES TO EMPLOYEES OF A CAR-LIGHTING COMPANY UNLAWFUL.—Upon inquiry from a car-lighting company it was *Held,* That its experts for the testing and observation of the performance of its lights on trains are not employees of the carrier, and are not therefore entitled to free transportation. (See Ruling 95.)

170. IMPORTED MERCHANDISE NOT ENTITLED TO INLAND PROPORTIONAL RATE WHEN THE TRANSPORTATION FROM THE PORT IS PURELY LOCAL.—An importer of flax, after unloading a cargo at the port, sold it, and the purchaser some months later sold a part of the original shipment to a manufacturing company, by which it was shipped to a point in the Middle West at the regular local rate of the carrier that took the movement. At the time there was in effect an inland proportional rate from the port to destination: *Held,* That the movement from the port was a separate and distinct transaction upon which the local rate was the only lawfully applicable rate.

May 4, 1909.

171. FREE TRANSPORTATION TO SHIPPERS OF PERISHABLE FREIGHT.—The tariffs of a carrier included a refrigeration service, under rates named therein, on perishable freight. Upon inquiry whether the shippers or their agents might have free transportation to inspect the reicing of the cars: *Held,* That it does not appear that they are necessary caretakers within the meaning of section 1 of the act. (Compare Ruling 150.)

172. RATE IN EFFECT ON RECEIPT OF SHIPMENT IS THE LAWFUL RATE.—Freight was received by a carrier and bills of lading were issued therefor on December 21 and 29, 1908. The freight was actually moved on January 1, 1909, on which date a lower rate went into effect: *Held,* That the rate in effect on the date the carrier received the property for transportation is the lawful rate.

173. FREE TRANSPORTATION FOR FAMILY OF DECEASED EMPLOYEE.—An engineer of one carrier having ended his run for the day was preparing to return to his home over another line the train service of which was more convenient. He lost his life by inadvertently stepping in front of a train of this carrier. Upon inquiry whether under the recent amendment to the antipass provision of section 1 free transportation might be given to his widow and children by the road by which he had been employed: *Held,* That the case comes within the spirit and meaning of the amendment. (The amendment referred to is in the act of April 13, 1908. See Rulings 18, 103, and 193.)

174. FREE TRANSPORTATION OF FAMILY OF EMPLOYEE.—May an employee use free transportation for the remains of his wife after they had been temporarily interred? *Held,* That within the meaning of section 1 of the act the deceased wife of an employee may be regarded as a member of his family until given permanent burial. (See Ruling 95-*c*.)

175. CARLOAD SHIPMENTS.—A coffee broker purchased from three different merchants at New York three lots of coffee for shipment to one customer as one carload. The three lots were delivered to the carrier under circumstances that would have entitled them to go to destination as a carload shipment had proper instructions been given. Because of the failure of the shipper's agent to give such instructions the three lots went forward to destination as three shipments, at the less-than-carload rate. Upon inquiry by the carrier whether it might assess the carload rate: *Held*, That freight charges must be collected on the basis of the less-than-carload rate.

176. FREE OR REDUCED-RATE TRANSPORTATION TO AND FROM EXHIBITIONS.—Specimens of ore that are not to be offered for sale but are intended exclusively for exhibition at the Chamber of Mines at Los Angeles may be carried free of charge or at reduced rates, under section 22 of the act.

May 10, 1909.

177. SIDE TRIPS NOT SPECIFICALLY SHOWN IN A THROUGH TARIFF.—Modifying conference ruling No. 148,

it is *Held*, That a note in a through tariff providing that passengers purchasing through tickets thereunder shall be entitled to such side-trip privileges as are stated in the individual tariffs, on file with the Commission, of the carriers that are parties to the through fare, is a sufficient compliance with the requirements of the law and with the rules of the Commission.

178. USE OF MILEAGE TICKETS IN NEW TERRITORY.—A tariff authorizes the sale of mileage tickets good between points within a specified limited territory. Subsequent to the date upon which such a ticket is sold and prior to the date of its expiration the tariff is amended so as to include additional territory. May such mileage ticket be thereafter honored for transportation between points in the added territory? *Held*, That the terms of the contract of original sale must be adhered to unless the amendment to the tariff specifically authorizes honoring outstanding tickets between points in the added territory.

179. TARIFFS PROVIDING FOR TRANSPORTATION OF CARETAKERS IN PASSENGER CARS.—When an express company provides in its tariff for free transportation for caretakers in charge of live stock, poultry, or fruit, and the railroad company over whose lines such express company operates provides in its tariff that such caretakers may be permitted to ride in passenger cars, the tariff of the express company and that of the railroad company must give reference to each other.

180. LESSEE ROAD NOT SERVING PUBLIC AS COMMON CARRIER.—For operating purposes only a carrier leased 20 miles of its line to another railroad company. The contract required the lessee for an agreed compensation to be paid to it by the lessor, to operate the lessor's trains and to maintain its way, tracks, and appurtenances, the rate and charges to be collected by the lessor and the lessee to have no direct dealings with the public. On the facts as stated in the inquiry: *Held*, That the lessor must publish the rates, fares, and charges, and the lessee need not be a party to the tariffs nor concur therein, but is simply a contractor performing certain services for the lessor. (Compare Ruling 229.)

June 7, 1909.

181. SUBSTITUTIONS OF TONNAGE.—A shipper proposed a tariff rule authorizing carload shipments of lime originating at eastern points to be stopped at Omaha, where a part of the contents could be unloaded and an equivalent tonnage of cement or plaster substituted, the charges to final destination to be assessed in accordance with the rate on lime from the original point of origin: *Held,* That the proposed rule would be unlawful. (Withdrawn February 10, 1913.)

182. SALE OF TICKETS AFTER DEPARTURE OF LAST TRAIN ON FINAL SELLING DATE.—Tariff quoting passenger fares provides that tickets shall be on sale between certain specified dates and that they shall be good going for a specified period, including the date of sale. Passenger desiring to take advantage of such fare applied for such ticket on the last day of sale and after the last train for the day had departed from that station. Agent refused to issue the ticket desired. The time limit specified in the tariff was sufficient to carry passenger through destination within that limit even if he left the initial point on the day following the last date of sale. Tariff did not require that journey should commence on date of sale of ticket: *Held,* That agent should have issued the ticket requested, the time limit thereunder being sufficient to carry passenger through to destination by his starting on the following day and the tariff containing no requirements as to date upon which journey should begin: *Held further,* That if tariff had provided that journey must commence on the day of sale of ticket, agent could not legally have issued such ticket after the last train for the day had departed on the last date of sale.

183. RESERVATION OF RIGHT TO ROUTE SHIPMENTS.—The following rule in a published tariff was approved as lawful, subject to complaint by shippers:

The A. & B. Railroad Company reserves the right to route through to destination property delivered to it for transportation at the through rates shown in this tariff, and every carrier participating in such transportation shall have the right, in cases of necessity, to forward said property by any railroad or route between the point of shipment and the point of destination, or the point to which the rate is given; but if such diversion shall be

from a rail to a water route, the liability of the carrier shall be the same as though the entire carriage were by rail. (Compare Ruling 146.)

184. PERFORMANCE OF TRANSPORTATION SERVICE WITHOUT RATES ON FILE.—In a recent prosecution instituted by the Commission of a carrier for engaging in transportation of interstate commerce without having previously filed with the Interstate Commerce Commission lawful tariffs applicable thereto, and in which conviction was had and fine of $12,000 was assessed, the court, speaking through Humphrey, J., said:

"It thus appears not only that the performance of interstate transportation by a carrier which has neglected to file and publish its rates and charges is a misdemeanor under the act to regulate commerce and under the Elkins Act, punishable by as severe penalties as any other violation of these acts, but it also appears that the requirement for filing and publication of the rates has been in the act to regulate commerce ever since the passage of the original Cullom bill, and that its importance has been recognized by the Congress by successive amendments designed to make it more precise and its violation more surely and more severely punishable.

"The railroad line of the defendant here is entirely situated within the state of Illinois. It is not more than 16 miles in length. It is really no more than a switching road connecting the various railways reaching East St. Louis and Alton, Ill., with each other and with various industries which have been established upon its rails. From the indictment and the plea thereto it appears, however, that this defendant is engaged in the transportation of property moving wholly by railroad from one state to another state. It is, therefore, as much subject to the act as though it owned and operated all the line of railroad connecting the points in different states between which moved the commodities mentioned in the indictment *C. N. O. & T. P. Ry.* v. *I. C. C.*, 162 U. S., 184; *L. & N. R. R.* v. *Behlmer*, 175 U. S., 650; *U. S.* v. *C. & N. R. R. Co.* (C. C. A.), 157 Fed. Rep., 321; *U. S.* v. *Belt Line R. R.* (C. C. A., seventh circuit, October term, 1908).

"These authorities establish that the law regarding publication of rates and charges for interstate transportation applies with equal force to all carriers engaging in such interstate transportation, whether such carriers operate trains from one state to another state or operate entirely within the boundaries of a single state.

"The chief object of the act to regulate commerce is the prevention of discrimination. Carriers, being engaged in a public

employment, must serve all members of the public on equal terms. This was the doctrine of the common law. It has been explicitly stated and strengthened by the successive acts to regulate commerce. The requirement of the act that all rates should be published is perhaps the chief feature of the scheme provided for the effective outlawing of all discriminations. If this portion of the act is not strictly enforced, the entire basis of effective regulation will be lost. Secret rates will inevitably become discriminating rates. Whenever discriminating rates or practices are made public, a thousand forces of self-interest and of public policy will be set at work to reduce them to fairness and equality. The failure of any carrier to properly file and publish its rates is quite as serious a violation of the act to regulate commerce as a failure to observe such rates after they have been properly filed and published." (168 Fed. Rep., 545.)

It is clearly the duty of the Commission to strictly enforce the provision of the law referred to, and it may confidently be expected that that duty will be performed. (See Ruling 194.)

185. FREE OR REDUCED RATE TRANSPORTATION TO MUSEUM OF NATURAL HISTORY.—A museum of natural history, erected in a public park by private subscription and supported partly by taxes and partly by the income of funds contributed by citizens, may be given free or reduced rate transportation under section 22 of the act on articles intended for exhibition therein, notwithstanding the fact that as a means of securing additional income it charges an admission fee on certain days of the week, admission being free on other days. (See Ruling 245.)

June 8, 1909.

186. LIABILITY FOR MISROUTING.—Before delivering his merchandise to a carrier, a shipper was quoted a rate of 16 cents via all available routes between the points of origin and destination. Bills of lading were issued showing that rate and, at the shipper's request, also showing routing via a named junction. Before delivery was made at destination it was discovered that the 16-cent rate did not apply over that route, and the delivering carrier therefore assessed the sum of the locals through that junction, amounting to 65 cents per 100 pounds. *Held*, That as the rate quoted was inserted in the bill of lading, shipment ought to have been moved over a route carrying that rate. (See Ruling 159; amended by Ruling 286-*f*.)

187. INTERPRETATION OF CONFERENCE RULING NO. 3.—The case upon which this ruling was made was one where freight charges were collectible from the consignee. To give it general application, the words "from consignees" are now stricken from the rule, so that it will read:

COLLECTION OF UNDERCHARGES.—The Commission adheres to its previous ruling that carriers must exhaust their legal remedies to collect undercharges.

(Superseded by Ruling 314. Compare Rulings 16 and 156.)

June 14, 1909.

188. RATES BASED ON DECLARED VALUATION.—The agent of a shipper not knowing the value of a dog to be sent by express, nevertheless named a valuation of $500, and the resulting charges to destination amounted to $45. The dog was actually worth $15, and at this valuation the express charges would have been $8. The consignee declined to accept delivery and pay the charges demanded. Upon inquiry whether charges may be collected on the basis of the actual value of the dog, it was *Held,* That the shipper is responsible for the act of his agent and that the charges at the valuation given must be collected.

189. RETURN OF CARETAKERS.—A shipment of live stock moved between two points over two connecting lines. Upon inquiry by the delivering road, which had a through direct line between the two points, it was *Held,* That it can not free of charge return the caretakers over its own direct line through to the point of origin of the shipment.

190. IN THE ABSENCE OF INSTRUCTIONS INITIAL CARRIER NOT REQUIRED TO ROUTE VIA RAIL AND WATER.—Rule 70 of Tariff Circular No. 15-A (Ruling 214 of this Bulletin) contemplates that where rail-and-water and all-rail rates are available for a shipment the shipper shall designate which class of routing he desires and that the agent of the carrier shall secure such designation from the shipper.

A shipment was delivered to a rail carrier destined to a point to which it might be forwarded via either all-rail or rail-lake-and-rail route. No class of route was designated by the shipper. Shipment was forwarded all rail: *Held,* That taking into consideration the liabilities of carriers and the question of marine insur-

ance upon water-borne traffic, the carrier's agent did not negligently misroute this shipment. (Interpreted in Ruling 284; see also Ruling 316.)

191. CAR-SERVICE CHARGES ON TRAFFIC FROM AND TO CANADA.—With respect to traffic between points in Canada and points in the United States, the Commission does not waive the requirement that carriers shall file tariffs showing their terminal charges and that such charges must either appear specifically in the tariffs naming the rates or the tariffs establishing such charges must be specifically referred to in the tariffs naming the rates.

192. INTERPRETATION OF AMENDED RULE 70 OF TARIFF CIRCULAR 15-A.—The amendment of April 6, 1909, to Rule 70 of Tariff Circular No. 15-A (Ruling 214-*i* of this Bulletin) is to be regarded merely as an application of the principle of the original ruling to cases based on the state of facts presented in the amendment, and carriers may settle all such claims arising after March 18, 1907, under the authority of the original ruling without bringing them to the Commission, the carrier at fault to bear the entire burden of the refund without recourse on its connections for any part thereof. (Amended by Ruling 286.)

193. FREE TRANSPORTATION OF REMAINS OF DECEASED EMPLOYEE AND FAMILY ACCOMPANYING SAME.—It is the view of the Commission that the spirit and meaning of the law with relation to free passes for employees and their families will not be violated if, in the case of the death of an employee while in the service of a carrier, free transportation be given to his remains and to members of his family who might lawfully use free transportation, if he were still alive, to the place of interment and return to their homes. (See Rulings 18, 103, and 173.)

NOTE.—By the amendatory act of June 18, 1910, provision is made for free transportation to widows and orphans of deceased employees, the former during widowhood, the latter during minority.

194. REFUND DENIED OF DEMURRAGE COLLECTED UNDER TARIFF NOT ON FILE.—The Commission will not entertain with favor claims for refund of demurrage charges,

collected in accordance with a carrier's established practice, solely upon the ground that the demurrage tariffs were not on file with the Commission at the time the demurrage charges accrued. The failure to file demurrage tariffs constitutes a violation of the act, with which the Commission will deal through the Division of Prosecutions. (See Ruling 184.)

195. APPLICATION OF COMBINATION RATES ON FREIGHT MOVING THROUGH ANOTHER JUNCTION.—The conference ruling of June 14, 1909, under this caption was rescinded on November 24, 1909. Amended Rule 5, Tariff Circular No. 18-A, covers and governs the subject.

196. INTERCHANGE OF FREE TRANSPORTATION FOR EMPLOYEES OF WATER LINES.—When a common carrier by water, other than an ocean carrier, not subject to the act, unites with a carrier by rail for the interstate transportation of passengers, partly by water and partly by rail, under a common control, management, or arrangement for a continuous carriage shown by concurrence in tariff or tariffs duly published and filed with the Commission, such carriers can lawfully interchange transportation for their officers, agents, and employees. (Reaffirming Ruling 95-*g*.)

June 21, 1909.

197. CARRIERS SUBJECT TO THE ACT.—A railroad not otherwise subject to the act subjects itself to the jurisdiction of the Commission and the provisions of the act if it transports express matter for an express company that is subject to the act. (See Ruling 368.)

June 22, 1909.

198. INTERPRETATION OF RULE 70, TARIFF CIRCULAR NO. 15-A (Ruling 214 of this Bulletin).—Under this rule any carrier, whether it be the initial or a connecting line, that misroutes a shipment, thereby causing additional transportation charges, may, upon admitting its error, pay the damages arising therefrom, provided the whole burden is borne by it without participation therein by its connections. But the admission must be in good faith with respect to the particular case of misrouting; the Commission will not recognize the validity of any gen-

eral agreement between two or more carriers by which one assumes responsibility for misrouting in all cases.

199. RESPONSIBILITY FOR MISROUTING.—When a shipper has given routing instructions which a carrier fails to transmit to its connection, the carrier so failing shall be responsible for all additional transportation charges resulting from a misrouting of the shipment. (Amended by Ruling 286-*c*.)

200. REPARATION CLAIMS ON THE INFORMAL DOCKET.—(*a*) At a recent conference between the Commission and representatives of a number of carriers the embarrassments arising through the tying up of rate schedules under the one-year clause customarily inserted in informal reparation orders were fully considered, and the discussion that then took place as well as our subsequent reflections upon the matter, have led us to the conclusion that some modifications of our practice in that regard may be made in certain cases to advantage and without impairing the effectiveness of the law. We have therefore agreed upon the following rules which we think will afford some relief in the premises:

1. In cases where the through rate in effect at the time of the shipment was in excess of the sum of the local rates the order, instead of requiring the maintenance of an absolute rate for one year from the date of the filing of the application, shall require the absolute rate to be maintained for a period of only six months from the date upon which the reduced through rate equaling the sum of the locals became effective; this rule shall apply, however, only in cases where the local rates in question are to and from some well-recognized and established basing point or line, such as the Mississippi, Missouri, and Ohio rivers, Chicago, Minnesota Transfer, Buffalo, etc. In all other cases the present practice shall be enforced. (Modified by Ruling 376.)

2. Where there is a natural geographical relation between the point involved and other points, which relation the carrier has theretofore expressed in its tariffs by grouping that point with the other points, either with respect to rates on the commodity in question, or with respect to rates on other commodities, or with respect to class rates, the order may require the maintenance of the group relation for one year from the date of the application

instead of requiring an absolute rate to or from the point in question.

3. Where the rates on a product of a raw material have had a definite relation to the rates on the raw material, and that relation has been temporarily disturbed and subsequently restored, the order may control the relation for one year instead of fixing an absolute rate on the product.

4. Where a carrier is compelled to charge a higher rate than was intended because of an error in printing a tariff, the one-year clause may be omitted only where the error is specifically called to the attention of the Commission within ninety days after the tariff containing the error has been filed.

(*b*) Because of the uncertain condition of the tariffs of carriers the Commission has been rather liberal in the past in the conduct of its special reparation docket and proposes, in order to help carriers dispose of claims that have accumulated in the past, to continue this policy for the present. It is manifest, however, that the time is approaching when in the general interest of all concerned the Commission must adopt a different attitude. We take occasion therefore now to say that the Commission will cooperate with carriers, so far as that may legally be possible, in the effort to get all old claims disposed of, and, with respect to shipments made prior to September 1 next, will pursue its present policy of liberality. But with respect to shipments moving on and after that date the Commission will draw the lines much more closely, and will adopt such measures as will materially narrow the scope of its activities in that connection. We are not prepared at this time to define in detail what our policy in the future will be. It may be well, however, now to say that after that date we shall not award reparation, either on the formal or the special docket, in any case where the carrier in question has reduced a rate simply in order to meet the lower rate of a competitor. Any other course of action not only deprives the competitor of the natural benefit of its lower rate, but tends to destroy the inducements for making a lower rate. Moreover, any other course of action is demoralizing, in that it enables the carrier, before its own lower rate has become effective, to assure shippers that they may ship by its line notwithstanding its higher rate and afterwards secure reparation on the basis of the lower rate

of its competitor. Where there is a difference in rates between two points over different lines, shippers must understand that they may get the benefit of the lower rate only by sending their merchandise over the line publishing the lower rate. (See Ruling 205.)

(*c*) It may be well also to announce that it has been suggested that when reparation is granted to a complainant, either in a formal or an informal proceeding, on a finding that the rate under which his shipment moved was excessive and therefore unlawful, the spirit of the law requires that the order ought also to compel the carrier to make a refund on the same basis on all other shipments, moving after the date of the filing of any such complaint, under the rate thus condemned. While no conclusion has been reached there is force in this view and it will have further consideration. (See Ruling 49; amended by Ruling 220-*d*.)

(*d*) The suggestions that have come to us from various quarters in relation to the conduct of the special reparation docket indicate that some misapprehension exists as to the purpose of that docket, and as to the authority of the Commission in dealing with such cases. It may be well, therefore, to say that our action in special reparation cases has no authority in law except the authority upon which we take similar action in formal cases. In all cases, whether on the formal or the special docket, the law in section 15 specifically requires a complaint and answer and a full hearing; and in section 14 it is provided that where damages are awarded the report of the Commission shall include the findings of the fact on which the award is made. We have endeavored to simplify the procedure on the special docket by accepting the application of the carrier as the equivalent of a complaint and answer, and by accepting its admission that the rate charged under the circumstances then existing was unreasonable as a sufficient compliance with the requirements of section 15 for a full hearing. The informality in the pleadings in such cases seems to have led some carriers as well as shippers into the error of supposing that special reparation cases can be disposed of still more informally. This, however, is a mistaken view of our authority. The special docket is not an informal docket in any sense except in respect to the form of the pleadings and the character of the hearing. Our orders in such cases must be regarded as formal orders as fully in all respects as our orders in formal

cases. The Commission can exercise no authority on the informal docket that it can not exercise on the formal docket, nor may it omit any requirement with respect to cases on the special docket that the law imposes upon us in the disposition of cases on the formal docket. (See Rulings 14 and 220.)

June 23, 1909.

201. JOINT THROUGH RATES TO AND FROM PORTO RICAN PORTS.—Without at this time deciding whether Porto Rico is to be regarded as a Territory of the United States as that phrase is used in section 1 of the act, the Commission will recognize the validity of joint through rates from or to points in the United States to or from a port or ports in Porto Rico when properly concurred in by the water carriers. (See Ruling 155.)

June 24, 1909.

202. DISTANCE TARIFFS TO SHOW DISTANCE BETWEEN STATIONS.—Where rates are stated in a tariff at so much per mile, or according to distance, that tariff, or some tariff specifically referred to therein, must show the distance between the stations between which such rates are to be applied. For the present the Commission will not apply this rule to ordinary mileage tickets or books for passenger travel.

June 29, 1909.

203. SUBSTITUTION OF TONNAGE IN TRANSIT (cancels Ruling 85).—A milling, storage, or cleaning-in-transit privilege can not be justified on any theory except that the identical commodity or its exact equivalent, or its product, is finally forwarded from the transit point under the application of the through rate from original point of shipment. It is therefore not permissible at transit point to forward on transit rate commodity that did not move into transit point on transit rate, or to substitute a commodity originating in one territory for the same or like commodity moving into transit point from another territory, or to make any substitution that would impair the integrity of the through rate. It is not practicable to require that the identity of each carload of grain, lumber, salt, etc., be pre-

served, but, in the opinion of the Commission, it is not possible to lawfully substitute at the transit point any commodity of a different kind from that which has moved into such transit point. That is to say, oats or the products of oats may not be substituted for corn, corn or the products of corn for wheat, nor wheat or the products of wheat for barley, nor may shingles be substituted for lumber, or lumber for shingles, nor may rock salt be substituted for fine salt, nor fine salt for rock salt; likewise oak lumber may not be substituted for maple lumber, nor pine lumber for either oak or maple, nor may hard wheat, soft wheat, or spring wheat be substituted either for the other. These illustrations are given not as covering the entire field of possible abuses, but as indicating the view which the Commission will take of such abuses as they arise. (Reaffirming Ruling 181.)

To the end that abuses now existing at transit points may be eliminated, carriers will be expected to conform their transit rules and their billing to the suggestions of this rule. In the event of the failure of any carrier so to do, reductions of legal rates caused by transit abuses will be regarded as voluntary concessions from legal rates. (Withdrawn February 10, 1913.)

204. TRANSIT PRIVILEGES.—It is the sense of the Commission that no transit privilege should extend beyond one year. (Qualified by Ruling 232.)

205. LIABILITY FOR MISROUTING.—An initial carrier misrouted a shipment, resulting in additional transportation charges, for which it admitted its responsibility and made settlement in accordance with Rule 70 of Tariff Circular No. 15-A (Ruling 214 of this bulletin). Subsequently the connecting line over which the shipment moved became a party to a tariff naming the same rate that applied at the time of the movement over another route. Thereupon the initial carrier and the connecting line requested permission to divide the misrouting overcharge: *Held,* That the petition must be denied on the ground that such a course would amount to the retroactive application of a published rate. (See Rulings 200 and 220-*h*.)

July 2, 1909.

206. PROCEDURE IN FORMAL CASES.—(*a*) Complaints which involve the same or substantially the same principle, sub-

ject, or state of facts, even though two or more rates or regulations are alleged to be unreasonable or discriminatory and numerous shipments are affected thereby should be included in one complaint, in which the several rates, regulations, discriminations, and shipments are set out in items, exhibits, or paragraphs. Two or more complainants may join in one complaint against one or more carriers, and one complainant's complaints against two or more carriers may be included in one complaint, when the subject of complaint, the principle involved, or the state of facts is substantially the same. In other words, two or more complaints should not be filed when one complaint can be made fairly to cover the subject, the principle, or the facts.

(*b*) If one complainant or two or more complainants file separate complaints which rest upon the same principle or upon the same or a substantially similar state of facts, the Commission will, in its discretion, consolidate the several complaints into one case, under one number and title, so that the same may be disposed of in one hearing and in one report.

(*c*) Reparation will not ordinarily be awarded in a formal case attacking a rate as unreasonable or otherwise in violation of law unless intent to claim reparation is specifically disclosed therein, or in an amendment thereto, filed before the submission of said case. The Commission may, however, in the exercise of its discretion, upon good cause shown, and under unusual circumstances, deal specially with a particular claim for reparation.

(*d*) Claims for reparation based upon a decision of the Commission filed by complainants not parties to the case in which such decision was rendered will not ordinarily be allowed unless reparation was claimed in the complaint upon which such decision of the Commission was based, or was awarded by the Commission. The Commission may, however, in the exercise of its discretion, upon good cause shown, and under unusual circumstances, specially consider a particular claim for reparation of this class.

(*e*) Complaints for reparation must disclose as nearly as possible all the claims of complainant or complainants covered by or involved in the complaint, except that when a general rate adjustment or a rate under which many shipments have been made to many destinations, or from many points of origin by

many shippers, is involved, complaint may contain specific prayer for reparation on all shipments, and the proving up as to shipments and amounts of reparation due thereon be left until the questions of the reasonableness of the rate or rates and whether or not reparation will be awarded, have been decided. And each claimant for reparation under a decision that has been rendered must include all his shipments and claims in one complaint or statement.

September 15, 1906.

207. PAYMENT FOR TRANSPORTATION.—Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates or fares in effect at the time, precludes the acceptance of services, property or other payment in lieu of the amount of money specified in the published schedules.

October 12, 1906.

208. FREE PASSES AND FREE TRANSPORTATION. —(*a*) The provisions of the act relative to the issuance of free tickets, free passes, free transportation, or free carriage to employees of carriers apply only to persons who are actually in the service of the carriers and who devote substantially all of their time to the work or business of such carriers. Land and immigration agents unless they are bona fide and actual employees, representatives of correspondence schools, agents of accident or life insurance companies, agents of oil or lubricating companies, etc., are not within the classes to which free or reduced-fare transportation can be lawfully furnished. (See Rulings 95 and 308.)

(*b*) But the Commission does not construe the law as preventing a carrier from giving necessary free transportation to a person traveling over its line solely for the purpose of attending to the business of or performing a duty imposed upon the carrier, nor from giving free carriage over its line to the

household and personal effects of an employee who is required to remove from one place to another at the instance of or in the interest of the carrier by which he is employed. (See Rulings 109, 134, 255, and 361.)

(*c*) Nor does the Commission construe the law as preventing a carrier from giving free or reduced-rate carriage over its line to contractors for material, supplies, and men for use in construction, improvement, or renewal work on the line of that carrier, provided such arrangements for free or reduced-rate carriage are made a part of the specifications upon which the contract is based and of the contract itself. (See Ruling 386.)

(*d*) The provisions of the act relative to the issuance of free or reduced-fare transportation to ministers of religion do not apply to or include members of the families of ministers of religion. Neither do the provisions of the act relative to the issuance of free or reduced-fare transportation admit of including therein officers of the Government, the army, or the navy, or members of their families, or other persons to whom such considerations may have been extended in the past, unless they are within the classes specifically named in the act.

Reduced rate or fare transportation may be granted to such persons as are specified in the law as those to whom free transportation may be given. (See Ruling 95.)

(*e*) Section 22 of the act authorizes carriers to grant free or reduced-rate transportation of property for the United States, state, or municipal governments, or for charitable purposes or for exhibition at fairs and expositions. It also authorizes free or reduced-fare transportation of certain specified persons. This special provision and the words "reduced rates" are construed to be special authority for carriers to depart from established tariff rates or fares; and for such transportation as is provided for in said section 22 it is not necessary for carriers to provide tariffs or observe tariff rates or fares and regulations excepting in the issuance, sale, and use of mileage, excursion, or commutation passenger tickets, and joint interchangeable mileage tickets. As to these, the provisions of section 6 with regard to publishing, filing, posting, and observing tariffs must be complied with. (See Rulings 33, 36, 65, 218, 244, 297, and 311; compare Ruling 107.)

November 16, 1906.

209. DIVISION OF JOINT RATES OR FARES—CONTRACTS AND AGREEMENTS FOR, MUST BE FILED.—A contract, agreement, or arrangement between common carriers, governing the division between them of joint rates or fares on interstate business, is a contract, agreement, or arrangement in relation to traffic within the meaning of section 6 of the act to regulate commerce, and a copy thereof must be filed with the Commission. Where such contract, agreement, or arrangement is verbal, or is contained in correspondence between the parties, or rests on their custom and practice, a memorandum of its terms must be filed with the Commission.

When the agreement or arrangement under which divisions are made is in the form of a contract or formal agreement or recorded memorandum, a copy of each such contract, agreement, or memorandum is to be filed with the Commission. Where such arrangement is made by correspondence or verbally, a concise memorandum of the basis and general terms and application of the arrangement or practice is to be filed with the Commission. The filing of the division sheets themselves is not desired. (See Ruling 269.)

210. CORRESPONDENCE WITH COMMISSION ON FREIGHT AND PASSENGER MATTERS.—It is believed that the best results and understandings will be reached if the conducting of ordinary correspondence between carriers and the Commission is confined to as few persons as possible. Request is therefore made that the traffic manager or the general passenger and general freight agents of each road designate not more than two officials or other representatives to respectively conduct the correspondence with the Commission on freight and passenger matters, and to promptly advise the Commission of such appointments.

211. DISTRIBUTION OF OFFICIAL CIRCULARS AND RULINGS.—It is obviously impracticable for the Commission to place copies of its official circulars and rulings in the hands of all the officers of carriers or to furnish copies for distribution among them. The officers at the head of traffic departments, or in charge of the passenger and freight departments, respectively, will please designate for each road one official in

the passenger department and one in the freight department (unless both are under one head officer and one appointment is considered sufficient), to whom such circulars and rulings are to be sent; and arrange for such designated officials to disseminate the information among other interested officers and agents. Please report these appointments to the Commission as early as possible.

With the view of giving prompt information to those who may be interested, the Commission will upon application place upon its mailing list regularly organized boards of trade, chambers of commerce, commercial clubs, and shippers' associations, for the purpose of mailing to them copies of official circulars containing rulings and orders of the Commission.

January 21, 1907.

212. TRANSPORTATION OF NEWSPAPER EMPLOYEES ON SPECIAL NEWSPAPER TRAINS.—In its decision of January 21, 1907, on the petition of certain newspapers in New York City, the Commission decided that a commodity rate may not be applied to the transportation of passengers or a passenger fare to the transportation of a commodity, and that therefore employees of the newspapers, riding on special newspaper trains, can not lawfully be transported under a commodity rate established for the carriage of newspapers or at any rate other than the one specified in the regularly published schedule of passenger fares.

March 4, 1907.

213. DIVERTING TRAFFIC BECAUSE OF BLOCKADES.—*(a)* Whenever, by reason of blockade upon the line of a carrier resulting from storm, washout, wreck, or similar casualty, it becomes necessary for it to divert to the line of another carrier passengers or freight that are in transit, the carrier so diverting its business should pay the carrier or carriers, upon whose train such passengers or freight are carried, regular tariff rates or fares from and to the points between which it or they transport such diverted traffic, except that if the carrier accepting such diverted traffic is participant in a joint tariff in which the diverting line is also a participant and under which the di-

verted traffic is being moved, settlement may be made on basis of the division of the through joint rate or fare. (See Rulings 83, 138, 146, 147, and 183.)

(*b*) If, because of such blockade, a carrier's train is detoured over the line of another carrier, or special train is arranged for movement of the interrupted traffic, the tariff rates or fare, if there be any for such movement, must be applied. In the absence of such tariff regulations compensation should be agreed upon. (See Ruling 138.)

This rule does not apply in cases of congested lines due to heavy traffic or ordinary causes.

March 18, 1907.

214. ROUTING AND MISROUTING FREIGHT.—(*a*) Alleged neglects or errors on part of agents of carriers in misrouting shipments lead to numerous claims of overcharge, many of which are meritorious. The lawful charge on any shipment is the tariff rate via the route over which the shipment moves. No carrier can lawfully refund any part of the lawful charge except under authority so to do from the Commission or from a court of competent jurisdiction. (See Ruling 286-*a*.) That thorough understanding and uniform practice may be had in this connection, the Commission issues the following administrative ruling:

(*b*) In order to secure desired delivery to industries, plants, or warehouses and avoid unnecessary terminal or switching charges, the shipper may direct as to terminal routing or delivery of shipments which are to go beyond the lines of the initial carrier; and his instructions as to such terminal delivery must be observed in routing and billing such shipments. The carriers may not disregard the instructions of shippers as to intermediate routing, except when tariff of initial line reserves the right to carrier to dictate intermediate routing. When such reservation is made in tariff, (1) where all-rail rates and rail-and-water rates are available the agent of carrier must have the shipper designate which of the two he wishes to use; and (2) the agent must not route shipment via a route that will be more expensive to the shipper than the one desired by him, or that does not furnish substantially as good and expeditious service. If car-

rier is not willing to observe the intermediate routing instructions of shipper it must not execute bill of lading containing such routing. Carriers will be held responsible for routing shown in bill of lading. (See Rulings 190, 284, and 316. Amended by Ruling 321.)

(*c*) In the absence of specific through routing by shipper, which carrier is willing to observe, it is the duty of the agent of the carrier to route shipment via the cheapest reasonable route known to him of the class designated by the shipper—that is, all-rail, or rail-and-water—and via which he has rates which he can lawfully use. If a foreign car is available which under rules as to car service must be sent via a particular line or route over which a higher rate obtains, agent must explain to shipper that fact and allow shipper to elect whether he will use that car at the higher rate or wait for another car. If shipper elects to use the car at the higher rate, agent should so note on bill of lading. If agent is in doubt, he should secure information from proper officers of traffic departments. It is important that agents at initial points be able to, and that they do, quote correct rates and give correct routings. (See Rulings 91, 140, 190, 284, 316.)

(*d*) If a carrier's agent misroutes a shipment and thus causes extra expense to the shipper over and above the lawful charges via another available route of the class designated by shipper—that is, all rail or rail and water—over which such agent had applicable rates which he could lawfully use, and responsibility for agent's error is admitted by the carrier, such carrier may, as to shipments moving subsequent to March 18, 1907, adjust the overcharge so caused by refunding to shipper the difference between the lawful charges via the route over which shipment moves and what would have been the lawful charges on same shipment at the time via the cheaper available route of the class designated which could have been lawfully used. Such refund must in no case exceed the actual difference between the lawful charges via the different routes as specified, and must in every instance be paid in full by the carrier whose agent caused such overcharge and must not be shared in by or divided with any other carrier, corporation, firm, or person. This authority is limited strictly to the cases specified and to the circumstances recited and does not extend or apply to instances in which soliciting or commercial agents of carriers induce shippers to route shipments over

a particular line via which a higher rate obtains than is effective via some other line. (See Rulings 93 and 286.)

(*e*) The rule is intended to apply to cases in which the agents who bill or actually forward or divert shipments through error or oversight send the shipments via routes that are more expensive than those directed by shippers or available in the absence of routing instructions by shippers. It must not be used in any case or in any way to "meet" or "protect" a rate via another route or gateway via which the adjusting carrier has not in its tariffs at the time the shipment moves rates which are available and lawfully applicable thereto, nor as a means or device by which to evade tariff rates or to meet the rate of a competing line or route, nor to relieve shipper from responsibility for his own routing instructions.

November 15, 1907.

(*f*) The prerequisites to any refund under this rule are admission by carrier of responsibility for its agent's error in misrouting the shipment, and such carrier's willingness to bear the extra expense so caused, without recourse upon any other carrier for any part thereof. If, therefore, the error is discovered before the shipment has been delivered to consignee or before charges demanded upon same have been paid, the carrier acknowledging responsibility for the error may authorize the delivering carrier to deliver shipment upon payment of the charges that would have applied but for the misrouting and to bill upon it for the extra charge; or, if the shipment has been delivered undercharged before the error is discovered, the carrier that acknowledges responsibility for the error may pay the undercharge to the carrier that delivered the shipment instead of requiring it to collect the undercharge from shipper, to be refunded to shipper. (Interpreted by Ruling 198.)

Complete distinction must be observed between cases to which this rule applies and those provided for under Ruling 217.

(*g*) Shippers must bear in mind that there is a limit beyond which an agent of a carrier could not reasonably be expected to know as to terminal delivery or local rates at distant points and on lines of distant roads to or with which he has no specific joint through rates. Consignors and consignees should cooperate with

agents of carriers in avoiding misunderstandings and errors in routing and must expect to bear some responsibility in connection therewith.

March 9, 1909.

(*h*) If, under this rule, a carrier adjusts a claim for misrouting and later learns that the responsibility for misrouting actually rests upon another carrier, such other carrier may voluntarily reimburse the carrier that made the payment in the full amount of such payment, or the matter may, if necessary, be referred to the Commission for determination of the question of which carrier is responsible for the error.

April 6, 1909.

(*i*) In some instances a shipper tenders a shipment accompanied by a bill of lading in which certain routing is specified and in which he also enters the rate which he expects to have apply to the shipment. In such instances if the rate so entered in the bill of lading does not apply via the route specified in the bill of lading but is lawfully applicable via another route, it is the duty of the carrier to send the shipment via the route via which such rate lawfully applies, unless a lower rate is lawfully applicable via the route specified by shipper; and failure on part of carrier's agent to follow this course will be deemed misrouting, responsibility for which will rest upon the carrier whose agent so misroutes the shipment. (Reaffirmed and amended by Rulings 286-*f*; see also Rulings 159 and 192.)

March 18, 1907.

215. COMBINATION OF JOINT RATE OR FARE TO COMMON POINTS AND LOCAL RATE OR FARE BEYOND.—(*a*) In order to secure uniformity in practice and understandings and to remove the cause of many complaints, the Commission decides that when a joint through rate of fare is the same to two or more points and rate or fare on through shipment or passenger to local station to which no specific joint through rate or fare applies is made up by combination of such joint through rate or fare to common points and local rate or fare beyond, the rate or fare for through shipment or passenger must

be determined by calculating the joint through rate or fare to the point from which the lower local rate or fare applies to point of destination and adding thereto such local rate or fare. For example: Joint through tariff names the same rates or fares from certain eastern points to Chicago and Milwaukee. If shipment or passenger is destined to a point to which the local rate or fare is less from Milwaukee than from Chicago, the rate or fare applied should be the joint through rate or fare to Milwaukee plus the local rate or fare from Milwaukee to destination, and unless the lines of delivering carrier reach both Chicago and Milwaukee the shipment or passenger should move via Milwaukee. If the local rate or fare from Chicago to point of destination is lower than from Milwaukee, the rate or fare should be the joint through rate or fare to Chicago plus the local rate or fare from Chicago to destination, and unless the lines of delivering carrier reach both Milwaukee and Chicago the shipment or passenger should move via Chicago.

(*b*) Rates or fares for outbound through movements from such local stations and under like circumstances must be applied on the same basis where the joint through rates or fares are the same from two or more points.

(*c*) This does not authorize any carrier to apply to transportation over its lines any rate or fare except those stated in its own lawfully published tariffs or in the lawfully published joint tariffs in which it has concurred. If a carrier desires to "meet the rate" of a competitor, it must do so by lawfully including in its own tariffs such specific rates or fares, proportional or otherwise, as may be necessary so to do. (See Rulings 195 and 214.)

(*d*) It is suggested that shippers can assist in avoiding mistakes and misunderstandings by calling attention to the rate that should apply in such cases as come under this rule by indicating it on shipping bill in connection with routing instructions; for instance, "Rate on Milwaukee." This is, however, merely a suggestion, and does not relieve the agents of carriers from the responsibility of quoting and applying the correct lawful rate.

(*e*) This rule does not apply where a shipment has reached its destination as originally given by shipper and has been re-

consigned, except when tariff contains reconsigning rule that provides for such application.

(f) This rule must not apply in any case where there is an applicable specific joint through rate or fare from point of origin to point of destination. (See Rule 55, Tariff Circular 18-A.)

March 25, 1907.

216. FREE TRANSPORTATION OF OFFICERS OR EMPLOYEES OF OMNIBUS OR BAGGAGE EXPRESS COMPANIES.—In its decision on the petition of the Frank Parmelee Company, the Commission held that a carrier subject to the act can not lawfully give free transportation to officers, agents, or employees of an omnibus or baggage express company, except, as authorized in the act, for baggage agents who meet passenger trains at some point near the larger cities and go through the trains to arrange for transfer of passengers and their baggage. (See Ruling 95-*a*, par. 3, and 95-*g*.)

May 6, 1907.

217. RETURN OF ASTRAY SHIPMENTS.—Instances occur in which, through error or oversight on the part of some agent or employee, a shipment is billed to an erroneous destination or is unloaded short of destination or is carried by. The Commission is of the opinion that in bona fide instances of this kind carriers may return such astray shipments to their proper destination or course without the assessment of additional charges, and may arrange for such movement of such astray shipments for each other on mutually acceptable terms without the necessity of publishing, posting, and filing tariff under which it will be done. (See Rulings 31 and 240.)

Complete distinction must be observed between cases to which this rule applies and those provided for under Ruling 214.

May 27, 1907.

218. TRANSPORTATION OF FEDERAL TROOPS.—The Commission is of the opinion that carriers, either by contract or bid or other arrangement with the War Department, may lawfully make special rates or fares for the movement of

federal troops, when moved under orders and at the expense of the United States Government, and that the rates or fares so made need not be posted or filed with the Commission. (See Rulings 33 and 208-*e*.)

The lawfully published rates or fares for the transportation of the general public, in the opinion of the Commission, are to be regarded, however, as the maximum rates and fares that may lawfully be charged the Government for the movement of federal troops.

This ruling also governs similar transportation for the naval and marine services. (Ruling does not apply to state or territorial troops; see Ruling 297.)

June 3, 1907.

219. TRANSPORTATION OF MEN OR PROPERTY FOR TELEGRAPH COMPANIES.—(*a*) In its decision on the petition of the Western Union and Postal Telegraph companies, issued December 27, 1906, the Commission held it would be unlawful for a carrier subject to the act to contract or stipulate with a telegraph company for the carriage of its officials, employees, or property for any greater or less or different compensation than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of telegraph line and service on its own line. It was held that a group of separately incorporated roads, recognized as a "railway system," may be considered as one in the making of contracts for telegraph service on that system. (See Rulings 95-*a*, par. 2, and 161; see also amendatory act of June 18, 1910, interpreted in Ruling 305.)

(*b*) This definitely differentiates between the employees of the telegraph company who are actually engaged in constructing and maintaining a telegraph line along the line of a railway, or in operating such telegraph line as a part of the actual operation of that railway, and those who are engaged in the commercial business of the telegraph company. The fact that railway officials may, by use of deadhead franks, send messages on railway business from or receive such messages at a commercial office of a telegraph company does not constitute that

office a part of the operation of any of the lines of railway which such officials represent nor bring that telegraph office into such relationship with the business of the railways as to warrant treating it as part of the operating facilities of such railways. Practically all telegraphing so done is "off the line" business and is to be considered as commercial business. The same distinction is to be observed in the hauling of materials and supplies for telegraph companies with which the railway company has contract for telegraphic service. (See Ruling 305.)

November 15, 1907.

(*c* This rule applies also to telephone service, and carriers that have not already done so are hereby requested and called upon to promptly file with the Commission copies of all contracts for telegraph or telephone service on their lines. (See Ruling 305.)

June 7, 1907.

220. SPECIAL REPARATION ON INFORMAL COMPLAINTS.—(*a*) To assist in the settlement of certain claims of shippers against carriers, and as a practical means of disposing with promptness of informal complaints that might otherwise develop into formal complaints, and in connection with which the unreasonableness of the rate or regulation is admitted by the interested carrier or carriers, the Commission on full information will authorize adjustment by special order if all of the facts and conditions warrant such action. The connections in which the Commission has authority to modify the provisions of the law are specified in the act. The Commission will not assume to modify it in any other connections or features.

(*b*) The instances in which the Commission will authorize refund or reparation on informal complaint and in an informal way will be confined to those in which the informal showing develops plainly a case in which the Commission would award reparation on formal hearing and in which an adjustment agreeable to complainant and carrier or carriers and in conformity with the provisions of the law is reached.

(*c*) Reparation involving refund of alleged overcharges in instances in which the lawful tariff rates have been applied

will be authorized under informal proceedings only when the carrier admits the unreasonableness of the rate charged and it is shown that within a reasonable time, not exceeding six months, after the shipment moved it has incorporated in its own tariffs, or in tariffs in which it has concurred, the rate upon basis of which adjustment is sought and has thus made that rate lawfully applicable via the route over which shipment in question moved. Adjustment of a claim of this character that is filed with the Commission within six months after the shipment moved may, however, be authorized, even if more than six months have elapsed between the movement of the shipment and the effective date of tariff rate or regulation that forms the basis of such adjustment. Authority for refund on account of a reduced rate or changed tariff regulation will also contain Commission's order requiring the maintenance of such rate or regulation for at least one year. (See Rulings 14 and 200. Superseded by Ruling 396.)

(*d*) No carrier may pay any refund from its published tariff charges save with the specific authority of the Commission in accordance with the provisions of the act. When an informal or formal reparation order has been made by the Commission the principle upon which it is based shall be extended to all like shipments, but no refunds shall be made upon such like shipments except upon specific authority from the Commission therefor. (See Rulings 49 and 200-*c*.)

(*e*) The shipper should pay the lawfully published charges applicable via the route over which the shipment moves, and make claim for refund if he believes he has been overcharged. The Commission will not ordinarily include in reparation award demurrage charges which accrue pending adjustment or subsequent to consignee's refusal to accept the shipment and pay the lawful charges thereon, but in special cases such demurrage charges may be included in the amount of refund. (See Ruling 32.)

(*f*) It is the duty of the delivering carrier to collect, and of the consignee to pay, demurrage charges as per lawful tariffs. Demurrage charges accruing because of error of a carrier are considered in the same light as are other additional transportation charges caused by carrier's error; and if adjusted, the full

expense thereof must be borne by the carrier whose agent is responsible for the error. (See Ruling 214; see also note to Ruling 242.)

(*g*) The Commission has repeatedly announced the view that the law does not permit the use of any rate or fare except that contained in a lawful tariff that is applicable via the line, route, and gateway over and through which the shipment or passenger moves. The lawful rate or fare for through movement is the through rate or fare, wherever such through rate or fare exists, even though some combination makes a lower rate or fare and even though the practice in the past has been to give to some the benefit of such lower combination. The Commission long since extended to carriers, in a general order, permission to reduce, on one day's notice, a joint commodity or class rate or fare that is higher than the sum of the intermediate rates between the same points to make it equal the sum of such intermediates. If, therefore, carriers have maintained through rates or fares that are higher than the sums of the intermediates between the same points, it is because of their desire so to do, and not, as some agents of carriers have informed shippers, because the law or the Commission forces them to do so. (See Rule 56, Tariff Circular 17-A or 18-A.)

(*h*) If a carrier desires to give its patrons the benefit of the same rate or fare that applies via another line or gateway, and which is lower than its own rate or fare, it can do so by lawfully incorporating that rate or fare in its own tariffs, and so give the benefit of it to all of its patrons alike. The law forbids giving such lower rate or fare to one and withholding it from another, but neither the law nor the Commission stands in the way of adoption in lawful manner of the lower rate or fare as available for all. (See Ruling 205.)

(*i*) The Commission's power to authorize adjustments will not be exercised in such way as to create the very discriminations which the law aims to prevent. No doubt instances will occur in which seeming hardship will come to some. Much of such embarrassment will be avoided if agents of carriers and shippers take pains to be certain that correct rates are quoted and correct routing is given.

(*j*) Claims filed since August 28, 1907, must have accrued within two years immediately prior to the date upon which they

are filed; otherwise they are barred by the statute. Claims filed with the Commission on or before August 28, 1907, are not affected by the two years' limitation in the act. The Commission will not take jurisdiction of or recognize its jurisdiction over any claim for reparation or damages which is barred by the statute of limitation, as herein interpreted, and the Commission will not recognize the right of a carrier to waive the limitation provisions of the statute. (See Rulings 10, 306, and 307.)

July 8, 1907.

221. REFUNDS AND COMMISSIONS.—(*a*) The act prohibits a carrier from demanding, collecting, or receiving a greater or less or different compensation for transportation than that named in its tariffs in effect at the time. It prohibits the rebating or refunding to any person in any manner, or by any device whatsoever, any part of the lawful charges so collected. It is therefore manifestly unlawful for a carrier to refund to any association, committee, or person any part of the charges collected by the carrier as a condition of the sale of transportation. A carrier's agents may, as a matter of convenience, sell admission tickets to entertainments in connection with which excursion-fare tickets are sold, but the purchase of such admission ticket must not be made a condition of the sale of transportation ticket. (See Ruling 7.)

March 1, 1908.

(*b*) The act does not prohibit a carrier from providing in its own interest and as a means of stimulating travel over its line an entertainment at a point on its line: nor from contributing to the expense of such an entertainment if such contribution be made in a definite sum and be in no way dependent or contingent upon the number of tickets sold, and provided that no part of such contribution be by any device or through any person whatsoever permitted to effect any departure from or discrimination under the carrier's tariff fares.

May 12, 1908.

(*c*) The Ruling of the Commission on this date, published in

Conference Rulings Bulletin No. 4, was amended on February 14, 1911, to read as follows:

A carrier may employ an agent to act for it in working up passenger excursions and make his compensation depend upon the results of his efforts by executing a contract in the following form and filing a copy with the Commission, together with reference by I. C. C. number to the tariff which contains the fares. Any person so appointed becomes in fact the agent of the appointing carrier and such carrier will be, and will be held, responsible and liable for his acts as its agent. If any part of the compensation paid by a carrier to such an agent is used either directly or indirectly in such way as to reduce for any person the lawful tariff charges of any carrier subject to the act to regulate commerce, the agent or agents and the carrier or carriers causing or permitting such departure from the lawful tariff charges will be held to full responsibility and liability therefor:

The ——— rail ——— company, having arranged to run an excursion from ——— to ——— and return, on ———, to be known as the ——— excursion, at the following fares: Adults, ———; children, ———, hereby appoints ———, residing at ———, its agent to solicit and develop business for said excursion and accepts responsibility and liability for the acts of said agent. The said ——— hereby agrees to devote to this work such portion of his time from ——— to ——— as may be necessary, in consideration of which the ——— rail ——— company agrees to compensate him as follows: If ——— adult tickets, or their equivalent, are sold, ——— cents for each adult and ——— cents for each half ticket so sold.

It is understood and agreed that no compensation will be paid hereunder if less than ——— adult tickets, or their equivalent, are sold.

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April 13, 1908.

222. DEMURRAGE ON PRIVATELY OWNED CARS. —The Commission decided in case No. 933, "In the Matter of Demurrage Charges on Privately Owned Tank Cars," 13 I. C. C. Rep., 378, that private cars owned by shippers and hired to carriers upon a mileage basis are subject to demurrage when said cars stand upon the tracks of the carrier either at point of origin or destination of shipment, but are not so subject when upon either the private track of the owner of the car or the private track of the consignee. The carrier must charge demur-

rage in all cases where such demurrage is imposed by tariff provision upon its own equipment, except when a privately owned car is upon a privately owned siding or track and the carrier is paying or is responsible for no rental or other charge upon such car. (Modified and explained by Ruling 79; see important note to Ruling 242; see also Rule 75 of Tariff Circular 18-A and Rulings 123 and 270 of this bulletin.)

May 12, 1908.

223. DEMURRAGE ON INTERSTATE SHIPMENT.—*(a)* The act requires that carriers shall publish, post, and file "all terminal charges * * * which in any wise change, affect, or determine * * * the value of the service rendered to the passenger, shipper, or consignee," and all such charges become a part of the "rates, fares, and charges" which the carriers are required to demand, collect, and retain. Such terminal charges include demurrage charges.

(b) On March 16, 1908, the Commission decided that demurrage rules and charges applicable to interstate shipments are governed by the act to regulate commerce, and therefore are within its jurisdiction and not within the jurisdiction of state authorities. Any other view would open a wide door for the use of such rules and charges to effect the discriminations which the act prohibits. (See Ruling 54.)

(c) Demurrage rules and charges must be observed as strictly as transportation rules and charges. The Commission can not, therefore, recognize as lawful any rule governing demurrage the application of which is dependent upon the judgment or discretion of some person, or which provides for exemption therefrom in certain exigencies in the creation of which the carrier has no part. Interstate tariffs containing such rules must be corrected or canceled. (See important note to Ruling 242. This rule is also published as Rule 75 of Tariff Circular 18-A. It is amended by Ruling 135 herein; see also Ruling 54.)

May 12, 1908.

224. TRANSPORTATION OF TRUCKS OF CARS DESTROYED ON FOREIGN LINES.—If a car of one company

is destroyed on the line of another company and the lines of those two companies directly connect with each other, the carrier upon whose line the car is destroyed may transport free, as its own property, to junction with the line of the carrier owning the car, the trucks of the destroyed car, which are understood to be salvage from a wreck, the cost of which must be borne by the carrier on whose line it occurs. If there is not direct connection between the line of the carrier owning the car and the line upon which it is destroyed, the carrier on whose line the car is destroyed may transport the trucks free to a junction with an intermediate carrier, and pay to the intermediate carrier or carriers their full tariff rates for transporting them to a junction with the line of the carrier owner of the car destroyed, and such owner may transport them on its own line as its own property.

It does not appear to the Commission that opportunity for abuse or discrimination is opened by this practice. It does not appear to transgress the Commission's rule that carriers may not haul freight free for each other; and it is approved with the reservation that if discrimination or unlawful practice is found to grow out of it the plan will be condemned. (See Ruling 225.)

November 13, 1908.

225. CARRIERS MAY NOT BE GIVEN PREFERENTIAL RATES.—(*a*) In answer to inquiries the Commission expresses the opinion that under the law a carrier, or a person or corporation operating a railroad or other transportation line, may not, as a shipper over the lines of another carrier, be given any preference in the application of tariff rates on interstate shipments, but it may lawfully and properly take advantage of legal tariff joint rates applying to a convenient junction or other points on its own line, provided such shipments are consigned through to such point from point of origin and are, in good faith, sent to such billed destination. In other words, one carrier shipping its fuel, material, or other supplies over the lines of another carrier must pay the legal tariff rates applicable to the same commodities shipped by an individual, but when a carrier is the consignee of a shipment of its own property which moves under a joint rate and is to participate in the haul

of same via its own line, routing instructions of consignor to a specified junction point on the line of consignee carrier must be observed. There may be some instances, such as the movement of needed fuel, in which, in order to keep the trains or boats moving, such traffic could temporarily be given preference in movement without creating unjust or unwarranted discrimination. (See Rulings 153, 224, and 373.)

(*b*) Where stock in one carrier company is owned by another carrier company, but both maintain separate organizations and report separately to the Commission, they may not lawfully carry property free for each other. (See Ruling 9.)

November 9, 1909.

226. SIGNATURE TO RELEASED VALUATION CLAUSES ON BILLS OF LADING.—Rule 6 of the Southern Classification provides that where the tariff offers a reduced rate based on a certain fixed valuation a release, in the form specified in the tariff and containing the agreed valuation, must be written and signed by the shipper on the face of the bill of lading. As applied to a case where the shipper indorsed the released valuation on the bill of lading, but, not knowing the requirements of the rule, omitted to indorse the special form across its face, it was *Held*, That the rule is unreasonable and that it is the carrier's duty to secure the shipper's signature to such a release on the bill of lading when it has reasonable notice of his desire to take advantage of the lower rate upon a released valuation. (Compare Ruling 160.)

227. EXCHANGE BILLS OF LADING.—It is the view of the Commission that exchange bills of lading ought to show specifically the point of origin of the shipment and the route over which it has moved.

228. REDEMPTION OF MILEAGE BOOKS.—The rules governing the sale, use, and redemption of mileage books should be a part of the tariff under which they are sold. If a carrier deems it wise to provide in such rules for the redemption of unused portions of such books on the basis of the mileage rate for the portion used, it will be recognized by the Commission as redemption "at the full tariff rates" within the meaning of

Ruling 76, of this bulletin, when the books were sold under tariff authority and on the basis of a specific sum per mile.

229. LINE JOINTLY OPERATED THROUGH SEPARATE COMPANY MUST CONCUR IN TARIFFS FOR THROUGH TRAFFIC.—Two carriers desiring a joint operation of their combined lines between two points propose that they shall be operated by a new and separate company which shall handle as its own, and under its own tariffs, all local business between those points, and shall handle all other business under some arrangement with the two lines which does not permit it to participate in the earnings on the through traffic: *Held*, That Ruling 180 of this bulletin, entitled "Lessee road not serving as common carrier," does not apply and that the road operating between the two points must concur in the through rates over its line.

November 22, 1909.

230. TRANSIT PRIVILEGE—RESPONSIBILITY OF CARRIER FOR MISROUTING.—As the agent of an intermediate carrier has no means of knowing just why a shipment has been routed through particular junctions, he has no right to substitute his own judgment as to routing for the specific routing instructions accompanying the shipment. In a stated case the initial carrier issued bills of lading showing particular routing but no rate; the transfer billing subsequently issued to a connecting line showed the routing and a 10-cent division of a 33-cent rate that did not apply through the junctions named but through another junction; and the agent of the connection therefore diverted the shipment through the latter junction to destination. It subsequently appeared that because of the diversion the shipper had lost a transit right at a given point on the route specified, which was necessary to effect the sale of the shipment at destination: *Held*, That as tariffs are permitted to contain rules providing that they are subject to the transit privileges shown on the tariffs of individual carriers on file with the Commission, the intermediate line was responsible to the shipper for the difference between the rate paid in order to get the shipment back to the transit point and the legal rate over the route directed by the shipper. (See Ruling 214.)

231. CARRIER MUST FIND THE RATE NAMED BY SHIPPER AND ROUTE ACCORDINGLY OR ASK INSTRUCTIONS.—A bill of lading showed a rate of $1.55 per ton and routing in care of a connecting line. Through one junction the two carriers maintained a joint through rate of $1.75 per ton; through another junction, equally direct but carrying no joint rate, the sum of the intermediate rates was $1.55 per ton: *Held*, That while an initial line is not chargeable always with knowledge of the rates of its connections, yet having accepted a shipment and a bill of lading upon which the consignor had noted a definite rate it was its duty to find that rate and route the shipment accordingly or to call upon the consignor for further instructions; and failing to do either it is liable for the excess in transportation charges resulting from routing the shipment through one junction when through another junction equally direct the through charge is the amout named in the bill of lading. (Reaffirmed by Ruling 286-*f*.)

232. CREOSOTING LUMBER—TRANSIT PRIVILEGE OF EIGHTEEN MONTHS NOT EXCESSIVE.—The Commission has expressed the view that a transit privilege extending through a period of more than one year is *prima facie* unreasonable. (Ruling 204, of this bulletin.) Experience has shown, however, that as applied to the creosoting of lumber a period of eighteen months is not unreasonably long, providing the full local rates on the inbound material are required to be paid.

233. PARTIAL UNLOADING AT INTERMEDIATE POINT OF SHIPMENTS.—Upon inquiry as to the legality of a practice permitting the stoppage of shipments of perishable commodities at points short of destination to partly unload: *Held*, That the practice is legal only when authorized under proper tariff rules.

234. MISROUTING RESULTING IN WRONG TERMINAL DELIVERY.—A carload shipment routed by the consignor in order to get particular delivery at destination reached the wrong delivery tracks. Instead of demanding delivery on the right tracks the consignee moved the contents of the car by dray, although the car could have been switched to the proper

tracks without additional expense to the shipper had he given the carrier the opportunity to do so: *Held,* That no reparation could be allowed. (Reaffirmed by Rulings 283, 286-*d*, and 392, overruling 25.)

235. DRAYAGE CHARGES.—Certain shipments were delivered at destination as actually routed by the consignor, but there was a general understanding with the carrier, not covered by tariff provision, that traffic should be diverted at a certain point in order to accommodate consignees located near certain team tracks on the delivering line. The agent having failed to divert the shipments at that point the consignees were subjected to extra drayage charges: *Held,* That the claim for a refund must be rejected. (See Rulings 20 and 234.)

236. CLAIMS MAY NOT LAWFULLY BE PAID UNTIL THEY HAVE BEEN INVESTIGATED.—The Commission adheres to Rule 68 of this bulletin, to the effect that it is not a proper practice for railroad companies to adjust claims immediately upon presentation and without investigation. The fact that shippers may give a bond to secure repayment in case, upon subsequent examination, their claims prove to have been improperly adjusted does not justify the practice. Carriers that have adopted that practice will be expected promptly to discontinue it. (See also Ruling 15.)

November 23, 1909.

237. REFUND ON SHIPMENT FORWARDED TO ERRONEOUS DESTINATION THROUGH CONSIGNOR'S ERROR.—A car of coal was forwarded to the destination named in the bill of lading, but the carrier not being able to find the consignee, and learning that a company of the same name at a near-by point was tracing a coal shipment, reconsigned it to that point without consulting the consignor, and that subsequently proved to be the correct destination: *Held,* That a refund might be allowed upon showing that the additional transportation expense fell on the consignor.

In this connection the general principle is expressed in the following rule: If a shipper sends a shipment to an erroneous destination he should have the right to guard, so far as possible,

against resulting loss by disposing of the shipment at that point. The carrier should not, therefore, forward such shipment to another destination with attendant additional transportation charges without having made reasonable effort to secure disposition instructions from the shipper.

December 6, 1909.

238. REFUND OF FARE PAID FOR NEW TICKET WHEN LIMITED TICKET ORIGINALLY PURCHASED HAS BEEN LOST OR DESTROYED.—If a limited passenger ticket is lost or destroyed before being used (and no error or neglect of a carrier's agent is involved), it is not unlawful for the carrier, after the limit of the ticket has expired, to refund to the passenger the extra fare paid as a result of such loss or destruction, provided the loss or destruction, the identity of the claimant as the original holder, and the fact that the extra fare was paid for travel by the original holder over the route and within the limit of the lost ticket, are clearly and definitely proved in a form that becomes a part of the record in the case; and provided it is clearly shown that such ticket has not been used or redeemed by any other person. Such action should be withheld for a sufficient period of time properly and reasonably to guard against the lost ticket being redeemed or used by some person other than the original holder. (Compare Rulings 76 and 247.)

239. CONFLICTING RATES—LOWEST RATE IS THE LEGAL RATE.—A carrier in reissuing a tariff brought forward certain rates originally named in a previous tariff, and also slightly increased the rates named between the same points on the same commodity in a supplement to the previous tariff: *Held*, That where a tariff contains conflicting rates the lower or lowest of the rates so published is the legal rate. (Compare Rulings 50, 70, and 104.)

240. SWITCHING MOVEMENT ANALOGOUS TO AN ASTRAY MOVEMENT.—The yardmen of an interstate carrier being under the impression that a loaded car was empty delivered it to a switching road by which it was switched to a

loading point, and the error being there discovered it was thence switched back: *Held*, That while the switching line may treat the shipment as analogous to an astray movement and on that account may waive its charges if it desires to do so, it may nevertheless lawfully demand and collect of the carrier that made the error its lawful rates for the service performed. (See Ruling 217.)

241. A CANAL BOAT LINE ENGAGED IN THROUGH MOVEMENTS IN CONNECTION WITH A RAIL LINE IS SUBJECT TO THE ACT AND MUST FILE TARIFFS.—A canal boat line carrying traffic moving from New York City to Canadian points under an arrangement for through movement, the traffic being transferred to a rail line at Buffalo by its own agents or the agents of the railroad, is a common carrier under the act and must file tariffs with the Commission.

242. UNIFORM DEMURRAGE RULES AND PRACTICES.—Recognizing the great benefits to be derived from uniformity of car-service rules, the Commission endorses the code which was reported to the National Association of Railway Commissioners and by that association recommended to the state and interstate commissions, it being understood that this action is, of course, subject to the right of the Commission to inquire into the legality or reasonableness of any rule or rules which may be the subject of complaint, and that announcement to that effect be made with the Code of Demurrage Rules.

In view of the exhaustive investigation upon which the Demurrage Code is based, it is to be understood as controlling in cases where any conference ruling previously made conflicts with any of its provisions. (See Ruling 313.)

243. ROUTING INSTRUCTIONS WITH AND WITHOUT NAMING THE RATE.—A shipment was routed through a certain junction by the consignor, but on the papers presented to the Commission it did not clearly appear whether he also named the rate that had been available through that junction but was canceled shortly before the movement. The instructions were complied with by the carrier and the new and higher rate applied: *Held*, That this was a shipper's error and the higher rate must be collected unless he also named in the bill

of lading the lower rate legally in effect through another junction, in which case carrier was liable. (See Ruling 286-*f*.)

December 7, 1909.

244. REDUCED RATES ON PROPERTY FOR THE UNITED STATES OR MUNICIPAL GOVERNMENTS.—Rule 61 of Tariff Circular 17-A and Ruling 65 of Bulletin No. 3 (Ruling 65 herein) are hereby withdrawn and the previous ruling of February 4, 1908, reported as Ruling 36 of this bulletin, is restored. (See Rulings 208-*e* and 311.)

December 13, 1909.

245. FREE TRANSPORTATION OF PERSONS UNDER SECTION 22.—There is nothing in the provisions of section 22 of the act relating to free or reduced rate transportation to warrant carriers in according free transportation to scientists or other employees of a public museum.

246. COMPLAINTS FILED BY TRAFFIC OR CREDIT BUREAUS.—While it is the policy of the Commission to entertain complaints instituted on behalf of shippers by traffic or credit bureaus, in all such cases where reparation is awarded, the order will require payment to be made by the defendant carriers either to the consignor or the consignee, as their interests may appear. (Amended by Ruling 362.)

December 14, 1909.

247. PASSENGER TICKET LOST BY CARRIER THROUGH ERROR.—Through error a carrier's agent so punched a round-trip ticket to New York as to limit its use to October 14 instead of October 17. The holder at destination requested a correction, the ticket, being sent back for that purpose by the passenger agent, was lost in the mails. The initial carrier's agent at New York secured from its connection a return ticket in lieu of the lost ticket. It now asks that its connections be authorized to accept report of this ticket without revenue: *Held*, That the initial carrier must pay the cost of the return ticket. (Compare Ruling 238; see Rulings 113, 167, 266, and 277.)

January 4, 1910.

248. COLLECTION OF ESTABLISHED RATES ON RECALLED SHIPMENT.—A shipment had moved 150 miles from the point of origin before the consignor discovered that an error had been made in filling the consignee's order. On inquiry by telephone he was informed by the carrier's clerk that the car could be returned without extra charge; and thereupon the consignor requested its return for a correction of the loading. A part of the carload was exchanged, the shipment was again billed out and moved to destination: *Held*, That the Commission can not relieve the carrier from the obligation of collecting the published rates for all the movements actually made.

249. OUTBOUND CHARGES ON A SHIPMENT MAY NOT BE REFUNDED BY THE CARRIER AND CHARGED BACK AGAINST THE CONSIGNOR.—A shipment having been accepted by the consignee at destination and removed to his place of business was subsequently returned to the delivering carrier, the outbound charges were refunded and included in the return waybill as advance charges. Upon delivery of the returned shipment to the original consignor the return charges, as well as such advance charges, were demanded and collected: *Held*, That the published rate for the return movement was the only charge that carrier could lawfully exact from the original consignor.

250. DEMURRAGE ON CARLOAD SHIPMENT TRANSFERRED INTO TWO CARS.—When a shipment leaves a point of origin in a single car and for the convenience of the carriers is transferred in transit into two cars and is subsequently detained by consignee at destination beyond the free time, demurrage should be assessed as for one car only, so long as either car is detained. (Affirmed in Ruling 339; amended by Ruling 357. Compare Ruling 273.)

January 10, 1910.

251. NO REPARATION ON BASIS OF RATE NOT FILED.—The Commission will not recognize, as a basis for reparation, any rate that is not on file with it.

252. DESTRUCTION OF DOCUMENTS.—The destruction of canceled tariffs that have been posted at the stations of a

carrier as required by law is not regarded by the Commission as an offense under section 20 of the act so long as a copy of the same tariff is preserved by the carrier in its general files. (See general orders of Commission relating to preservation and destruction of records.)

February 7, 1910.

253. MISROUTING THROUGH ERROR OF JOINT AGENT OF TWO CARRIERS.—A shipment originating on one line and not routed by the shipper reached a junction point with another line where a joint agent was maintained. Instead of delivering the shipment to the other line at that point, the joint agent permitted it to go forward on the originating line to another junction point with the second line, over which route the charges were substantially higher than if the second line had taken the shipment at its first junction with the originating carrier: *Held*, That although the agent was a joint agent, he was, with respect to this shipment, acting as agent for the originating carrier, and the cost of his error should be borne by that line alone. (See Ruling 286.)

254. NO REFUND ON THE BASIS OF A RATE NOT EFFECTIVE.—Through inadvertence a carrier quoted a northbound rate of 26 cents instead of a southbound rate of 29.5 cents. A sale having been effected on the basis of the rate quoted, application is made for authority to refund on that basis. Within a few months after the date of the movement the southbound rate was reduced to 17 cents: *Held*, That reparation on the basis of the northbound rate must be denied, but that an application for authority to refund on the basis of the subsequently established southbound rate would be entertained.

255. FREE TRANSPORTATION OF HOUSEHOLD GOODS OF EMPLOYEES.—Upon inquiry, *Held*, That a carrier can not lawfully transport free of charge and deliver to a connection the household goods of an employee who has left its service to accept a position with another carrier. (Reaffirming Ruling 109; see also Ruling 208-*b*.)

256. THE LOWEST COMBINATION OF RATES IS THE LAWFUL CHARGE, IN THE ABSENCE OF A

JOINT THROUGH RATE, ONLY WHEN BOTH FACTORS ARE FILED WITH THIS COMMISSION.—Upon a movement from a domestic point to a destination in Canada charges were assessed at a combination of rates both factors of which were on file with this Commission but which made higher than another combination over the same route one factor of which was on file with the Canadian Commission but not with this Commission: *Held,* That the Commission can not award reparation on the latter combination. (See Rule 5, Tariff Circular 18-A.)

257. COMMISSARY CAR OPERATED BY A CARRIER UNLAWFUL.—A carrier for 25 years has operated a commissary car making two trips monthly with a staple line of meats, groceries, and a restricted stock of shoes, overalls, and other wearing apparel. The sales are limited to employees of the company and their immediate families and are not made for cash but on tickets signed by the company foreman showing the amount of wages due the holder. The purchases are limited to two-thirds of this amount: *Held,* That the practice is illegal.

Upon a subsequent further consideration of this inquiry it was *Held,* That the operation of such a car is in violation of the commodities clause of the act and also in violation of sections 2 and 3 in that such a practice unjustly discriminates against other persons who pay full tariff rates for the same service.

258. WAIVER OF UNDERCHARGES.—With respect to shipments that move on and after March 1, 1910, it will be the policy of the Commission not to authorize the waiver of any uncollected undercharge that is not brought to the attention of the Commission within 30 days after the date of the delivery of the shipment.

259. FREE TRANSPORTATION FOR RED CROSS SOCIETY.—Upon inquiry it was *Held,* That interstate carriers would not be in violation either of section 1 or section 22 in according free transportation to a car occupied by the American National Red Cross Society and its attendants when traveling for the purpose of giving courses of instruction looking to the prevention of accidents in mines and factories and on railroads and trolley lines, and of methods for first aid to the victims of

such accidents, the car being used also for displaying approved safety appliances and illustrating methods followed in relief work.

260. THE CREDENTIALS OF EXAMINERS OF THE COMMISSION MUST BE HONORED BY CARRIERS WHETHER PRESENTED WITH OR WITHOUT SPECIAL LETTERS OF ADVICE.—While it has been the practice of the Commission when examining the accounts of interstate carriers through the board of examiners attached to the Bureau of Statistics and Accounts, to give notice in advance to carriers, this is done for the convenience of the Commission and of the carriers, and is not a requirement imposed upon the Commission by the law. The credentials of an examiner are all that is necessary to entitle him to free and full access to the carrier's records, whether at its general offices or at a station or elsewhere, and the refusal to give access on the presentation of such credentials by an examiner is in violation of the law. The Commission, except in special cases where another course is desirable, will continue to give previous notice of any such examination in writing, unless the refusal of the carriers to honor the credentials of examiners when presented without such notice shall make it necessary to withdraw the practice.

February 8, 1910.

261. DEMURRAGE ACCRUING BECAUSE OF CARRIERS FAILURE TO NOTIFY CONSIGNEE.—Although the tariffs of a carrier provided that it would not accept shipments consigned to "Shipper's Order, Notify" where the party to be notified is not located at destination, it nevertheless accepted such a shipment, and because of its failure on the transfer billing to note the shipper's instructions to notify the consignee at a distant point demurrage accrued at destination: *Held,* That the claim has no standing except upon the carrier's admission that its tariff rule was unreasonable and a showing that it has been changed; and if presented under such conditions and acted upon favorably, the order would require the maintenance of the newly established rule for a period of one year.

262. MISQUOTATION OF CANADIAN RATES.—Upon inquiry as to the rates on a locomotive "on cars," from a point

in New York to a point in the Province of Quebec, the carrier quoted a rate to Sherbrooke and a 7-cent local rate beyond, at 20 per cent less than the actual weight. Charges were collected upon that basis and the carrier now applies to the shipper for payment of an undercharge arising out of the fact that the tariff naming the rate beyond Sherbrooke contains no provision for a deduction from the actual weight of the shipment. The shipper makes the point that the rate beyond Sherbrooke is a Canadian rate and that the domestic carrier is therefore not prohibited by the act from adjusting the charges on the basis of the rate quoted by it: *Held,* That it would be a violation of law to omit the collection of the undercharge.

February 14, 1910.

263. FREE INTERSTATE TRANSPORTATION TO OFFICERS AND EMPLOYEES OF BRIDGE COMPANIES.—Upon inquiry by an interstate carrier whether free transportation may lawfully be accorded to the officers and employees of a bridge company which makes annual reports but files no tariffs and collects no charges from shippers or passengers: *Held,* That free transportation may not lawfully be accorded to the officers and employees of a nonoperating company. (See Rulings 95 and 355.)

The fact, subsequently developed, that trains move over the bridge only on signal and telegraphic orders by employees of the bridge company was held not to be sufficient ground for modifying the ruling.

264. CARLOAD MINIMUM UNDER A JOINT THROUGH RATE.—A tariff named through carload rate from A to D of $1 and provided that as to 30 cents of the rate the minimum weight should be 20,000 pounds and as to 70 cents of the rate the minimum should be 12,000 pounds. The Commission declined to entertain an informal request for reparation on the basis of that rate until the tariff was changed; and it was said that if the tariff were not changed a formal complaint would be entertained: *Held also,* That where two or more carriers publish a joint through rate they must publish in connection therewith one carload minimum weight for the through movement under that rate. This ruling is not to be understood, however,

as condemning the publication in joint tariffs, and the use of through rates made up in combination on a specific base point and providing one minimum weight in connection with the specified portion of the rate up to the base point and a different minimum weight in connection with the specified portion of the rate beyond the base point.

February 17, 1910.

265. REFUND OF PORTION OF UNUSED PASSENGER TICKET.—A man and wife holding round-trip tickets embracing a stopover privilege at an intermediate point returned from that point without completing the rest of the journey. The tariff naming the excursion rate under which the tickets were sold also named an excursion rate to that intermediate point and return and prescribed the same conditions: *Held,* That the case falls within Ruling 76 of this bulletin. (Affirmed by Ruling 303; see also Ruling 115.)

March 7, 1910.

266. REFUND ON PASSENGER TICKET.—In selling a round-trip ticket the carrier's agent neglected to punch the return limit in the margin. The ticket was used on the going journey in accordance with its conditions. The tariff permitted a stopover at an intermediate point on the return journey. When the holder presented the ticket for validation that agent punched a return limit in the margin, which rendered the ticket useless except for continuous passage back to the point of origin. Not observing this limitation, the passenger stopped over, and upon presenting the ticket at that point the agent marked it "Void," thus compelling the holder to purchase a ticket from that point to his home. He arrived there within the time limit under which the original ticket was sold, having traveled also over the route named in the tariff and otherwise complied with its conditions: *Held,* That the holder was entitled to a refund of the excess fare paid on account of the carrier's error, each of the carriers to reserve the earnings due it under the round-trip ticket. (See Rulings 113, 167, 266, and 277.)

267. GRAIN-DOOR ALLOWANCES.—Tariffs authorizing allowances for grain doors do not conform with Ruling 78 of this

bulletin unless they state both the maximum allowances per car and the maximum allowance per grain door. (See Ruling 132.)

268. CARRIERS MAY NOT DEFEAT THEIR PUBLISHED THROUGH FARES WITH PARTY RATE TICKETS.—The tariffs of certain carriers provide a 10-party fare from A to B but no such fare from B to C. Upon inquiry whether it would be legal to ticket a party of ten from A to C on the basis of the party fare from A to B and the individual fares from B to C when such combination makes less than the joint through individual fare from A to C: *Held*, That while a party of ten, acting on their own initiative would have the right to use the party fare from A to B and to purchase such transportation as is available from B to C, the carriers may not ticket them through from A to C on such a combination and thus defeat their own published through fare.

269. PUBLISHED DIVISIONS OF THROUGH RATES TO AND FROM MEXICO.—The purpose of Rule 72 of Tariff Circular No. 18-A requiring the domestic carriers to publish their divisions of rates to and from Mexico is to give to this Commission definite information as to their lawful earnings and was not intended as a means of exercising any jurisdiction over carriers in Mexico. (See Ruling 209.)

270. DERRICK AND SIMILAR CONSTRUCTION CARS ARE NOT ORDINARILY SUBJECT TO DEMURRAGE CHARGES.—In the absence of specific tariff provision therefor demurrage does not accrue on derrick cars, pile-driver cars, and similar cars that are not and ordinarily can not be unloaded, when owned or leased by a contractor doing construction work on the line of the carrier concerned, or when standing upon storage tracks. (Qualifying Ruling 222; see also Ruling 123.)

March 8, 1910.

271. DESTRUCTION OF DOCUMENTS.—The regulations of the Commission respecting the preservation and destruction of the records and documents of common carriers also apply to the records and documents of all joint agencies maintained by or on behalf of carriers subject to the act.

March 14, 1910.

272. EXCURSION OF COMMERCIAL ASSOCIATION AT EXPENSE OF CARRIER.—The Commission can not sanction a proposed interstate excursion for certain commercial clubs, the members of which are to be carried at the expense of the railroad company and as its guests.

March 15, 1910.

273. SHIPMENT TRANSFERRED IN TRANSIT FROM ONE LARGER CAR TO TWO SMALLER CARS.—For a through shipment of an emigrant outfit the initial carrier, at the request of the consignor, furnished a 40-foot car which became out of order while on its line. At the junction point the connecting carrier transferred the shipment into two 36-foot cars, and in that form it moved to destination on the line of a third carrier. There was no joint through rate, but the second and third carriers maintained a rate for a 36-foot car, all weight in excess of a given minimum to be charged for proportionately, the tariff, however, expressly forbidding the use of larger equipment. At destination charges were collected on the basis of two carloads from the point of transfer: *Held,* That in transferring the shipment, the connecting carrier ought to have loaded the full minimum weight into one car and to have adjusted the charges on the balance of the shipment in the second car at the less-than-carload rate. (Compare Ruling 250.)

274. LARGER CAR FURNISHED AT CONVENIENCE OF INITIAL LINE UNDER TARIFF AUTHORITY FOR APPLYING THE MINIMUM ON THE SMALLER CAR ORDERED, CONNECTING LINE NOT PUBLISHING SUCH PROVISION.—(*a*) Complaints of alleged overcharges arise in connection with shipments that move over the lines of two or more carriers under combination rates, the initial carrier having a provision in its tariff that in case a car of certain dimensions or capacity is ordered by a shipper, and the carrier for its own convenience furnishes a larger car, such larger car may be used on the basis of the minimum weight applicable to the car ordered, while the connecting carrier does not have such tariff provision and therefore charges for the full minimum weight applicable to the car used. See Rule 66 of Tariff Circular 18-A.)

(*b*) The law imposes upon carriers the obligation of arranging to every reasonable extent for through carriage and through shipment. Neither the burden of following his shipment to a connecting point between two carriers and there transferring it, nor of bearing the expense of such transfer, can be laid upon the shipper. It is not deemed reasonable that in a case of this kind the shipper should be required to pay higher charges than he would have paid had the initial carrier furnished the equipment that is provided for in its tariff and that was ordered by the shipper. The carriers in the different classification territories ought to have, and should provide at the earliest practicable moment, a uniform rule on this subject.

(*c*) It is believed that where the initial carrier provides in its tariffs that if for its own convenience it furnishes a car larger than that ordered by the shipper, it will be used upon the basis of minimum weight applicable to the car ordered, and the connecting carrier to or over whose lines such shipment is moved has not such provision in its tariff, the initial carrier should note upon the bill of lading and upon the way bill or transfer bill, which accompanies delivery of a shipment to its connections, the fact that car of certain size was ordered and car of certain size was for its own convenience furnished by the carrier to be used on the basis of the minimum weight applicable to the car ordered; and that connecting carrier, receiving such notice on the way bill or transfer bill and not having provision in its tariff which permits the use of the car on the basis of the lower minimum weight, should transfer the shipment into car of the size or capacity ordered by the shipper or into car to which the same minimum weight applies, without additional expense to the shipper.

This ruling outlines the policy which the Commission will follow in cases of this nature which may be brought before it. It is, of course, understood that shipper may not demand any car that is not provided for in the initial carrier's tariff. (See Ruling 339.)

April 1, 1910.

275. HOURS OF SERVICE LAW—TRAIN BAGGAGEMEN.—The provisions of section 1 of the hours of service law apply to train baggagemen who are employees of the railway company and who are required by the rules of the company to

perform or to hold themselves in readiness, when called upon, to perform any duty connected with the movement of any train. (See Rulings 74 and 287.)

276. DEMURRAGE CHARGES—TARIFF AUTHORITY THEREFOR.—A consignor while loading cars at the point of origin detained them for several days before they were billed out for movement to interstate destinations. The initial carrier issued a tariff providing for demurrage, but the tariff naming the rate applicable on the movements neither provided demurrage charges nor referred to the initial carrier's tariff where such charges were specified: *Held,* That there was sufficient tariff authority for the collection of the charges by the initial carrier.

277. ERROR IN THE ISSUANCE OF PASSENGER TICKETS.—The Commission adheres to its formerly expressed view that connecting lines are entitled to divisions according to the transportation which they honor on presentation by the traveler, and therefore that a carrier whose agent had made an error in not properly punching half-fare and lower-class tickets must bear the full burden of the mistake. (See Rulings 69, 113, 167, 247, and 266.)

278. FREE TRANSPORTATION TO TRAVELING SECRETARIES OF Y. W. C. A.—Under the provisions of the act free or reduced rate transportation may not lawfully be accorded to traveling secretaries of a Young Woman's Christian Association.

April 5, 1910.

279. APPLICATION OF RATES ON ARTICLES SOLD UNDER TRADE NAMES.—A compound described under its technical chemical name in the tariff carrying the rate is offered for shipment and sold by a manufacturer under a trade name: *Held,* That while the packages may bear the trade name of the article, the shipper is not entitled to the rate applicable on the specified compound unless the packages, as tendered for transportation, are also labeled so as to indicate that they contain the compound.

280. ESTIMATED WEIGHTS PER PACKAGE.—Sometimes a transportation rate is stated to be a certain sum per pack-

age, and sometimes the rate is stated in cents per 100 pounds, and it is provided that the package will be taken at a stated estimated weight. Changes in size or dimensions of packages and disagreements as to the size or dimension upon which the estimated weight was fixed have caused troublesome complications. In so far as, and whenever, it is practicable, the size and dimensions of such packages should be clearly and accurately described and defined in the tariff.

April 11, 1910.

281. A CONCURRENCE BY ONE CARRIER IN THE TARIFFS OF ANOTHER DOES NOT LEGALIZE THE USE BY THE FORMER OF THE LOCAL RATES OF THE LATTER.—A tariff published by one carrier in addition to certain joint through rates also named local rates between two points on its line that were also served by the lines of another and concurring carrier: *Held,* That the local rates of the carrier that published the tariff could not be recognized as the rates of the concurring carrier on local movements between the two points in question.

282. JOINT RATE REDUCED TO THE SUM OF THE LOCALS, MINIMUM WEIGHT BEING INCREASED.—The charges on a movement were collected under a joint rate that exceeded the sum of the locals, but which was subsequently reduced to equal the lower combination, the minimum weight, however, being increased. The carrier offered to refund on the basis of the new through rate and the advanced minimum weight: *Held,* That in such cases reparation will be awarded on the basis of the newly established joint through rate at the carload minimum weight in effect at the time of the movement, subject, of course, to actual weight when higher than such minimum. (Rescinded by Ruling 338.)

May 10, 1910.

283. DRAYAGE CHARGE RESULTING FROM MISROUTING.—Routing instructions were not followed with the result that the shipment arrived and was accepted at a pier in New York City more distant from the consignee's place of business than the designated pier: *Held,* That the claim for repara-

tion on the basis of the lower cost for draying the goods from the specified pier must be denied. (Ruling 25 overruled; Ruling 234 affirmed; see also Rulings 286-*d* and 392.)

284. INTERPRETATION OF MISROUTING RULING NO. 24.—Ruling 190, interpreting present Ruling 214 of this bulletin, holds that, considering the carrier's liabilities and the marine insurance involved in a movement by water, the carrier's agent did not negligently misroute a shipment which, in the absence of instructions from the shipper, he routed by an all-rail route. Those rules did not attempt to differentiate between all-rail routes and car-ferry routes; and on the presentation now of that question it is *Held*, That in the absence of different rates in one tariff applying via all-rail and car-ferry routes, and where break of bulk is not necessary or directed, car-ferry routes are understood to be included in the general term "all-rail." (Superseded by Ruling 316.)

285. FREE TRANSPORTATION FOR THE REMAINS OF AN EX-EMPLOYEE.—The Commission finds no warrant in law for holding that free transportation may be accorded to the remains of an ex-employee of a carrier who resigned from the service some time prior to his death.

286. ADJUSTMENT OF CLAIMS FOR DAMAGES RESULTING FROM THE MISROUTING OF FREIGHT.—(*a*) The Commission holds that it has exclusive jurisdiction over claims for damages arising from the misrouting of freight. (See Rulings 139 and 214.)

(*b*) The statute of limitations embodied in section 16 of the act to regulate commerce, as amended, governs misrouting claims, and thereunder the Commission is without jurisdiction to take cognizance of claims presented more than two years after the delivery of shipments at destination.

(*c*) If a connecting line accepts a shipment at the junction point without routing instructions, it will be held responsible for any excessive charges that may directly accrue from its error in forwarding the shipment to destination via any other than the cheapest available route. (Amending Rulings 137 and 199.)

(*d*) It is the duty of a carrier to make delivery in accordance with routing instructions. Where such routing instructions have

not been followed and delivery is tendered at another terminal than that designated, it remains the duty of the delivering carrier to make delivery at the terminal designated in routing instructions, either by a switch movement or by carting. In either event the additional cost to the delivering carrier must be paid in whole by the carrier guilty of misrouting. In case the carrier delivers to the designated terminal by wagon or dray it must employ for such service facilities owned or contracted for by it and may not make an allowance to the shipper for such service. (Reaffirming Ruling 283; see also Ruling 392.)

(*e*) The Commission will exercise jurisdiction to award damages as against the carrier guilty of misrouting to the extent of the additional cost thus imposed on the delivering carrier.

(*f*) The obligation lawfully rests upon the carrier's agent to refrain from executing a bill of lading which contains provisions that can not lawfully be complied with, or provisions which are contradictory, and therefore impossible of execution. When, therefore, the rate and the route are both given by the shipper in the shipping instructions, and the rate given does not apply via the route designated, it is the duty of the carrier's agent to ascertain from the shipper whether the rate or the route given in the shipping instructions shall be followed. The carrier will be held responsible for any damages which may result from the failure of its agent to follow this course. (Modifying Rulings 159, 186, 192, 214-*i*; affirming Ruling 231; see also Rulings 243 and 370.)

March 16, 1908.

287. THE HOURS OF SERVICE LAW.—(*a*) The provision of this act apply to all common carriers by railroad in the District of Columbia, or in any Territory of the United States, or engaged in the movement of interstate or foreign traffic; and to all employees of such common carriers who are engaged in or connected with the movement of any train carrying traffic in the District of Columbia, or in any Territory, or carrying interstate or foreign traffic. (See Ruling 56.)

(*b*) SEC. 2. The requirements for ten consecutive hours off duty applies only to such employees as have been on duty for

sixteen consecutive hours. The requirement for eight consecutive hours off duty applies only to employees who have not been on duty sixteen consecutive hours, but have been on duty sixteen hours in the aggregate out of a twenty-four hour period. Such twenty-four hour period begins at the time the employee first goes on duty after having had at least eight consecutive hours off duty. The term "on duty" includes all the time during which the employee is performing service, or is held responsible for performance of service. An employee goes "on duty" at the time he begins to perform service, or at which he is required to be in readiness to perform service, and goes "off duty" at the time he is relieved from service and from responsibility for performance of service. (Qualified by Ruling 74.)

(*c*) The act does not specify the classes of employees that are subject to its terms. All employees engaged in or connected with the movement of any train, as described in section 1, are within its scope. Train dispatchers, conductors, engineers, telegraphers, firemen, brakemen, train baggagemen, who, by rules of carriers, are required to perform any duty in connection with the movement of trains, yardmen, switch tenders, tower men, block-signal operators, etc., come within the provisions of the statute. (Qualified by Rulings 108 and 275; see also Ruling 88.)

(*d*) The proviso in section 2 covers every employee who, by the use of the telegraph or telephone, handles orders pertaining to or affecting train movements. In order to preserve the obvious intent of the law this provision must be construed to include all employees who, by the use of an electrical current, handle train orders, or signals which control movements of trains. (See Ruling 88.)

(*e*) The prime purpose of this law is to secure additional safety by preventing employees from working longer hours than those specified in the act. Therefore a telegraph or telephone operator who is employed in a night and day office may not be required to perform duty in any capacity or of any kind beyond nine hours of total service in any twenty-four hour period.

(*f*) The phrase "towers, offices, places, and stations" is interpreted to mean particular and definite locations. The purpose of the law and of the proviso for nine hours of service may not be avoided by erecting offices, stations, depots, or buildings in close

proximity to each other and operating from one a part of the day while the other is closed, and vice versa.

The statute is remedial in its intent and must have a broad construction so that the purpose of the Congress may not be defeated.

(*g*) The Commission interprets the phrase "continuously operated night and day" as applying to all offices, places, and stations operated during a portion of the day and a portion of the night, a total of more than thirteen hours.

The phrase "operated only during the daytime" refers to stations which are operated not to exceed thirteen hours in a twenty-four hour period, and is not considered as meaning that the operator thereat may be employed only during the daytime.

(*h*) The act provides that operators employed at night and day stations or at daytime stations may, in case of emergency, be required to work four additional hours on not exceeding three days in any week. Manifestly, the emergency must be real and one against which the carrier can not guard.

"In any week" is construed to mean in any calendar week, beginning with Sunday.

(*i*) SEC. 3. The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point. (See Ruling 88.)

"Casualty," like its synonyms "accident" and "misfortune," may proceed or result from negligence or other cause known or unknown. (Words and Phrases Judicially Defined, vol. 2, 1003.)

Act of God. Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight, and pains, and care reasonable to have been expected. (Bouvier's Law Dictionary, vol. 1, 79.)

(*j*) It will be noted that the penalties for violation of this act are against the "common carriers, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty," in violation of the law. It is clear that the officers and agents of carriers who are liable to the penalties pro-

vided in the act are those who have official direction or control of the employees; and that the penalties do not attach to the employees who, subject to such supervision or control, perform the service prohibited.

(*k*) SEC. 4. To enforce this act the Interstate Commerce Commission has all the powers which have been granted to it for the enforcement of the act to regulate commerce, including authority to appoint employees, to require reports, to examine books, papers, and documents, to administer oaths, to issue subpœnas, and to interrogate witnesses.

October 3, 1910.

288. COMPETENCY OF RAILROAD EMPLOYEES—CONDITION OF SIGNAL DEVICES.—Upon inquiry: *Held,* That, except in cases of accident, the Commission has no authority under the act to regulate commerce to look into the competency of railroad employees or the physical condition of block signals, and makes no general investigations of that nature.

October 4, 1910.

289. POSTING NAMES OF RESIDENT AGENTS AT BLIND SIDINGS.—The act requires a carrier to post the name of its resident agent in every office, warehouse, depot, or station building at which freight is received. But upon inquiry: *Held,* That this is not necessary at blind sidings where there is no station agent or any station building at which freight is received.

October 10, 1910.

290. STATEMENT OF SEX OF CHILDREN ON APPLICATIONS FOR PASSES.—Upon inquiry by a carrier whether under Ruling 95 of this Bulletin it is necessary that applications by one carrier on another for exchange transportation should show the sex of the child or children for whom free transportation is requested: *Held,* That an application in behalf of "John Smith and children" is not a sufficient compliance with the rule; it should be made in the name of "John Smith, one son, and two daughters," so that the representation that they are the children of the person named may affirmatively appear.

October 11, 1910.

291. PARAGRAPH 5 OF SECTION 15 OF THE AMENDED ACT DOES NOT APPLY TO TELEGRAPH COMPANIES.—Upon inquiry: *Held,* That the paragraph of section 15 of the amended act to regulate commerce giving the shipper the right to route his shipments does not apply to telegraph companies.

November 7, 1910.

292. ALLOWANCES FOR FLOOR RACKS IN REFRIGERATOR CARS ANALOGOUS TO GRAIN-DOOR ALLOWANCES.—Certain carriers filed tariffs providing that when refrigerator cars without floor racks are set for loading, and shippers are required to furnish floor racks to protect the freight loaded, allowances will be made equal to the cost of the racks but not to exceed $2.50 per car. The question of the lawfulness of such tariffs being under consideration: *Held,* That the principle involved is the same as that relating to grain doors furnished by shippers. (See Rulings 19, 78, 132, and 360.)

293. RATES OR FARES PUBLISHED SUBSEQUENT TO FEBRUARY 17, 1911, IN VIOLATION OF SECTION 4 AS AMENDED.—Subsequent to February 17, 1911, any rate, fare, or charge maintained or imposed in violation of the long-and-short-haul provision of the fourth section of the act as amended, which rate, fare, or charge is not covered by an order of the Commission granting relief from the provisions of the section, or by pending application for such relief, will be held not to be brought into conformity with said section by a change in classification; cancellation of commodity rate leaving class rate or combination rate to apply; cancellation of a rate with provision that in lieu thereof a rate in some other tariff shall apply; correction of error in tariff; addition or elimination of routes without change in list of participating carriers; or by any other change which does not leave the rate, fare, or charge free from conflict with the law. (See Rulings 299, 304, 318.)

294. TRANSPORTATION FROM FOREIGN COUNTRIES NOT ADJACENT THROUGH THE UNITED STATES TO AN ADJACENT FOREIGN COUNTRY.—Upon inquiry: *Held,* That the transportation of property from foreign

countries not adjacent through the United States to an adjacent foreign country is subject to the act and tariffs covering such movement must be filed. (Withdrawn November 11, 1912.)

295. RATES BASED ON VALUE OF MERCHANDISE.—Carriers may lawfully establish schedules of charges applicable to a specific commodity and graduated reasonably according to value. When such rates are published shippers are entitled to the rate corresponding to the actual value of the property offered by them for transportation. Shippers are not entitled under such rates to understate the actual value of shipments for the purpose of obtaining the rate applicable upon articles of less value. The valuation stated to carriers should correspond with the actual value as shown by invoices, etc. Shippers misstating the value of property for the purpose of obtaining the rate applicable to property of less value are guilty of misbilling and are subject to prosecution under section 10 of the act to regulate commerce. (See Ruling 58.)

November 8, 1910.

296. POWER TO REQUIRE ADDITIONAL PASSENGER TRAIN SERVICE.—(*a*) Upon complaint of a resident at a suburban station that sufficient trains are not run to and from New York City during the morning and evening hours to accommodate commuters: *Held*, That the Commission is without authority to require the running of additional trains.

(*b*) Upon complaint of the discontinuance of a daily accommodation train between Washington and a rural community 27 miles distant, *Held*, That the Commission is without power to grant relief.

297. FREE AND REDUCED RATE TRANSPORTATION OF PERSONS TRAVELING AT THE EXPENSE OF STATE OR TERRITORIAL GOVERNMENTS.—Ruling 218 of this Bulletin is confined to movements at the instance and expense of the United States. The Commission finds nothing in the law authorizing free or reduced rate transportation of persons, other than indigents, traveling at the expense of a state or territorial government. (See Ruling 208-*c*.)

November 14, 1910.

298. THROUGH FARES HIGHER THAN THE COMBINATION OF INTERMEDIATE FARES.—Upon inquiry whether the prohibition against charging a greater compensation as a through charge than the aggregate of the intermediate charges subject to the provisions of the act is to be construed as meaning that fares must be made not higher than the lowest possible combination of intermediate fares, and if not, upon what basis they may be constructed: *Held,* That the fares must be constructed upon the basis of being no higher than the lowest combination of fares that are published and filed as available for interstate travel or in making up interstate fares. If a carrier desires to exclude from this consideration any of its purely intrastate fares it must refrain from publishing and filing such intrastate fares as available for use in making up interstate fares.

December 17, 1910.

299. APPLICATION OF SECTION 4, AS AMENDED JUNE 18, 1910, TO EXPORT AND IMPORT RATES.—(*a*) Inland export and import rates are subject to the provisions of the act and within the jurisdiction of the Commission.

(*b*) The fourth section of the amended act forbids carriers subject thereto, without authority from the Commission in accordance with said section, to charge more for the transportation of a like kind of export or import traffic for a shorter than for a longer haul over the same line in the same direction; that is, as we understand the law, the validity of a rate under this section is determined by comparison of an export rate with an export rate, or an import rate with an import rate.

(*c*) So far as the fourth section is concerned, carriers are not required in the first instance to establish export and import rates which shall be measured and limited by domestic interstate rates between the same points of origin and destination in the United States; but as export and import rates, as well as domestic interstate rates, are subject to the provisions of the act and the jurisdiction of the Commission, it is clear that the reasonableness of any of these rates under the provisions of section 1, and questions of discrimination under the third section, may all be con-

sidered and the Commission may condemn any discrimination in export and import rates, upon comparison with those applicable on domestic interstate traffic, to the extent that the same may be found unjust or unreasonable in any particular case upon investigation and full hearing.

(Section 4 as amended is also interpreted in Rulings 293, 304, 318.)

January 14, 1911.

300. BROKERAGE CHARGES BY EXPRESS COMPANIES ON SHIPMENTS FROM ABROAD.—A suit case consigned from London in care of an express company at New York City for further transportation inland by express was appraised by the customs officials, with its contents, at the sum of $363. Upon complaint of a charge of $3 exacted by the express company for its services in clearing the shipment through the customs house, no scale of such charges being filed with this Commission, it was *Held*: That brokerage charges of this nature are not within the jurisdiction of the Commission, not being a part of the transportation service. (See Ruling 7.)

February 13, 1911.

301. EMPLOYEES ON PRIVATELY OWNED OR CHARTERED CARS.—Upon inquiry: *Held*, That porters, cooks, or waiters on privately owned or chartered cars moving under tariff authority may be carried as employees.

302. TELEGRAMS RELATING TO SHIPMENTS.—Telegraphic instructions or inquiries made by shippers to or of a carrier in relation to their shipments may not properly be paid for by the carrier unless so provided in its published tariffs; a telegram sent by the carrier to the shipper relating to his traffic, and his reply thereto, pertain to the business of the carrier and may be sent at its expense. (Construed by Ruling 327; see Ruling 363.)

February 22, 1911.

303. REDEMPTION OF TICKETS.—Under appropriate provision in its tariffs a carrier may redeem the unused portion of a round-trip ticket on the basis of a lower round-trip fare to a

point directly intermediate, provided the latter fare was lawfully available for the journey as actually commenced and concluded; or it may, under a tariff provision to that effect, exchange a round-trip ticket to a point directly intermediate for a round-trip ticket available at the same time to a more distant point, upon collecting the difference in the fares of the two tickets. (Affirming Ruling 265; see also Rulings 76, 115.)

March 13, 1911.

304. APPLICATION OF SECTION 4 AS AMENDED JUNE 18, 1910.—(*a*) The fourth section applies to all rates and fares, but in determining whether its provisions are contravened rates and fares of the same kind should be compared with one another; that is, transshipment rates should be compared with transshipment rates; proportional rates with proportional rates; excursion fares with excursion fares; and commutation fares with commutation fares. It would not be in violation of the fourth section, for instance, if a proportional rate to or from a given point were lower than the regular rate to or from an intermediate point, nor if the commutation fare to or from a more distant point were lower than the regular fare to or from an intermediate point. (Rules 309, 310.)

(*b*) A proportional rate is defined as one which applies to part of a through transportation which is entirely within the jurisdiction of the act to regulate commerce; that is, the balance of the transportation to which the proportional rate applies must be under a rate filed with this Commission. A rate to a port for shipment beyond by a water carrier not subject to the provisions of this act would not be a proportional rate.

The foregoing holding is not intended to approve the lawfulness of any existing transshipment rate.

(*c*) An excursion rate is one which provides for a return to the initial point or some corresponding point.

(*d*) Where from the absorption of a switching charge it results that the total transportation charge from a more distant point to the point where the property is delivered is less than the total transportation charge from or to an intermediate point the fourth section is violated. Owing, however, to the very general practice of absorbing switching charges from competitive and

not from noncompetitive stations, and in view of the fact that much benefit and little complaint results, the Commission will, by general order, permit a continuance of this practice, reserving for consideration and determination individual cases which may require special consideration. (Such an order was entered March 20, 1911.)

(*e*) If a carrier has been given authority to maintain from or to noncompetitive intermediate points rates higher than those from or to more distant competitive points and a new intermediate station is opened, rates from or to such intermediate station which are the same or in harmony with those authorized may be established by the carrier without special authority from the Commission.

(*f*) If a carrier is authorized to maintain rates to or from a given point which are not in conformity with the fourth section, it may establish rates upon branch lines connecting with the main line at these points which are higher than such intermediate rates by arbitraries or by the branch-line locals, without special authority from the Commission.

(Section 4 as amended is also interpreted in Rulings 293, 299, 318.)

305. APPLICATION OF THE AMENDED ACT TO TELEGRAPH AND TELEPHONE COMPANIES.—(*a*) Each and every telegraph and telephone company which transmits messages over its line or lines from a point in one State, Territory, or District of the United States to any other State, Territory, or District of the United States, or to any foreign country, is subject to the provisions of the act.

(*b*) If a telegraph or telephone company, the line of which is wholly within a single State, Territory, or District of the United States, receives a message within such State, Territory, or District of the United States, for transmission to a point without the State, Territory, or District of the United States, which it transmits over its line to another point in the same State, Territory, or District of the United States and there delivers it to an interstate line for transmission to destination, the first-named company by virtue of its participation in this transaction, is not made subject to the provisions of the act; unless there be an ar-

rangement between that company and its connection for through continuous transmission of such messages, in which latter case all of the participating companies in such through continuous transmission are subject to the provisions of the act.

(*c*) If two or more lines are connected so that a person within one State, Territory, or District of the United States talks with a person at a point without such State, Territory, or District of the United States, or so that a message is transmitted directly from a point within a State, Territory, or District of the United States to a point without the same, the transmission of messages in this manner constitutes interstate commerce and brings all of the participating lines within the purview of the act.

(*d*) It follows that telegraph and telephone companies subject to the act, as above indicated, must conform to the provisions of section 1 thereof requiring that all of their rates and charges for the transmission of interstate messages shall be reasonable and just, and that such companies may lawfully issue franks covering free interstate service or may grant free interstate service to the same extent, and subject to the same limitations as other common carriers under the provisions of said section. (See Rulings 95-*a*, par. 2, 161, 219, and 364.)

(*e*) Such telegraph and telephone companies subject to the act are also governed by the provisions of section 3 forbidding any undue or unreasonable preference or advantage by rebates or otherwise, or any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and are subject to the lawful orders of the Commission made pursuant to the provisions of section 15 of the act, and also of section 20 thereof respecting the keeping of accounts and memoranda and the making of reports to the Commission.

April 3, 1911.

306. STATUTE OF LIMITATIONS NONOPERATIVE AS BETWEEN CARRIERS.—Before the expiration of two years a delivering line discovered and at once refunded an overcharge; upon demand made by it after the two years had expired a connecting line declined to repay its share, on the ground that the statute had run: *Held*, that in such cases the statute does not run as between carriers. (See Ruling 220-*j*.)

307. CLAIMS BARRED BY THE STATUTE OF LIMITATIONS.—Overlooking a higher through rate, charges were collected on the sum of the intermediate rates. After two years had expired the through rate was reduced to that basis and still later the balance of the through rate legally in effect on the date of the shipment was collected. Upon presentation of the claim some months later: *Held*, That it was barred by the statute, and that the case is controlled by *Blinn Lumber Co. v. S. P. Co.*, 18 I. C. C. Rep., 430. (See Rulings 10 and 220-*j*.)

308. USE OF FREE TRANSPORTATION BY RAILROAD EMPLOYEE WHILE CONNECTED WITH MUNICIPAL OFFICE.—Upon inquiry: *Held*, That a railroad employee on leave of absence for the purpose of filling a term in a public office, or to engage in other business, is not entitled during such period to free passes either for himself or his family. (See Ruling 208-*d*.)

309. PASSENGER FARES UNDER THE FOURTH SECTION.—*Held*, That carriers may not disregard the fourth section in order that passenger fares may be stated in multiples of five. (See Ruling 304-*a*.)

310. PASSENGER FARES UNDER THE FOURTH SECTION.—Held, That in determining whether the provisions of the fourth section are contravened, mileage, commutation, party rate, and half fares for children should be compared only with fares of the same character. (See Ruling 304-*a*.)

April 4, 1911.

311. FREE TRANSPORTATION OF PROPERTY FOR COUNTY AUTHORITIES.—Upon inquiry: *Held*, That under section 22 interstate lines may carry free or at reduced rates for county authorities. (See Rulings 33, 65, 208-*e*, 244, and 297.)

312. TERMINAL COMPANIES SUBJECT TO ACT.—Upon inquiry: *Held*, That terminal companies must file statistical reports as required by the Commission.

April 10, 1911.

313. DEMURRAGE RULES.—The following interpretations and explanations by the American Railway Association of certain of the National Demurrage Rules recommended by the Commission on December 18, 1909, for use throughout the country are tentatively accepted subject to the right and duty of the Commission, upon complaint made or on its own initiative, to inquire into the legality and reasonableness of any such rule so interpreted and applied.

RULE 1.—CARS SUBJECT TO RULES.

Cars loaded with company material for use of and consigned to the railroad in whose possession the cars are held are not subject to demurrage.

Empty cars placed for loading with company material are subject to demurrage, unless the loading is done by the railroad company for which the material is intended and on its track.

(*a*) Empty cars placed for loading live stock by shippers are not exempt and should be reported.

Live poultry is not considered as live stock, and cars so loaded are subject to demurrage.

(*c*) Empty private cars stored on tracks, switched by carriers, taken for loading without order or requisition from shipper and without formal assignment by carrier's agent, shall be recorded as placed for loading when actual loading is begun.

NOTE.—Private cars belonging to an industry which does its own switching, placed upon an interchange track for forwarding, and refused by the carrier's inspector, shall be released from demurrage if withdrawn by the industry from the interchange track within twenty-four (24) hours after rejection.

Private cars are not in railroad service—

(*a*) When loaded and unloaded on the tracks of the owner and not moved over the tracks of a carrier;

(*b*) When placed by the carrier for loading on the tracks of the owner and refused by the inspector.

RULE 2.—FREE TIME ALLOWED.

(*a*) When the same car is both unloaded and reloaded, each transaction will be treated as independent of the other.

(*b*) 1. Applies to cars held on carrier line for disposition. A change of consignee after arrival of car at destination is not a reconsignment under these rules, unless a switching movement covered by a tariff is involved. It also includes cars held in transit for reconsignment. (See also (*b*) 3.)

It also applies to cars held on the carrier line within a switching district consigned to a point on a switching line within such district, which can not be received on account of disability of the consignee. The carrier line must in all cases give notice in writing to the consignee of all cars so held. Time will be computed in accordance with Rule 3 (*b*), following.

RULE 3.—COMPUTING TIME.

NOTE.—The exemption of holidays does not include half holidays.

(*b*) When orders for cars held for disposition or reconsignment are mailed, such orders will release cars at 7 a. m. of the date orders are received at the station where the freight is held, provided the orders are mailed prior to the date received, but orders mailed and received on the same date release cars the following 7 a. m.

RULE 4.—NOTIFICATION.

When cars are for delivery to public team tracks, and placement is delayed for more than twenty-four (24) hours after notice of arrival is given, a notice of placement must also be given to the consignee, and the free time for unloading computed according to the notice of placement.

RULE 7.—DEMURRAGE CHARGE.

Charges accruing under these rules must be collected in the same manner and with the same regularity and promptness as other transportation charges.

RULE 8.—CLAIMS.

The exemptions on account of high water or snowdrifts apply only when the point at which car is placed for loading or unloading is inaccessible to the general public by reason of these conditions.

May 1, 1911.

314. COLLECTION OF UNDERCHARGES.—The law requires the carrier to collect and the party legally responsible to pay the lawfully established rates without deviation therefrom. It follows that it is the duty of carriers to exhaust their legal remedies in order to collect undercharges from the party or parties legally responsible therefor. It is not for the Commission, however, to determine in any case which party, consignor or consignee, is legally liable for the undercharge, that being a question determinable only by a court having jurisdiction and upon the facts of each case. (Superseding Rulings 3 and 187. See also Rulings 16 and 156.)

315. USE OF INTRASTATE MILEAGE BOOKS ISSUED IN EXCHANGE FOR ADVERTISING.—A State statute permits the exchange of intrastate mileage books for advertising. Upon inquiry: *Held,* That such books may not be used upon any part of an interstate journey.

316. CONFERENCE RULING 284 SUPERSEDED.—Upon inquiry as to the application of Rulings 190 and 214 to routes made up partly of a car ferry: *Held,* That routes involving the transshipment of freight from a rail line to a water line or from a water line to a rail line are "rail-and-water routes," and that routes composed of rail lines connected by car ferries over which the freight is ferried in the car constitute "car-ferry routes" and are understood to be included in the general term "all-rail."

Held further, That where a shipper does not specify a particular route, or a rail-and-water route, the carrier's agent must consider car-ferry routes as available in performing the duty of routing a shipment over the cheapest route. (See Ruling 190, interpreting Ruling 214.)

May 2, 1911.

317. ERRORS IN TRANSMISSION OF TELEGRAPHIC MESSAGES.—Upon inquiry: *Held,* That the Commission has no jurisdiction over claims for damages due to alleged errors in the transmission of telegraphic messages.

May 8, 1911.

318. APPLICATION OF FOURTH SECTION WHEN ONE OR MORE POINTS ARE IN A FOREIGN COUNTRY.—The fourth section does not apply when the more distant point and the intermediate point are in a foreign country; nor when the point of origin and point of destination are both in the United States and the intermediate point is in a foreign country. (See Rulings 293, 299, and 304.)

June 2, 1911.

319. FREE TRANSPORTATION OF WITNESSES.—Upon inquiry: *Held,* That a carrier may not lawfully issue free

interstate transportation to one not otherwise entitled to it in order to enable him as a witness to attend a proceeding in court unless the carrier is a party thereto or has a direct legal interest in the result.

320. FREE TRANSPORTATION OF INSTRUCTOR IN USE OF BOILER COMPOUND.—In arranging for the purchase of a chemical compound to be used in locomotive boilers it was understood that the chemical company would give to the engineers and firemen the necessary instructions for using the compound and that the carrier would furnish passes to an instructor for that purpose: *Held,* That the instructor is not entitled to use free transportation under Conference Ruling No. 208-b. Overruled by Ruling 336. (See Ruling 169.)

321. SHIPPER MAY DIRECT TERMINAL ROUTING.—In view of the amendment to section 15 of the act, paragraph *b* of Conference Ruling No. 214 is now amended so as to read as follows:

(*b*) In order to secure desired delivery to industries, plants, or warehouses and avoid unnecessary terminal or switching charges, the shipper may direct as to terminal routing or delivery of shipments which are to go beyond the lines of the initial carriers; and his instructions as to such terminal delivery must be observed in routing and billing such shipments. When shipments are accepted without specific routing instructions from shipper, where all-rail rates and rail-and-water rates are available the carrier's agent must have the shipper designate which of the two he wishes to use. Carriers will be held responsible for routing shown in bill of lading. (See Rulings 190 and 284.)

322. SUSPENSION OF TARIFF SCHEDULES.—The authority conferred on the Commission by the amendatory act of June 18, 1910, to suspend schedules stating new individual or joint rates, fares, or charges, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, was not intended to withdraw from carriers the right to initiate their rates, fares, charges, and regulations and does not mean that in every case of advanced rates or charges the schedules should be suspended. The statute vests a discretion in the Commission in that regard and

contemplates that it will be exercised in a judicial spirit. Except in cases where it acts on its own initiative the Commission will not ordinarily suspend the operation of a schedule unless the changes complained of are called to its attention at least 10 days before the effective date of the schedule, thus giving the Commission time in which to act intelligently and to avoid discriminations that might result from the improper suspension of a schedule.

Requests for such action by the Commission should be made in the form of a complaint indicating the schedule by its I. C. C. number and specifically referring to the parts thereof as to which suspension is asked, together with reasonably detailed explanations as to the probable effect of the proposed new rates, fares, etc.

June 8, 1911.

323. OFFSETTING OF UNDER OR OVER CHARGES.—It appearing that some confusion has been caused by the Commission's Conference Rulings Nos. 48, 133, and its ruling of February 14, 1911, the following is issued in lieu of the three rulings above mentioned:

The Commission has no authority to control the disposition of an overcharge. The carrier must charge no other than its lawful rate and the failure to collect the full rate as to any shipment is a violation of the law, as is the collection of more than the full rate. The Commission declines to declare that an overcharge may be offset as against an uncollected undercharge; such offset is not within the power of the Commission to authorize or condemn.

June 19, 1911.

324. DIVISIONS OF COMPANY COAL.—Upon inquiry: *Held,* That it is unlawful for carriers to make special and discriminatory divisions of joint rates upon locomotive fuel as between an originating or participating carrier and a purchasing carrier. In the division of joint rates a railroad must be treated precisely as any other shipper is treated, and the Commission will regard any special division as a device to defeat the published rate. All divisions upon fuel coal must be made in good faith

without respect to the fact that one of the carriers is the purchaser of such coal.

June 20, 1911.

325. LEASE OF LAND BY SHIPPER FROM A CARRIER AT NOMINAL RENTAL UNLAWFUL.—Under a lease in which a nominal rental is reserved a private person has erected a grain elevator upon land belonging to an interstate carrier: *Held,* That the arrangement constitutes an undue preference.

October 9, 1911.

326. BAGGAGE CHECKED BY INITIAL LINE WITH ROUTING INADEQUATELY SPECIFIED.—Upon inquiry as to the legal propriety of a proposed agreement by an association of general baggage agents providing, in substance, that an intermediate line shall forward to checked destination by the most direct route any baggage received by it not fully routed; that the initial line shall report to the lines actually moving the baggage the amount of any excess baggage charges collected by it; and that in case there is more than one station at destination the initial as well as the terminal line shall be advised of the station at which the baggage may be found, it was *Held,* That, subject to such modified conclusions as may be required in the light of further information, the Commission sees no present objection to such rules if properly published in the tariffs.

October 10, 1911.

327. TELEGRAMS RELATING TO SHIPMENTS—RULING 302 CONSTRUED.—Telegrams from a shipper relating to his traffic must be paid for by him, but a carrier may lawfully answer such a message at its expense. (See Rulings 302, 351, and 363.)

November 6, 1911.

328. SAFETY APPLIANCES—CARS OF SPECIAL CONSTRUCTION.—Locomotives while equipped with snowplows or flangers are to be regarded as cars of special construction within the meaning of the order of March 13, 1911.

329. SAFETY APPLIANCES—ORDER OF MARCH 13, 1911, CONSTRUED.—The order entitled "United States Safety Appliance Standards," adopted on March 13, 1911, is interpreted with respect to the details mentioned as follows:

1. That gondola and ballast cars with swinging side doors at ladder locations may be considered as cars of special construction.

Ladders and handholds need not be applied to swinging side doors.

A side vertical handhold shall be placed on corner post of such cars, as nearly as possible over sill step.

2. That high-side gondola and ballast cars with end platforms 18 inches or more in length may be considered as cars of special construction.

Ladders shall be placed on such cars as prescribed for high-side gondola and hopper cars, with sill step under ladder, or as near under ladder as car construction will permit. Ends and side of cars to be equipped with handholds in the same manner as flat cars.

3. Ladders—spacing of ladder treads. That the spacing of top ladder treads shall be taken from eave of roof at side of car, whether latitudinal running board is used or not. (Shown on plates illustrating United States safety appliance standards, issued by the Commission July 1, 1911.)

4. Box and other house cars—automobile cars with swinging end doors—end ladders:

That these cars may come under the head of cars of special construction, as per clause on page 37 of the order, and the end ladders placed as nearly as possible to designated location.

November 14, 1911.

330. FREE CARRIAGE OF RAILWAY Y. M. C. A. LIBRARY BOOKS.—It is not unlawful for an interstate railroad to carry without charge, for use by railway employees, books belonging to the libraries of Railway Young Men's Christian Associations.

331. TRANSFER OF SHIPMENT IN TRANSIT TO ANOTHER CAR.—A shipment started to move under a joint through rate and an established minimum for the car of the size in which it was loaded, but for the convenience of the carrier, was subsequently transferred into a smaller car taking a lower minimum under the same through rate. Charges were collected on

the actual weight, which was in excess of the lower and less than the higher minimum weight: *Held,* That where a joint through rate is in effect the through charges are not affected by such a transfer of the shipment in transit from one car to another whether larger or smaller; and that the through charges here should have been collected at the joint through rate and on the basis of the minimum weight applicable on the car ordered or accepted by the consignor for the movement. (See Rulings 273 274, 339, and 357.)

December 11, 1911.

332. CARRIERS FAILING TO OBEY ROUTING INSTRUCTIONS LIABLE TO PROSECUTION.—It is the view of the Commission that interstate carriers failing or refusing to observe specific routing instructions by the shipper are liable to prosecution under section 10, the right to determine the through line or route over which his freight shall be transported having been expressly reserved to the shipper under section 15 of the act as amended on June 18, 1910.

333. COMPANY MATERIAL.—Material for use in the repair of one of its cars was shipped by a carrier to the shop of a connecting line. Upon inquiry whether the material could move free of charge over both roads it was *Held,* That in cases of this kind company material may move without charge only over the line at whose expense the repair is made. (See Ruling 373.)

January 9, 1912.

334. RATES ON GASOLINE MOTOR CARS MOVING UNDER THEIR OWN POWER.—The movement of a gasoline motor car, from the manufacturer to the purchaser, over the rails of a common carrier is transportation that is subject to the act, when between interstate points, notwithstanding the fact that it moves under its own power and is operated by employees of the manufacturer. Such transportation is lawful only when a rate for it has been duly published. Except on the commodities specifically enumerated in section 1 of the act, rates can not lawfully include the passage of attendants, and as gasoline motor cars are not so enumerated the attendants must pay fares on the basis of

the regularly published passenger fare then in effect. In adjusting its rates the carrier should take into consideration the conditions surrounding the movement of traffic of this kind.

335. FREE TRANSPORTATION OF HOUSEHOLD GOODS.—A bureau of the American Railway Association, known as the Bureau for the Safe Transportation of Explosives, ordered one of its inspectors to permanent duty at another station. *Held,* That the carriers in the route between the two points can not lawfully transport his household goods free of charge, even though they are members of that association.

336. FREE TRANSPORTATION OF INSTRUCTOR IN THE USE OF BOILER COMPOUNDS.—Annual passes may not lawfully be issued to or used by employees of companies manufacturing boiler compounds; nor may a carrier transport such persons free of charge when going to or from instruction work on the line of a connection. A carrier using the compound in its locomotive boilers may give free transportation to an expert of the manufacturer whom it desires to send over its own line to instruct its employees in the use of the compound, but only for that purpose and to the extent necessary in the performance of that duty, provided the agent does not sell or solicit orders. (Overruling *Conference Ruling 320.* See Ruling 346.)

January 15, 1912.

337. AGENTS FOR CARRIERS MAY NOT ACT AS AGENTS FOR SHIPPERS.—At certain docks the stevedores, who are also the loading contractors for a connecting rail line, unload the vessel and load its cargo into the cars, handling a loading slip to the rail line, upon which the latter issues bills of lading. For the purpose of defeating the through rate, or in such a manner as to have that result, they also act as agents for consignees, and forward to inland rail points goods received by water at the docks and originally intended for such destinations.

Affirming the principle of *Conference Ruling 98,* it is *Held,* That neither a railroad nor its agents or employees may lawfully act as forwarding agents for shippers. (See Ruling 365.)

February 5, 1912.

338. JOINT RATE REDUCED TO THE AGGREGATE OF THE INTERMEDIATES, MINIMUM WEIGHT BEING INCREASED.—A joint rate exceeding the aggregate of the intermediate rates was later reduced to equal their sum, the minimum weight, however, being increased. *Held*, That in such cases reparation, when awarded informally by the Commission, will be on the basis of the newly established joint rate and minimum weight, subject of course to the actual weight when higher than the new minimum. (Rescinding Ruling 282.)

339. TWO SMALL CARS FURNISHED IN LIEU OF A LARGER CAR ORDERED BY THE SHIPPER.—Upon informal complaints and numerous inquiries it is *Held*, That the act of a carrier in furnishing two small cars in lieu of the larger car ordered by a shipper under appropriate tariff authority is binding, at the rate and minimum applicable to the car ordered, upon all the carriers that are parties to the joint rate under which the shipment moves from the point of origin; the shipper is entitled to all privileges in transit, to reconsignment, and to switching at the same charges as would be applicable under the joint tariff had the shipment been loaded into one car of the capacity ordered; and demurrage will likewise accrue on that basis. If the shipment moves beyond the point to which the joint rate applies, the connecting line or lines are entitled to and should collect their transit, reconsigning, switching, and demurrage charges as provided in their own tariffs.

In all cases the initial carrier will be liable for such additional charges as may be imposed on the shipper by reason of its failure to furnish a car of the capacity ordered. Carriers that are parties to the joint rate under which the shipment commenced to move may share in such additional expense so incurred by the initial carrier.

Rule 66 of Tariff Circular 18-A; *General Chemical Co.* v. *N. & W. Ry.*, 15 I. C. C. Rep., 349; *Conference Ruling 250; Milwaukee Falls Chair Co.* v. *C. M. & St. P.*, 16 I. C. C. Rep., 217; *Conference Ruling 59; Noble* v. *B. & O. R. R.*, 22 I. C. C. Rep., 432; and *Conference Ruling 274*, reaffirmed, with the understanding, however, that the duty of transferring the shipment rests upon the carriers and not necessarily upon the connecting carrier. (See Ruling 357.)

340. RESTAURANT EMPLOYEES AT A UNION STATION NOT ENTITLED TO FREE TRANSPORTATION.—A restaurant is conducted in a union station primarily for the benefit of the traveling public by a terminal company claiming to be a common carrier within the meaning of the act. Upon inquiry, *Held,* That its employees in the restaurant are not entitled to free transportation.

341. SWITCHING ROADS—CONCURRENCES.—Two lines having no direct connection effect an interchange of traffic through a terminal railroad under an arbitrary switching charge of $3 a car, which they absorb out of the joint rate. Upon inquiry, it is *Held,* That it is not necessary that the switching road be shown as concurring in the joint through rate if its tariff of switching charges is on file and the tariff naming the joint through rate provides that such charges will be so absorbed.

February 12, 1912.

342. HOURS OF SERVICE LAW.—A trainman required by the rules of the carrier, in conjunction with his duties as trainman, to send, receive, or deliver orders affecting the movement of trains comes within the proviso of section 2 of the hours of service act, and therefore a carrier may not require a trainman, who has been on duty longer than the limit of time fixed for a telegraph or telephone operator, to send, receive, or deliver orders affecting the movement of trains, as a part of the duties regularly assigned to him.

But upon inquiry whether the practice of requiring conductors of trains delayed at stations where there is no regularly assigned telegraph or telephone operator on duty, and conductors of trains about to be overtaken by superior trains, to telephone or telegraph the train dispatcher for instructions is in accord with the act and with the Commission's order of interpretation of June 25, 1908, *Held,* That a trainman who has been on duty for more than 9 hours or for more than 13 hours is not prohibited from occasionally using the telegraph or telephone to meet an emergency.

March 4, 1912.

343. ICED REFRIGERATOR CAR NOT USED.—A refrigerator car set for loading, fully iced, was not used because

of weather conditions, and the shipper refused to pay the ice company's bill: *Held,* That while an action may doubtless lie at common law, it is not clear, in the absence of a tariff provision to cover such cases that the ice charges are collectible under the act.

344. RATES LAWFULLY CANCELED.—Upon inquiry: *Held,* That a rate once lawfully canceled may not be reinstated as a reissued item.

345. FREE TRANSPORTATION.—The free-pass provision of section 1 is construed as implying that free transportation may be accorded by carriers to Canadian customs and immigration inspectors on duty.

March 11, 1912.

346. FREE TRANSPORTATION OF INSTRUCTORS.—In the interest of safety and economy many carriers have adopted certain appliances and methods in the use of which by their employees instruction and supervision are essential to proper results and can only be given by experts. The contracts under which carriers undertake to use such appliances or materials not infrequently contain provisions requiring the vendor to furnish experts for these purposes and the carrier to transport them over its line free of charge.

The successful use of such appliances or materials makes for the public interest, and upon full consideration of numerous inquiries in the light of more complete information, and differentiating clearly between vendors' expert demonstrators and instructors and other of their agents, it is *Held,* That where a carrier purchases appliances, materials, or supplies, in the use of which instruction and supervision of employees by experts are essential to proper and successful results, it may, in the contract of purchase, undertake to grant free transportation over its own line to such expert demonstrators and instructors as are furnished by the vendor under the contract, to the extent and only to the extent that such transportation is necessary for the performance of their duty on that line; and provided that no such expert so traveling under free transportation shall in any way engage in the sale of goods or in the soliciting or taking of orders therefor: *Held further,* That such experts are not railway employees in the

sense that they may be given free transportation to travel over one road or system for the purpose of reaching another road or system to which they may have been assigned upon like duty.

The views expressed in *Conference Ruling No. 208* as to the general application of the law are adhered to; *Conference Rulings 134* and *336*, in which the principles of *Conference Ruling 208* are applied, are not to be understood as being modified by anything here said.

347. ERROR IN STATING CONCURRENCE NUMBER.—Through inadvertence a tariff showed an erroneous number of a lawful concurrence by a participating carrier: *Held,* That the tariff is not invalidated by a minor error of that character but is a lawful issue, and is binding upon the participating carriers.

348. FABRICATION OF STRUCTURAL STEEL.—In making shipments of structural iron and steel the consignor intended to take advantage of the privilege of fabricating the material in transit, but failed to note on the bill of lading as required by the tariff "To be fabricated at ———." As a result of this omission higher charges accrued: *Held,* That the Commission will not authorize the carrier to refund the additional charges resulting from the shipper's own error.

349. DESTRUCTION OF RECORDS.—The sale of documents, records, and papers of an interstate carrier as waste paper is held to be a lawful destruction of such records within the meaning of the rules and regulations of the Commission touching the destruction of records, provided all other requirements under those rules and regulations have been complied with.

April 1, 1912.

350. RATES APPLICABLE TO SHIPMENTS STOPPED SHORT OF INTENDED DESTINATION, AND FARES APPLICABLE TO PASSENGERS DISCONTINUING JOURNEYS.—Under transit tariffs requiring the payment of the full rate to final destination at the time the shipment is delivered at the transit point, it sometimes occurs that a shipment is never forwarded to the destination to which charges have been paid: *Held,* That it is not unlawful or improper in such cases to refund the charges that have been paid in excess of what the lawful

charges on the shipment would have been if the transit point had been its final destination.

Held further, That, subject to the time limit of ticket, the same rule applies where a passenger has purchased a ticket and has abandoned his journey at a point short of the destination shown on his ticket and also to a prepaid shipment of freight that is stopped and delivered at a point short of that to which prepaid.

351. TELEGRAMS OF SHIPPERS.—Upon inquiry, under *Conference Ruling 327*, whether carriers may send at their expense over shippers' names telegrams directing the routing of certain traffic: *Held*, That carriers may not pay for such telegrams. (See Ruling 363.)

April 2, 1912.

352. FREE TRANSPORTATION.—A carrier that has acquired a railroad by foreclosure, reorganization, or otherwise, may lawfully continue to issue free transportation to the widows, during widowhood, and minor children, during their minority, of persons who died while in the service of the company formerly operating the road.

353. SHIPMENTS BY WATER.—In the application of the act, a shipment by water from one port to another in the territory of the United States is to be regarded as coastwise business; a shipment by water from a port of the United States to a port of any foreign country, even though adjacent, is export business.

354. THROUGH SHIPMENTS VIA WATER AND RAIL.—Upon inquiry, and referring to water carriers as defined in section 1 of the act; *Held*, That if a rail carrier and a water carrier separately publish and file their rates applicable to through shipments, traffic over such route may lawfully be transported under through bills of lading, even though the rates are not joint through rates.

Held further, That a water carrier may not lawfully accept shipments for transportation on through bills of lading issued by a rail carrier unless the water carrier has lawfully published and filed rates applicable thereto.

Held further, That the acceptance by a water carrier of

through traffic on through bills of lading issued by a rail carrier is an evidence of an arrangement for continuous carriage which subjects the traffic to the provisions and jurisdictions of our act.

Held further, That it is not lawful for a rail carrier to issue through bills of lading under an arrangement with a water carrier for continuous carriage when the water carrier has no rates lawfully published and filed applicable to such transportation.

These holdings shall not be construed so as to conflict with Rule 71, Tariff Circular 18-A, which covers export and import traffic. (Last paragraph as amended in conference November 11, 1912.)

April 8, 1912.

355. FREE TRANSPORTATION OF OFFICERS OF NONOPERATING COMPANY.—A railroad constructed by municipal trustees was afterwards leased under a contract antedating the act to regulate commerce and providing that the lessee company would issue annual passes to the trustees and their agents and would furnish a car for their use in inspecting the line.

Upon inquiry whether these covenants, being a part of the consideration for the lease, may now be complied with by the lessee company, it is *Held*, That officers, directors, and other persons connected with a nonoperating company are not entitled to use free transportation. (See Rulings 95 and 263.)

May 6, 1912.

356. DISCLOSING NAME OF CONSIGNEE.—Upon inquiry: *Held*, That it is unlawful for a carrier to disclose to a shipper the name of the ultimate consignee of a shipment reconsigned in transit by the original consignee. (Sec. 15, act to regulate commerce as amended June 18, 1910.)

357. DEMURRAGE, SWITCHING, RECONSIGNMENT, AND DIVERSION CHARGES ON A CARLOAD SHIPMENT TRANSFERRED INTO TWO CARS.—In case a shipment leaves a point of origin in a single car and for the convenience of the carriers is transferred in transit into two

cars which are subsequently detained at destination beyond the free time, demurrage should be assessed as for one car only, so long as either car is detained; and in such cases switching, reconsignment, and diversion charges should be assessed as for one car only. (Amending Ruling 250; see also Rulings 273, 274, 331, and 339.)

358. DEMURRAGE AT PORTS RESULTING FROM VESSEL DELAY.—Coal consigned to tidewater was held in the cars at the port awaiting the arrival of a vessel which had been delayed by storms: *Held*, That the delay being due to conditions beyond the control of the rail carrier its demurrage charges might not lawfully be waived. (See Rulings 8 and 135.)

May 13, 1912.

359. SHIPMENTS TO COLON, PANAMA.—Colon, although within the geographical limits of the Canal Zone, is governed by and is under the sovereignty of the Republic of Panama. The Commission holds, therefore, that shipments from the United States to that point are entitled to export rates. (See Ruling 389.)

May 17, 1912.

360. ALLOWANCES UNDER SECTION 15.—*Held*, That an allowance purporting to be made under section 15 must be regarded as a concession from the rate unless duly published by the carrier in its tariffs and thus made available to all shippers furnishing a like facility or performing a like service of transportation in connection with their traffic. (See Rulings 19, 78, 132, and 292.)

June 3, 1912.

361. FREE TRANSPORTATION TO JOINT EMPLOYEE.—It is desired to move to another station a messenger carried on the pay rolls of an express company who also acts as baggageman for a rail line, 45 per cent of the salary paid him by the former being refunded to it by the latter: *Held*, That the railroad company may not lawfully transport his household goods free or at rates other than those duly established. (See Ruling 208 (b), also Ruling 157.)

June 4, 1912.

362. ASSIGNMENT OF CLAIM.—In awarding reparation the Commission will recognize an assignment by a consignor to a consignee or by a consignee to a consignor, but will not recognize an assignment to a stranger to the transportation records. (Amending Ruling 246.)

June 8, 1912.

363. PAYMENT BY CARRIER OF TOLLS ON TELEGRAMS.—A carrier's tariffs provide that it will pay for telegrams by consignees to shippers when they contain nothing in addition to the necessary specific instructions to route shipments over its rails: *Held*, That such a rule, when lawfully incorporated in the tariffs of a carrier, is not objectionable. (See Rulings 302, 327, and 351.)

364. EXCHANGE OF SERVICES BY TELEGRAPH AND RAILROAD COMPANIES.—Under the amendatory act of June 18, 1910, it is provided "That nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services." Upon inquiry, *Held*, That a railroad company and a telegraph company may exchange services with respect to strictly company matters on the basis of their agreement. (See Ruling 305.)

365. CARRIERS ACTING AS FORWARDERS OF SHIPMENTS.—Conference Rulings 98 and 337 do not apply when the consignment is to or in care of the carrier itself for the purpose of being forwarded by that carrier from the point of receipt, at the regular rate, over its own line and connections according to routing instructions, and when no lawful through rate is defeated and no discrimination or other violation of the act results. In no case may the same person act as the agent of the carrier and the shipper.

June 10, 1912.

366. DEMURRAGE CHARGES RESULTING FROM FAILURE TO GIVE NOTICE AT NAMED ADDRESS.—Upon informal complaint it is *Held*, That when the definite ad-

dress of a consignee is noted upon the bill of lading it is the duty of the initial and of each succeeding carrier to transmit that address to connections participating in the movement, and the duty of the delivering carrier to send notice of arrival to that address; the carrier at fault in this respect will be held liable for demurrage or storage charges accruing as the result of the failure of the notice to reach the consignee. (See Ruling 127.)

367. LIQUOR SHIPMENTS NOT DELIVERED.—An express company may not refund the prepaid charges on shipments of liquor which it carried to destination but could not deliver under a local law.

October 7, 1912.

368. CARRIER LOCATED WHOLLY WITHIN A STATE.—Some of the express matter carried by a traction company of an express company between points within a state originates at or is destined to points outside the state. Upon inquiry, *Held*, That the traction line is subject to the act to regulate commerce and must file reports and otherwise comply with its requirements. (See Ruling 197.)

October 8, 1912.

369. COASTWISE TRAFFIC OVER PANAMA RAILROAD.—Shipments moving between ports of the United States by vessel and the Panama Railroad and to ultimate destination by rail are interstate and must take interstate rates for the rail haul from the port to destination.

370. MISROUTING INVOLVING LOSS OF TRANSIT PRIVILEGE.—Besides stating the route and giving instructions to stop the car in transit to finish loading a shipper also noted a through rate on the bill of lading. This rate did not apply over the indicated route, but was applicable over a route that did not permit the stop specified. *Held*, That the initial carrier, not having advised the shipper of the facts, is liable under *Conference Ruling 286-f* for the higher charges that resulted from following the routing instructions.

371. FREE TRANSPORTATION OF EMPLOYEES OF BUREAUS OF CARRIERS.—The following persons may lawfully use free transportation:

(*a*) Employees of a weighing and inspection bureau who perform and supervise the weighing of cars for the carriers maintaining such bureau are exclusively engaged upon the work of such carriers, and are subject to the direction of their officials, but report to and are paid by the weighing and inspection bureau.

(b) Employees of the American Association of Railroad Superintendents known as chief interchange inspectors, whose duties are to settle disputes among car inspectors at junction points where traffic is interchanged with other lines.

372. FREIGHT MOVED FOR AN EXPRESS COMPANY.—On a shipment consigned to itself under a joint freight rate an express company is not entitled to the benefit of a rail carrier's division to its junction with the line over which the express company operates.

373. REPAIR OF CARS ON FOREIGN LINES.—A carrier on whose line a car was damaged made an order on a connecting line, which owned the car, for certain castings to be delivered to it at the junction of the two lines. *Held*, That the former line was a shipper over the line of the owning carrier and must pay the published rate. (See Rulings 225 and 333.)

374. CAR FERRY COMPANY SUBJECT TO THE ACT.—An incorporated company operates a car ferry connecting the two interstate rail lines by which it is owned. It separately conducts its own affairs and keeps its own accounts, but has no direct dealings with the public. *Held*, That the ferry company is a common carrier subject to the act, and must file tariffs, keep its accounts, and make reports in accordance with the rules and regulations of the Commission.

375. DESTRUCTION OF RECORDS OF LESSOR COMPANY.—A corporation owning a railroad that it has leased to a carrier for use in interstate traffic is itself subject to the act and must designate an officer to have charge of the destruction of its records.

376. REPARATION CLAIMS ON THE INFORMAL DOCKET.—In view of the provisions of section 4 of the act to regulate commerce, as amended June 18, 1910, section (a), paragraph 1, of *Conference Ruling 200,* governing the practice in special docket cases, is hereby amended so as to read as follows:

In special docket cases no order as to the rate for the future shall be entered where the joint rate in effect at the time the shipment moved exceeded the aggregate of the intermediate rates and the rates have been subsequently changed in such manner that at the time the order of the Commission is entered the through rate does not exceed the sum of the intermediate rates. (Modifying Ruling 200 (a), 1.)

October 14, 1912.

377. USE OF COMMISSIONS BY POST-OFFICE INSPECTORS WHEN OFF DUTY.—The use of his commission for transportation by a post-office inspector when returning to duty from a pleasure trip is unlawful. (See Ruling 95 (f).)

378. EXPORT BILLS OF LADING.—The rules and regulations of carriers governing bills of lading on export traffic must be published and filed with the Commission.

379. INTEREST UPON OVERCHARGE CLAIMS.—Upon inquiry, *Held,* That on all unsettled claims for overcharges carriers must pay interest from the time the charges were improperly collected.

October 15, 1912.

380. REFUND OF UNUSED PORTION OF PASSENGER TICKET.—A passenger, having a round-trip ticket for an interstate journey with stop-over privileges, stopped off at an intermediate point on the trip and later proceeded to destination. He did not use the return portion of the ticket. The tariff provided for redemption in such cases at the difference between the fare paid and the published rate to the point where the trip was discontinued. There were in effect between the starting point and destination a one-way fare with stop-over privileges, a one-way fare for a continuous passage, and one-way fares for continuous passage to the stop-over point and from that point

to destination. The latter combination was lower than the through fare with stop over.

Held, That the refund was properly made on the basis of the difference between the fare paid and the one-way fare with stop-over privileges.

November 11, 1912.

381. BRIDGE COMPANIES.—A bridge company which does not own or operate any motive power or cars and rents its bridge to an interstate carrier need not file tariffs with the Commission.

382. MILEAGE IN PART PAYMENT FOR TICKET.—A mileage book presented in part payment for a passenger ticket must be accepted for transportation to the farthest station covered by the remaining coupons, the passenger to pay the local fare from that point to destination. (See Ruling 81.)

383. MISROUTING SHIPMENT.—The address of the consignee having been omitted, a shipment arriving at destination by a line other than that designated in the routing instructions was sent to a storage warehouse. The consignee had made inquiry for it of the delivering carrier noted on the bill of lading. The freight rates were the same by either route. *Held*, That the initial carrier is liable for the storage and drayage charges resulting from misrouting the shipment.

384. CHARGES FOR MEALS ON DINING CAR.—The Commission has no jurisdiction over charges made for meals on dining car.

385. HIGHER PASSENGER FARE TO INTERMEDIATE POINT THAN TO MORE DISTANT POINT.—A higher passenger fare was charged to an intermediate point than was in effect to a more distant point over the same route. *Held*, That, the discrimination in its tariff being corrected, the Commission will entertain an application by the carrier to be permitted to make refund on the basis of the lower fare to the more distant point.

386. FREE TRANSPORTATION TO THE INSPECTOR.—A carrier purchases all its crossties from one source and the contract provides for free transportation to the inspectors of the

contractor while traveling to inspect and purchase the ties. *Held,* That free transportation may not lawfully be extended to such inspectors. (See Ruling 208-*c*.)

387. UNIFORM BILL OF LADING.—The uniform bill of lading contains the following clause:

"The value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid), at the place and time of shipment under this bill of lading."

At the time a particular shipment, lost in transit, was made, the market price of a commodity had advanced beyond the price fixed in a contract previously entered into, under which a large quantity had been purchased for future delivery. A construction of the clause being requested, it is the view of the Commission that the provision in the bill of lading contained in the parentheses above quoted does not apply to a shipment made several weeks later than the contract of sale.

December 2, 1912.

388. TRANSPORTATION OF EXPLOSIVES.—The regulations of the Commission touching the transportation by freight and express of explosives and other dangerous articles, together with the specifications for the containers thereof, are amended by extending their application to company materials and supplies of that nature.

389. TARIFFS CONTAINING EXPORT OR IMPORT RATES.—In order to avoid controversies and questions, *Held,* That tariffs hereafter issued containing rates applicable to export or import traffic shall specify, by inclusion or exclusion, the countries to or from which the shipments, to which such rates are applicable, shall move, whether such countries are or are not adjacent to the United States.

In the interest of clearness the tariffs should also specify whether or not shipments to or from Cuba, the Philippine Islands, Porto Rico, or the Canal Zone are included. For convenience and without regard to the status and political relation of the Philippines, Porto Rico, and the Canal Zone to the United States they, together with Cuba, are for these purposes to be classed with foreign countries. (See Ruling 359.)

390. AGENT'S ERROR IN FIXING TIME LIMIT TO PASSENGER TICKET.—Under a tariff providing for an extension of the time limit, when the privilege of stopover on a through ticket is availed of, the carrier's agent at the stopover point attached the necessary certificate but erroneously showed an expiration date not sufficiently in advance to permit the holder to reach destination by a continuous trip on a regular train; and in consequence it was necessary for the holder to pay the local fare of a connecting line to destination from the point where the time limit expired.

Held, That the carrier whose agent made the error must bear the entire burden of the refund of the additional fare. (See Rulings 167 and 277.)

391. FARE PAID UNDER MISAPPREHENSION OF A PRIVILEGE OFFERED UNDER A THROUGH TICKET.—A passenger, not knowing that a coupon attached to his through ticket, and good for passage between two intermediate points by steamship, might be exchanged for transportation by rail between those points, failed to make the request required under the tariff and purchased a local railroad ticket therefor.

Held, That the carrier may not lawfully refund the amount of the local fare.

December 9, 1912.

392. MISROUTING INVOLVING WRONG TERMINAL DELIVERY.—A shipment made with instructions for delivery on the tracks of one carrier was misrouted and arrived at destination on the tracks of another carrier. It could have been switched to the proper delivery track without unreasonable delay at the expense of the carrier at fault. Instead of requesting this the consignee drayed the shipment to his plant. *Held,* That reparation for the cost of drayage could not be allowed. (See Rulings 234, 283, and 286 (d).)

December 10, 1912.

393. REFUND OF PASSENGER FARE.—The holder of a round-trip ticket died at destination, all required steps for extending the time limit for the return trip having been previously taken except the affixing of the holder's signature. Had the

signature been affixed the ticket would have sufficed for the transportation for the corpse. Upon inquiry, *Held,* That refund may be made by the carrier.

394. JURISDICTION OVER WIRELESS MESSAGES.—The Commission considers that it has jurisdiction over wireless messages from a commercial station in the United States to a ship at sea, whether it be a United States or foreign ship. It does not consider that it has jurisdiction over messages between two American ships at sea.

December 16, 1912.

395. VIOLATIONS OF THE FOURTH SECTION.—Confirming the general principle of an order entered and announced on January 26, 1911, it is *Held,* That when a carrier in obedience to the requirements of the fourth section of the act has, after August 17, 1910, corrected discriminations against intermediate points, it may not lawfully restore such discriminatory rates unless upon formal application the Commission finds justifying circumstances and authorizes a deviation from the long-and-short-haul rule.

February 10, 1913.

396. SPECIAL REPARATION ON INFORMAL COMPLAINT. SUPERSEDING RULING 220 (*c*).—Reparation under informal proceedings will be authorized in instances where the tariff rate has been applied, upon the filing of an application by the carrier or carriers which participated in the transportation of the property in question, containing an admission that the rate charged was unreasonable, supported by a statement of the facts substantially showing that the charge demanded for the transportation service performed was excessive, that within a reasonable time a tariff naming the rate upon basis of which adjustment is sought has been published, and that such rate has been made lawfully applicable via the route over which the shipment moved. The Commission's order for refund on account of a reduced rate or changed tariff regulation will require the maintenance of such rate or regulation for at least one year.

SUPPLEMENT NO. 1 TO CONFERENCE RULINGS BULLETIN NO. 6.

Conference Rulings of the Interstate Commerce Commission

Issued June 1, 1914.

January 6, 1913.

397. REPARATION FOR MISROUTING.—Until the Commission otherwise directs, carriers may adjust claims arising under item *(f)* of *Conference Ruling 286* without first bringing them to the attention of the Commission; in pursuing this course, however, they must accept full responsibility for the correct application of the rule.

January 13, 1913.

398. FREE TRANSPORTATION OF COLLEGE SUPPLIES.—A college maintained largely by voluntary contributions provides free tuition through scholarships for worthy and needy pupils, but collects tuition from all students who are able to pay it: *Held,* That under section 22 of the act coal contributed to the institution may not be transported by carriers at other than the published rates.

399. REPORTS BY BRIDGE COMPANIES.—A bridge company which has leased its bridge to an interstate rail line must file the annual, monthly, and other reports required of lessor companies under the accounting rules of the Commission. (See Ruling 381.)

400. PASSES FOR TRAIN AUDITORS EMPLOYED BY AN AUDIT COMPANY.—An adult company under contract with several carriers provides train auditors to collect tickets; they do no other work and may be transferred from road to road as the parties to the contract may require. Upon inquiry: *Held,* That a trip pass may be issued by any such carrier for a particular journey over its line by an auditor in connection with its own business, but that annual passes must not be granted.

January 14, 1913.

401. COASTWISE TRAFFIC MOVING ON A THROUGH BILL OF LADING TO INLAND POINT.—A through bill of lading was issued on a shipment routed over a rail-and-water route from an inland point in one state to an inland point in another state. Under instructions from the consignee the shipment was delivered by the coastwise line to a forwarding company at the port of arrival, to be delivered by it to a rail line for carriage to the inland destination as a local state movement. The delivering rail line advanced the charges of the initial and coastwise lines and those of the forwarding company and collected them, together with its own charges, at destination. The sum of the local rates thus applied exceeded the through published rate from point of origin to destination. *Held,* That the through rate should have been assessed on the shipment. (See Ruling 354.)

February 3, 1913.

402. CONCURRENCE BY A LESSOR COMPANY IN RATES PUBLISHED BY A LESSEE.—When the lessor company participates in the service with its engines and crews and is compensated therefor on a percentage division it should concur in and be shown as a party to the tariffs of the lessee naming passenger fares and freight rates over the lessor's rails. (See Ruling 341.)

February 4, 1913.

403. STORAGE CHARGES ACCRUING DURING RECONSTRUCTION OF A LEASED WAREHOUSE.—A terminal company may not cancel charges that have accrued, under published rates, on shipments landed and stored on its wharf with its consent pending the repair of a warehouse which it had leased to the shipper and which had been destroyed during a storm.

March 10, 1913.

404. STORAGE CHARGES ACCRUING BECAUSE OF WEATHER CONDITIONS.—Because of inclement weather and impassable roads shippers failed to remove less-than-carload

freight within the free time specified in the tariffs and storage charges resulted. Upon inquiry: *Held,* That the same rule may be applied to storage charges as to demurrage charges if so provided in the tariff. (See Rulings 242 and 313.)

405. DEMURRAGE RULES APPLICABLE TO SHIPMENTS.—Before certain shipments were removed by the consignee at destination amended demurrage rules became effective providing charges after certain free time had elapsed: *Held,* That the rules in effect at the time the shipments arrived at the demurrage point must control.

April 7, 1913.

406. VIOLATION OF THE FOURTH SECTION.—A violation of the long-and-short-haul clause, having been canceled out of its tariffs, may not lawfully be restored by the carrier without the special authority of the Commission, even though the violation was in existence when section 4 of the act was amended on June 18, 1910. (See Ruling 395.)

407. COMMISSIONS PAID BY TELEGRAPH COMPANIES.—It is unlawful for a telegraph company to pay to the person, firm, or company in whose building a telegraph office is located any commission on the messages received by or transmitted for that establishment.

April 8, 1913.

408. NOTICES OF ORAL ARGUMENT.—Notices of the date assigned for the oral argument of a case pending before the Commission will hereafter be sent only to the attorneys who have appeared at the hearing or on briefs and not to all the railroads named on the pleadings.

409. APPLICATION OF AVERAGE AGREEMENT UNDER UNIFORM DEMURRAGE RULES.—No average agreement made under the uniform demurrage rules may properly combine in one account the cars of more than one consignee, each average agreement must cover the business of one consignee only. Demurrage agreements may not lawfully be made with draymen or with public elevators serving various consignees.

This rule is not intended to prohibit the application of the

average agreement at a public elevator or warehouse so far as it applies to cars consigned to the elevator or warehouse company.

410. EXCHANGE OF PASSES WITH WIRELESS TELEGRAPH COMPANIES.—It is the view of the Commission that passes and franks may lawfully be exchanged between wireless telegraph companies and other common carriers subject to the act. (See Ruling 394.)

411. LABOR AGENT MAY NOT LAWFULLY RECEIVE PASSES.—The proprietor of a labor agency, who furnishes laborers to railway companies and contractors, is not an employee of the carriers within the meaning of the first section of the act, and passes may not lawfully be issued to him.

412. PASSES TO AN ATTORNEY ENGAGED IN THE WORK OF A CARRIER.—A carrier arranged with a lawyer to give preferred attention to its railroad business at a monthly salary, the attorney being permitted also to engage in general practice. Upon inquiry: Held, That time passes may not lawfully be issued in such a case unless substantially all the attorney's time is devoted to the work of the carrier. (See Rulings 95-*a* and 208-*a*.)

413. SUPPLIES SOLD TO EMPLOYEES OF CARRIER BY A CONTRACTOR NOT TO BE TRANSPORTED FREE.—An employment agent is under contract with an interstate carrier to furnish it with track laborers and to keep them supplied, even at remote points along its line, with provisions, foodstuffs, clothing, etc., which they purchase of him from time to time with written orders upon the carrier against their pay. The contractor does no business with the general public. *Held*, That the supplies may not lawfully be transported free. (See Ruling 208-*c*.)

414. PASSES TO WITNESSES IN CRIMINAL CASES. Upon inquiry: *Held*, That, in case of a criminal prosecution for theft of property from a carrier subject to the act, the carrier may lawfully issue to witnesses on the side of the state interstate passes to and from the place of trial, even though the witnesses are not employees of that or any other common carrier. (See Ruling 319.)

April 14, 1913.

415. EXCHANGE OF BILLS OF LADING.—The exchange at an intermediate point of one bill of lading for another, showing a different consignor or consignee or a different destination, is unlawful except in connection with a reconsignment or diversion authorized in the tariff. (See Ruling 227.)

May 6, 1913.

416. CONSIGNEE RELIEVED OF DEMURRAGE CHARGES THAT ACCRUED AT POINT OF ORIGIN.—A consignee received a carload shipment, paid the freight charges thereon as agent for the shipper, sold the goods, and remitted the proceeds to the shipper after first deducting the freight charges. About six months afterwards a bill was presented to the consignee for demurrage charges which accrued at the shipping point. The demurrage charges were not shown as advance charges, but a clear bill of lading was issued by the carrier. Upon inquiry: *Held,* That the issuance of a clear bill of lading by the carrier and its failure to bill the demurrage as advance charges relieves the consignee from the obligation to pay the demurrage charges, and the initial carrier must look elsewhere for their payment.

417. FREE TRANSPORTATION FOR TRAINED NURSE IN FAMILY OF EMPLOYEE.—Upon inquiry whether a trained nurse is entitled to free transportation, under section 1 of the act, when in attendance upon, and traveling with, an employee of a carrier, who is himself entitled to free transportation, or with one of his family, the Commission affirms its definition of the term "families" as contained in *Conference Ruling 95-c* and, conforming to its uniform practice with respect to such matters, declines to determine whether particular individuals are eligible to receive free transportation.

May 12, 1913.

418. INTERSTATE CARRIER DEFINED.—An electric street railway, with a large passenger traffic and a substantial intrastate freight movement, derives a very small percentage of its revenue from shipments moving between interstate points. It

asserts that its entire freight service, both state and interstate, is performed as a matter of accommodation to patrons along its line.

Upon inquiry: *Held*, That if a company engages in interstate commerce at all it thereby becomes subject to the act and is amenable to its provisions with respect to making statistical, annual, and other reports to the Commission and must file tariffs. (See Rulings 197 and 368.)

419. REPARATION ON THE BASIS OF STATE RATES.—Upon further consideration *Conference Ruling 251* is modified as follows:

The Commission will not recognize as a basis for reparation any rate that is not on file with it, except that in misrouting cases a lower state rate not on file here may be accepted as the basis for reparation when officially verified by the local authorities.

June 3, 1913.

420. JURISDICTION OVER TELEPHONE COMPANIES IN PORTO RICO.—It is the view of the Commission that it has no jurisdiction over the service and rates of telephone companies the lines of which are wholly within Porto Rico.

421. A CARRIER MAY NOT LEASE ITS ELEVATORS AT A NOMINAL RENTAL.—An interstate carrier desires to lease to a grain dealer at a nominal rental an elevator which has not been in use for some time, and which the carrier is anxious to dispose of because the operation of the elevator would attract business to the road. Upon inquiry: *Held*, That such a transaction would be illegal. (See Ruling 94.)

June 5, 1913.

422. JURISDICTION OVER TRAFFIC MOVING ON THROUGH BILL OF LADING TO HAWAII.—A steamship company filed a proportional tariff with the Commission providing export commodity rates from a port in the United States to a port in the territory of Hawaii. The traffic was covered by through bills of lading from inland points in the United States to the port of transshipments and moved under tariffs filed with the Commission. Upon inquiry: *Held*, That under the Panama

Canal act the Commission has jurisdiction over shipments moving under the steamship company's proportional tariff. (See Rulings 155 and 201.)

423. COMBINATION RATE MAY NOT BE APPLIED UNTIL JOINT THROUGH RATE IS CANCELLED.—A mixed carload shipment moved under a joint mixed carload rate. There was also in effect at the time of the shipment a combination carload rate on the heavier weighted commodity in the mixture and a through less-than-carload rate on the lighter weighted commodity, which made a lower charge than that based on the joint mixed carload rate. The joint mixed carload rate had not been canceled. Upon inquiry: *Held*, That a refund to the basis of the lower combination could not lawfully be made.

424. ABSORPTION OF SWITCHING CHARGES OF AN INDUSTRY.—An industry operates its own rails as a plant facility to a connection with the plant rails of another industrial concern, the latter rails, on the other side of the plant, connecting with the rails of an interstate carrier. The trunk line desires to extend its service to the rails of the first industry. The intermediate industry refuses trackage rights to the carrier but will continue itself to switch cars to it, and will accept compensation therefor from the carrier instead of from the other industry, provided this course does not subject it to the act as a common carrier.

It is the view of the Commission that the service performed by the intermediate industry is a service for the shipper and not for the carrier and that the carrier may not lawfully absorb the switching charge of the intermediate industry.

425. REPARATION CLAIMS ON THE INFORMAL DOCKET.—Upon further consideration *Conference Ruling 376* is amended to read as follows:

In special docket cases no order as to the rate for the future shall be entered where the joint rate in effect at the time of shipment exceeded the aggregate of the intermediate rates and the rates have been subsequently changed in such a manner as that at the time the order of the Commission is entered the through rate does not exceed the sum of the intermediate rates, or in cases where at the time the shipment moved the rate for a short haul was greater than the rate for a longer haul over the same

line or route, in the same direction, the shorter being included within the longer distance and the rates have been subsequently changed in such a manner that at the time the order of the Commission is entered the rate for the shorter distance does not exceed the rate for the longer distance.

June 9, 1913.

426. TIME PASSES TO LOCAL ATTORNEYS, SURGEONS, ETC.—The Commission adheres to the ruling many times repeated that it is unlawful for an interstate carrier to issue time passes to local attorneys, surgeons, and others, who do not devote substantially all their time to the work or business of the carrier. The principle of *Conference Ruling 208-a* is reaffirmed.

427. INDUSTRIAL SWITCHING TRACKS.—A carrier may not lawfully build a switch track inside the plant boundary of an industrial company without adequate compensation. (See Ruling 110.)

428. PAYMENT BY RAIL CARRIERS OF ADVANCE CHARGES ON IMPORT TRAFFIC.—A rail carrier may not advance charges to an ocean carrier on import traffic except under a proper provision therefor in its tariffs. When such advance charges are made the freight bill of the rail line must show in separate items the charges so advanced and the charges of the inland carrier or carriers; it must also show the tariff rate or rates of the inland carrier or carriers. The name of the ocean carrier to which the charges are advanced must also be shown.

In order that carriers may have time in which to adjust their tariffs in conformity herewith this ruling will become effective on August 15, 1913.

June 16, 1913.

429. FREE OR REDUCED RATE TRANSPORTATION TO FAMILIES AND HOUSEHOLD GOODS OF POSTAL CLERKS.—The law does not authorize free or reduced rate transportation for the families and household goods of postal clerks whose headquarters were changed for the convenience of a carrier.

430. TIE INSPECTORS NOT ENTITLED TO FREE TRANSPORTATION.—A man who has a contract to furnish ties to an interstate carrier may not lawfully have free transportation as a tie inspector.

431. REDUCED RATE TRANSPORTATION FOR CONVICTS UNLAWFUL.—It is the view of the Commission that reduced interstate fares may not be granted by carriers for transporting to the penitentiary persons convicted in the United States courts for violation of Federal Laws.

June 18, 1913.

432. WAIVER OF UNDERCHARGES.—Upon further consideration the time limit within which uncollected undercharges may be brought to the attention of the Commission for authorization of waiver is extended from 30 to 90 days. (Modifying Ruling 258.)

June 23, 1913.

433. SHIPPER LIABLE FOR HIS ERROR IN MARKING L. C. L. SHIPMENTS.—Besides being expressly so provided in the rules of all freight classifications, it is on broad general grounds the duty of a shipper correctly to mark packages of less-than-carload freight intended for transportation, and when so marked the carrier is held to a strict responsibility for their safe delivery at destination.

A package of merchandise was addressed by a shipper to Lake City, Fla., instead of Lake City, S. C. *Held*, That the shipper making the error must bear the burden of the resulting freight charges, and the fact that the correct address was noted on the bill of lading is not material. *Parlin & Orendorf Plow Co.* v. *United States Express Co.*, 26 I. C. C. 561, reaffirmed.

July 23, 1913.

434. PASSES TO OFFICIALS OF RAILROADS IN ADJACENT FOREIGN COUNTIES.—Free interstate transportation may lawfully be issued to officials of any railroad in an adjacent foreign country which has filed with this Commission joint tariffs and concurrences in connection with interstate carriers in

the United States without reservation as to the Commission's jurisdiction.

July 24, 1913.

435. DESTRUCTION OF RECORDS.—It is the view of the Commission that all maps, profiles, plans, specifications, estimates of work, records of engineering studies, field books, and other records pertaining to the physical property of carriers come within the prohibition of destruction contained in section 20 of the act, and as such shall not be destroyed or otherwise disposed of unless their destruction be specifically authorized in the orders of the Commission in the matter of the destruction of records. (See orders of the Commission governing the destruction of records.)

July 25, 1913.

436. PASSES TO DIRECTORS OF A CARRIER IN THE HANDS OF RECEIVERS.—When the management of a railroad company has been placed in the hands of receivers and the officers and directors of the railroad company are not employed by the receivers: *Held,* That such officers and directors are not entitled to free transportation.

437. EMBARGOES ON ACCOUNT OF REVOLUTION IN ADJACENT FOREIGN COUNTRIES.—Embargoes against the receipt of freight have been established by Mexican railroads at different times on account of revolutionary troubles in Mexico. Upon inquiry: *Held,* That interstate carriers in the United States under the special circumstances will be permitted to file with the Commission the proper application for authority to establish on short notice tariffs naming the conditions and rates under which they will return or otherwise dispose of property billed to points in Mexico, but which they have been unable to deliver because of the revolutionary conditions in that country. It is understood that the tariffs will arrange that those carriers which participated in the haul within the United States will prorate the expenses of *per diem,* storage, loading and unloading of the shipments or of their return to the points of origin.

438. REFUND OF PASSENGERS FARES.—A ticket was purchased for an interstate journey during a time of high water,

the agent stating that through trains were being operated without difficulty or delay. Upon arrival of the train at an intermediate point the conductor informed the passenger that the train would be abandoned on account of high water. The passenger then purchased a ticket back to the point of origin. Upon inquiry: *Held,* That a refund of all the fares paid on the trip may be made, provided the railroad company publishes a general tariff rule providing a refund of fares to all passengers affected by such circumstances and conditions.

439. COMPANY MATERIAL HAULED OVER ANOTHER LINE UNDER TRACKAGE RIGHTS.—A carrier having trackage rights permitting it to haul general traffic may haul its own company material over the leased track as over its own rails. In the case passed upon in *Conference Ruling 153* there was no arrangement for handling commercial freight over the leased track.

440. DESTRUCTION OF RECORDS.—An express company has retired from business and asks permission to destroy certain of its records: *Held,* That in the absence of special permission by the Commission the records must not be destroyed except under the rules of the Commission.

441. TARIFFS COVERING ABSORPTION OF DRAYAGE CHARGES.—The absorption of drayage charges being under consideration, the Commission holds:

(*a*) Where there is an additional transfer or drayage charge in connection with a through shipment, the carriers' tariffs must specify what that charge shall be.

(*b*) If such drayage or transfer charge is absorbed, in whole or in part, by a carrier, the tariffs must show the amount of such transfer charge that will be absorbed.

(*c*) A drayage firm is not a proper party to a joint tariff nor is it a carrier under the provisions of our act; therefore, no tariffs can properly be filed by it.

(*d*) There is no provision in the law which requires, and the Commission has no authority to require, a carrier to confine such drayage to one drayman or one firm of draymen.

(*c*) The responsibility in case of loss and damage while a shipment is in charge of a truckman to whom it has been committed by the carrier is a question for the carrier to resolve, and is not for our determination.

442. FEEDING AND GRAZING IN TRANSIT.—*Conference Ruling 17* is amended to read as follows:

In connection with the published privilege of feeding and grazing in transit, or where carriers are required to feed live stock in transit, under the provision of an act approved June 29, 1906, commonly called the 28-hour law, carriers may lawfully provide in their tariffs that they will furnish feed at current market prices and bill the cost thereof, together with an addition not exceeding 10 per cent of such cost to cover the value of their services, as advance charges.

October 7, 1913.

443. THROUGH RATE ONLY LAWFUL RATE FOR THROUGH SHIPMENTS.—Upon inquiry as to whether a through distance tariff rate should be applied in cases where a combination rate, made up of a rate to an intermediate point and a distance tariff rate beyond, makes a lower through charge: *Held,* That the through rate is the only lawful rate. (See Ruling 220-*g*.)

444. ADVANCES OF CUSTOMHOUSE BROKERAGE FEES.—Rail carriers may properly advance customhouse brokerage fees and import duties and charges only when proper provision therefor is made in their published tariffs.

445. CHECKING SAMPLE BAGGAGE.—When carriers' tariffs provide for checking sample baggage and define sample baggage as that which is carried for display and not for distribution or sale, it is not lawful to distribute or sell articles contained in such baggage at any point to which it has been so checked. Such articles may lawfully be distributed or sold at any point to which they are shipped by mail, freight, or express, and they may lawfully be so shipped from a point to which they have been checked as baggage for use as samples or for display. (See Ruling 455.)

November 4, 1913.

446. PASSES TO STATION AGENT WHO DEVOTES ONLY PART TIME TO RAILROAD DUTIES.—Upon inquiry: *Held,* That a station agent employed by a railroad company may not lawfully receive free transportation when he employs other persons to perform his duties so that he may devote the greater part of his time to other business. (See Ruling 208-*a.*)

447. APPLICATION OF FOURTH SECTION.—The provisions of the fourth section apply where the point of origin is in an adjacent foreign country and the intermediate point and more distant point of destination are in the United States, or where the point of origin and the intermediate point are in the United States and the more distant point of destination is in an adjacent foreign country. (See Ruling 318.)

448. FREE TRANSPORTATION TO MEMBERS OF FAMILIES OF EMPLOYEES OF BUREAUS OF CARRIERS.—Upon inquiry it was agreed that *Conference Ruling 371,* holding that employees of bureaus maintained by common carriers may lawfully use free transportation, must necessarily be understood as meaning that members of their families may also use free passes.

December 1, 1913.

449. FREE TRANSPORTATION OF VETERINARY SURGEONS.—A veterinary surgeon not carried regularly on the pay rolls of a carrier but engaged by the carrier to examine live stock offered for shipment or to care for injured stock, may not be furnished with a term pass, but may lawfully use a trip pass over the lines of a carrier when performing a *bona fide* service for it. (See Rulings 208-*a* and 208-*b.*)

December 4, 1913.

450. TARIFFS OF A RAILROAD SYSTEM—THE TRADE NAME.—The tariffs and concurrences of a railroad system must show, in addition to its trade name, the corporate title or titles of the various lines of which the system is composed.

January 6, 1914.

451. DEMURRAGE CHARGES ON DAMAGED SHIPMENTS.—The uncertainty of a consignee as to whether or not he will accept a damaged shipment does not justify the carrier in waiving the demurrage charges accruing on the shipment pending his decision.

452. FREE TRANSPORTATION OF PROPERTY FOR TOWNSHIPS AND COUNTIES.—Upon inquiry: *Held*, That townships and counties are municipalities within the meaning of section 22 of the act to regulate commerce and carriers may lawfully transport their property free or at reduced rates. (See Rulings 33, 36, 297, and 311.)

453. CHANGE OF ROUTE BY CONSIGNEE.—Upon inquiry as to whether the consignee of a shipment moving under a straight bill of lading has a right to vary the original routing instructions given by the shipper, the Commission adheres to *Conference Ruling 332* to the effect that the route designated by the shipper shall be observed.

January 12, 1914.

454. FREE TRANSPORTATION FOR CUSTOMS BROKER.—A customs broker employed by a carrier on a commission basis and not paid a regular salary and who does not devote substantially all his time to the service of the company is not entitled to use free transportation. (See Ruling 208-*a*.)

February 3, 1914.

455. SALE OF PROPERTY TRANSPORTED AS BAGGAGE.—Upon inquiry as to whether or not it is unlawful for a person to sell property transported as baggage and upon which excess baggage charges on the entire weight are paid: *Held*, That if the carrier's tariffs make provision for the transportation of such property at excess baggage rates on the entire weight it would not be in violation of the law to dispose of the property by sale or otherwise. (See Ruling 445.)

March 2, 1914.

456. WRITTEN NOTICE TO CARRIER CONSTITUTES PRESENTATION OF CLAIM.—It is the view of the

Commission that the provision in the uniform bill of lading, requiring that claims for loss, damage, or delay be made within a period of four months after the shipment was made, is legally complied with when the shipper, consignee, or the lawful holder of the bill of lading, within the period specified, files with the agent of the carrier, either at the point of origin or the point of delivery of the shipment, or with the general claims department of the carrier, a claim or a written notice of intended claim, describing the shipment with reasonable definiteness. In all cases the provisions of the standard form for the presentation of claims, which was approved by the Commission on December 2, 1913, should be complied with so far as possible, and proof or evidence of the claim should be presented to the carrier within a reasonable time.

March 3, 1914.

457. WRITTEN STATEMENTS OF RATES FURNISHED BY CARRIERS.—It is the understanding of the Commission that under section 6 of the act carriers are required to make written statements as to rates only in relation to shipments about to be made or shipments affected by contracts about to be entered into, and that the provisions of that section do not require carriers to expend their time and labor in making such statements upon demands therefor by individuals wishing to issue books or notices of rates, or for other purely speculative purposes.

March 16, 1914.

458. LOSS OF RETURN PORTION OF PASSENGER FARE TICKET BY AGENT OF CARRIER.—The return portion of a passenger-fare ticket was lost by the agent of a carrier, and the carrier was obliged to furnish the traveler another ticket upon which to complete the return journey. Upon inquiry: *Held,* That the carrier at fault must assume the entire loss and pay to each carrier interested its proportion of the value of ticket furnished in lieu of the return portion of ticket lost. If, however, the return portion of ticket is later found, the carriers receiving settlement for the ticket furnished in lieu thereof may properly return the amounts received in settlement of the additional ticket furnished.

April 13, 1914.

459. PASSES FOR SUPERINTENDENT OF MAIL SERVICE OF THE CANADIAN GOVERNMENT.—It is the view of the Commission that free annual transportation may not lawfully be issued to a superintendent of mail service of the Canadian Government.

460. TELEGRAMS AND CABLEGRAMS.—The practice by telegraph and cable companies of returning to patrons the original telegrams or cablegrams in support of their bills is unlawful. Such documents must be retained in conformity with the regulations of the Commission governing the destruction of records of telephone, telegraph, and cable companies.

April 14, 1914.

461. WATER CARRIERS CONTROLLED BY OTHER COMMON CARRIERS.—Section 5 of the act as amended by the Panama Canal act prohibits common carriers subject to the act to have, after July 1, 1914, any interest, directly or indirectly, in any common carrier by water, or any vessel carrying freight or passengers, with which said carrier does or may compete for traffic.

The manifest purpose of this law is to bring about discontinuance of common ownership or control of water carriers except in those instances in which, after investigation and hearing, it is found that such operation is in the interest of the public or of advantage to the convenience and commerce of the people, and neither excludes, prevents, nor reduces competition on the route by water. The act does not in specific words authorize the continuance of such common ownership or control beyond July 1, 1914, pending the decision of the Commission on application relative thereto; but it is provided that any application filed before July 1, 1914, may be considered and granted thereafter. It is not conceivable that the Congress intended that the service should be withdrawn from the public on July 1, 1914, if for good and sufficient reasons it had been impossible for the Commission to determine the question presented in the application before that date. Although the language employed is different, it seems that the legislative intent was similar to that expressed in

the amended fourth section of the act and in the safety appliance acts.

The Commission therefore interprets the amendment to section 5 of the act as contemplating and authorizing a continuance of any existing common ownership or control after July 1, 1914, between rail and other carriers and water carriers not traversing the Panama Canal until such time as the Commission has passed upon the application relative thereto, provided such application is filed with the Commission prior to July 1, 1914.

April 25, 1914.

462. CARRIER MUST INVESTIGATE BEFORE PAYING CLAIMS.—Upon further consideration *Conference Ruling 15* is modified as follows:

A carrier can not shield itself from responsibility in paying a claim by accepting the authority of a connecting line to pay it, but must ascertain the lawfulness of the claim and allow it or not upon the basis of its own investigation. This is not to be understood, however, as requiring each carrier interested in the claim to make an independent investigation. The principle of direct investigation embodied in the rules of the freight claim association, whereby the carrier against which a claim is presented undertakes to make the investigation for itself and for the other carriers concerned in the joint movement out of which the claim arises, is approved by the Commission as a means of expediting the adjustment of claims. In all cases, however, the investigation so made must be thorough and must disclose a lawful basis for payment before the claim is adjusted. (See Rulings 68 and 236.)

May 19, 1914.

463. APPLICATION OF THE AVERAGE AGREEMENT UNDER UNIFORM DEMURRAGE RULES.—A storage warehouse company which is specifically designated as the consignee of carloads of miscellaneous freight, the property of others, and which company is responsible for the unloading and for the detention of cars so received, may be made the subject of the average demurrage rule. Cars arriving otherwise consigned and afterwards ordered to the warehouse for storage

may not be included under the average agreement with the warehouse company. (See Ruling 409.)

May 28, 1914.

464. INTEREST UPON OVERCHARGE CLAIMS.—Upon further consideration *Conference Ruling 379* is amended to read as follows:

It is the view of the Commission that in the settlement of an overcharge claim (by which is meant the amount collected on a shipment in excess of the legally published rate) the claimant is entitled to interest thereon at the rate of 6 per cent per annum from the date of the improper collection, except that in the settlement of an overcharge claim involving questions of weight or classification the claimant is entitled to interest thereon from the date of presentation of claim to carrier.

The Commission does not regard it as unlawful for a claimant to accept in satisfaction of his claim the ascertained amount of an overcharge without interest; and the Commission is of the opinion that when such refund is made by the carrier within 30 days after the improper collection of the overcharge, or within 30 days after the presentation of claims involving questions of weight or classification, it may be regarded, in accordance with a well-established usage, as a cash transaction, upon which interest does not accrue.

The views expressed in this ruling shall be understood as applying to all pending and unsettled overcharge claims and to those arising in the future, but not as authorizing or requiring the reopening of any claim which has been settled and closed by the acceptance by a claimant of the amount of an overcharge without interest.

SUPPLEMENT NO. 2 TO CONFERENCE RULINGS BULLETIN NO. 6.

Conference Rulings of the Interstate Commerce Commission

Issued July 26, 1915.

July 11, 1914.

465. ORDERS ISSUED ABROAD FOR DOMESTIC PASSENGER TICKETS.—Under an arrangement with the rail carriers trans-Atlantic steamship lines in selling a ticket for ocean passage from a foreign port will also sell an order upon a rail line for transportation from the port of arrival to an inland point, based on the fare in force at the time the order is issued. Upon inquiry as to whether a carrier may honor such an order when the fare has been changed between the date of its issue and the date of its presentation: *Held,* That the order may be honored on the basis of the fare in effect at the time it was sold, provided the rail carrier has published an appropriate tariff provision for the acceptance of such orders at the fares in effect when they were issued.

July 17, 1914.

466. PASSES FOR OFFICERS AND EMPLOYEES OF TAP LINES.—Under the recent decision of the Supreme Court of the United States in *The Tap Line Cases*, 234 U. S., 1, it is the view of the Commission that the law does not prohibit the use of interstate free passes by the officers and employees of common-carrier tap lines who devote substantially all their time to the service of the tap line and where, by the use of such free passes, no unlawful discriminations are affected. (See Ruling 208-*a* and *The Tap Line Case*, 31 I. C. C., 494.)

July 29, 1914.

467. EXCURSION TICKET ISSUED ON DATE NOT AUTHORIZED BY TARIFF.—A station agent sold a colonist ticket at a reduced fare before the commencement of the period designated in the tariff. Upon inquiry: *Held,* That the selling carrier is responsible for the error and in settlement with its con-

nections must allow them their usual divisions of the fare lawfully in effect on the date of sale.

December 23, 1914.

468. EXPORT AND IMPORT RATES—CONFERENCE RULING 389 RESTATED.—In order to avoid controversies and questions: *Held,* That tariffs hereafter issued containing rates applicable to export or import traffic shall specify, by inclusion or exclusion, the countries to or from which such rates are applicable, whether such countries are or are not adjacent to the United States.

In the interest of clearness the tariffs should also specify whether or not shipments to or from Cuba, the Philippine Islands, Porto Rico, the Hawaiian Islands, or the Canal Zone are included. (See Rulings 353 and 359.)

469. FREE TRANSPORTATION OF SUPPLIES FOR LABORERS.—Upon inquiry as to whether or not a carrier may transport without charge food or other supplies for the use of laborers employed on its line: *Held,* That such shipments may not be carried free except when shipped by an agent of the carrier acting for it and for whose actions the carrier assumes and accepts responsibility.

December 24, 1914.

470. SPECIAL RATES ON SHIPMENTS IN FOREIGN CARS.—A carrier may not by tariff limit the application of certain proportional rates to shipments in cars of other carriers.

January 19, 1915.

471. CHANGES IN RECONSIGNMENT CHARGES.—At the time a shipment commenced to move from the point of origin the tariff provided four days free time for reconsignment, but before the shipment reached the reconsigning point the time had been lawfully reduced to one day: *Held,* That the tariff in effect when the shipment was made applied.

May 3, 1915.

472. WAIVER OF UNDERCHARGES.—On and after August 1, 1915, the Commission will not consider on the informal

docket any application for authority to waive collection of undercharges in connection with shipments delivered subsequent to July 31, 1915. *Conference Rulings 258* and *432* are hereby rescinded as of August 1, 1915.

May 24, 1915.

473. DEMURRAGE AND STORAGE RULES.—Upon inquiry and to remove the confusion that exists among carriers and shippers it is *Held,* That demurrage and storage in transit are controlled by the tariff in effect when the initial movement begins; that demurrage on outbound shipments is controlled by the tariff in effect when the car is actually set for loading; that demurrage and track storage at destination are controlled by the tariff in effect when the car is actually or constructively set for unloading; and that offtrack storage by a carrier at destination, in its warehouse or otherwise, is controlled by the tariff in effect at the time such storage begins.

May 25, 1915.

474. ADJUSTMENT OF CLAIMS FOR DAMAGES RESULTING FROM MISROUTING.—*Conference Rulings 286 (d)* and *286 (f)* are amended to read as follows:

(*a*) It is the duty of a carrier to make delivery in accordance with routing directions. Where such routing instructions have not been followed and delivery is tendered at another terminal than that designated, it remains the duty of the delivering carrier to make delivery at the terminal designated in routing instructions, either by a switch movement or by carting. In either event the additional expense involved in making such delivery must be borne entirely by the carrier responsible for the misrouting and the reimbursement thereof to the delivering carrier may be made by the carrier at fault without a specific order of the Commission. (See Ruling 214-*d.*)

(*b*) In case the carrier is unable to deliver the shipment without unreasonable delay at the terminal designated, and the consignee elects to accept the shipment at the terminal where delivery has been erroneously offered, the shipper or consignee is entitled to recover damages in the sum of the difference between the expense of drayage actually incurred at a reasonable charge therefor and the expense which would have been incurred if proper delivery had been effected. Carriers admitting the justice of

claims of this character should file an application with the Commission for authority to pay same; each application to admit responsibility for the misrouting and be supported by affidavit of the agent of the carrier cognizant of the facts relied upon to justify the payment. (Affirming and modifying Rulings 234, 283, and 392. See *Sterling* v. *M. C. R. R. Co.*, 21 I. C. C., 454, and *Maxcy* v. *B. & O. S. W. R. R. Co.*, 26 I. C. C., 507.)

(*c*) The obligation lawfully rests upon the carrier's agent to refrain from executing a bill of lading which contains provisions that can not lawfully be complied with, or provisions which are contradictory and therefore impossible of execution. When, therefore, the rate and the route are both given by the shipper in the shipping instructions and the rate given does not apply via the route designated, it is the duty of the carrier's agent to ascertain from the shipper whether the rate or the route given in the shipping instructions shall be followed. The carrier will be held responsible for any damages which may result from the failure of its agent to follow this course.

If, however, the agent of the carrier, after exercising reasonable diligence, is unable to obtain more definite instructions as to routing, the goods should be sent via the route specified in the bill of lading. (Cancels Rulings 159, 186, 192-214-*i*, and 231; see Rulings 243, 370, and 397. See *Gibson Fruit Co.* v. *C. & N. W. Ry. Co.*, 21 I. C. C., 645, and *American Agricultural Chemical Co.* v. *B. & A. R. R. Co.*, 28 I. C. C., 400.)

475. PASSES TO OFFICERS AND EMPLOYEES OF OCEAN AND FOREIGN COMMON CARRIERS.—In view of the decision in *The United States* v. *Erie Railroad Company*, 236 U. S., 259, so much of *Conference Rulings 95 (a)*, *95 (g)*, and *196* as pertains to passes to officers and employees of ocean common carriers and of rail common carriers in foreign countries not adjacent is hereby withdrawn.

June 2, 1915.

476. PASSES TO THE FAMILY OF A DECEASED PENSIONED EMPLOYEE.—Upon inquiry as to whether or not common carriers may grant free transportation to the members of the family of a deceased pensioned employee: *Held,* That, with the exception of widows during widowhood and minor children during minority, the members of the family of a deceased pensioned employee may not lawfully use free passes.

June 14, 1915.

477. FREE TRANSPORTATION OF CAR WITH EXHIBITS FOR STATE AGRICULTURAL COLLEGE.—A state college uses a car containing live stock and agricultural products in giving free educational lectures and demonstrations to farmers in different parts of the state. Upon inquiry: *Held,* That if the college is sustained by the state and if the arrangements are made with the proper and responsible officers of the state such car and contents and the necessary agents employed in connection therewith may lawfully be moved by carrier without charge or at reduced rates. (See Ruling 398.)

July 8, 1915.

478. PASSES TO WATCH AND TIME INSPECTORS.—Upon inquiry: *Held,* That free passes may not lawfully be used by watch and time inspectors who, while engaged in the performance of a service for a carrier, pursue other business or sell or solicit the sale of merchandise of any character either to the employees of the carrier or to the general public. (See Ruling 208-*b*.)

July 22, 1915.

479. PASSES TO EMPLOYEES OF PRIVATE CAR LINES.—A company owns and leases cars to railroad companies on a mileage basis and ices and re-ices such cars at various points on the carriers' lines at the expense of the carrier. Inasmuch as the furnishing of cars and the icing of cars are duties imposed upon carriers under section 1 of the act, and following the principle laid down in *Conference Ruling 208* (*b*), it is, *Held,* That passes may lawfully be issued to the officers and employees of the car company when traveling solely for the purpose of furnishing or icing cars for shipment over the carrier's own lines, but may not lawfully be issued to or used by the officers of the car company when not traveling in the performance of a *bona fide* service for the carrier.

July 22, 1915.

480. TELEPHONE MESSAGES RELATING TO SHIPMENTS.—Upon inquiry: *Held,* That *Conference Rulings, 302,*

327, 351, and *363,* regarding the exchange of messages between carriers and shippers, relate to telephone messages as well as to telegrams.

July 23, 1915.

481. ERROR IN THE ISSUANCE OF PASSENGER TICKETS.—The agent of an initial carrier issues half-rate or lower-class tickets and properly punches the contract portion and some of the coupons but fails to punch the other coupons: *Held,* That *Conference Ruling 277* applies, and that the initial carrier should settle with the lines lifting the unpunched coupons on the basis of the fares applicable to the class of transportation indicated thereon.

July 26, 1915.

482. ROUTING OF SHIPMENTS BY CONSIGNEES.—While the Commission adheres to the views heretofore expressed in *Conference Rulings 332* and *453: Held,* That, under proper tariff provision therefor, carriers may observe routing, diversion, or reconsignment instructions furnished in writing by the consignee where the consignor and the consignee are identical, or where the shipment is made by the consignor as the authorized agent for that purpose of the consignee. Billing in such cases must show that the consignee is in fact the shipper or that the consignor named therein makes the shipment as authorized agent for that purpose of the consignee.

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