COMMENTS ON RECENT DECISIONS.

THE INTERSTATE COMMERCE COMMISSION *v.* THE LEHIGH VALLEY RAILROAD COMPANY.

THE decision of the United States Circuit Court for the Eastern District of Pennsylvania, in the case of the Interstate Commerce Commission *v.* the Lehigh Valley Railroad Company, marks another stage in the development of a controversy which is being watched with very great interest by business and railroad men throughout the country. It is true this last decision does not deal with any of the grave constitutional questions which are involved in the case, and that the precise point decided is not a new one, having been similarly held by Judge JACKSON in the Kentucky Circuit;[1] but, as that point is one of great importance in the practical enforcement of the Act to Regulate Commerce, a new decision upon it at this time, and in a case of such importance, cannot fail to draw general attention to certain peculiar features of the act.

This controversy originated in a complaint to the Interstate Commerce Commission by Coxe Brothers & Company, that the railroad company was charging unreasonable rates for the interstate transportation of anthracite coal. The Commission heard the evidence, and, after holding the matter under advisement for over two years, came to the conclusion that the rates in question were unreasonable, and issued an order forbidding the railroad company from making any charges in excess of certain maximum rates. The railroad company not having complied with this order, Coxe Brothers & Company petitioned the Commission to take some steps to secure obedience to their order, and thereupon the Commission, proceeding under the sixteenth section of the Act as amended, applied by petition to the Circuit Court, sitting in equity, praying for a writ of injunction, or other proper process, to restrain the railroad company from further violation of the order. To this petition the railroad company filed an answer, which (beside other defences of a legal character, which it was not necessary to decide at this stage) denied that the rates were unreasonable, and averred that all the findings of fact by the Commission were erroneous, and were not in accordance with the evidence.

Counsel for the Commission, Simon Sterne, Esq., of New York, did not file a replication, but put the case down for hearing on petition and answer, taking the ground that the only questions open for discussion were questions of law, such as the jurisdiction of the Commission, its authority to make such an order, and the constitutionality of the law. He laid stress upon the fact that this was no longer a controversy between Coxe Brothers & Company and the railroad company, but between the railroad company and the Commission, in which the latter was seeking to enforce its order, and argued that upon all matters of fact which had arisen in the former proceeding, the findings of the Commission were conclusive, and such matters of fact were not now open for discussion.

[1] Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. R. Co., 37 Fed. Rep., 567.

The Court, however, ACHESON, J., writing the opinion, having pointed out that the Act made no distinction between cases in which the petition was filed by the party interested and those in which it was filed by the Commission, refused to acquiesce in the above view, and directed the Commission to file a replication, holding that it was plainly the intention of the Act that the findings of the Commission should be *prima facie* evidence only, and that the language of the sixteenth section showed clearly that it was the duty of the Court to form an independent judgment, which it could only do after hearing all the evidence, including, besides that contained in the report of the Commission, any additional evidence that might be produced by either party. An analysis of this section shows that there can be no doubt as to the correctness of this view. The Court, upon a petition alleging the violation of a "lawful order," is to proceed to "hear and determine the matter," "as a court of equity," "in such manner as to do justice in the premises," and to this end it may prosecute, in such mode and by such persons as it may appoint, all needful "inquiries" to enable it to "form a just judgment" in the matter of the petition; and finally, "on such hearing, the findings of fact in the report of said Commission shall be *prima facie* evidence of the matters therein stated."

If this be the state of the law, one may perhaps be permitted to ask of what practical utility is the Commission? Judge JACKSON says: "In respect to interstate commerce matters covered by the law, the Commission may be regarded as the general referee of each and every Circuit Court of the United States upon which the jurisdiction is conferred of enforcing the rights, duties and obligations imposed under the Act." But this can only be so to a very qualified extent, for the same learned Judge refused to give to the findings of the Commission the effect of those of a referee, for he sent the whole case to another referee, who came to an opposite conclusion, which the Court confirmed. Had the complainant in that case been able to proceed in the Circuit Court in the first instance, it would have been saved the expense of the investigation before the Commission (in which each party pays his own costs), which was of really no advantage to it. Indeed, under the present state of the law, an investigation by the Commission is a mockery and a sham, and fails to serve any useful purpose. Under the present method, in order to obtain redress, a complainant must prove his case successively in two separate tribunals, and if he loses in either, relief is denied him. And even if he wins before the Commission, he has gained a very slight advantage; for although a favorable report will be *prima facie* evidence for him in the Circuit Court, yet, owing to several circumstances, this does not amount to much. The respondent is not compelled to show his hand before the Commission, and may keep back testimony which, when produced for the first time in the Court, may rebut the *prima facie* effect of the report, and throw the burden again upon the complainant. Then, the length of time which is likely to elapse (in the Coxe case nearly three years) between the hearing before the Commission and that in the Court, is of itself sufficient to discredit a report, especially upon such a subject as the reasonableness of rates. Nor can a judge who, by the law, is expressly

required to form an independent judgment, be expected to give very great weight to the conclusions which other men have arrived at from an investigation of the same questions into which it is his duty to inquire, especially if he has no particular reason to believe that those men had any better opportunities for eliciting the truth, or were any better fitted for forming an opinion.

The above views, if correct, would seem to lead to the conclusion that either the findings of fact of the Commission should be given the efficacy of a judgment, or the investigation by the Commission should be abolished, and an original proceeding before the Circuit Court, or some special court, substituted. The first proposition involves several grave constitutional questions which were discussed, but not decided, in both the above cases, and into a consideration of which it is not here intended to enter at length, but which may be briefly outlined.

It is perfectly well settled that functions, powers or duties which are properly embraced within what is called by the Constitution " the judicial power of the United States," can only be exercised by the courts of the United States, the judges of which, according to the Constitution, are to hold office during good behavior. It is quite evident that the Commission is not a court of the United States, for its members hold office only during stated periods, and there is no requirement, either of law or usage, that they shall be learned in the law. Judicial functions, therefore, cannot be bestowed upon the Commission. To invest the Commission with power to pass finally upon the reasonableness of rates, etc., would undoubtedly be clothing it with judicial functions; for, says the Supreme Court in Chicago, etc., R. R. Co. *v.* Minnesota,[1] "the question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus in substance and effect of the property itself, without due process of law, and in violation of the Constitution of the United States." And the Court accordingly held in that case, that the statute of Minnesota, which authorized a commission to fix rates and forbade any judicial investigation into the reasonableness of the rates so fixed, was void; and that decision governs the present question, because the constitutional provision in regard to due process of law applies to the United States as well as to the States.

It is quite evident, therefore, that the constitution of the Commission would have to be changed to correspond to that of a court before it could be invested with the power of passing finally upon such questions. To this it may be said that it would be better to abolish the Commission and provide for a similar proceeding in the Circuit Court. Though it may be urged, in support of this view, that the judges of the Circuit Courts, where

[1] 134 U. S., 418.

they have been called upon to construe the Interstate Commerce Act, or to decide questions of fact arising thereunder, have shown a grasp of the subject and an appreciation of the problems equal, if not superior, to that exhibited by the Commission—which was what might be expected from men whose whole training has been such as to fit them for the solution of difficult questions—yet there are compensating disadvantages. The evident reason for the establishment of a permanent Commission, with jurisdiction over the whole subject of interstate commerce, was the hope that by that means consistency and uniformity of policy would result, which it was thought could not be attained in any other way. True, the attainment of this object has been to a very great extent prevented by the frequent changes in the *personnel* of the Commission, and will be entirely frustrated if the present method of trying the cases *de novo* in the Circuit Courts is to continue; but both these obstacles may be in time removed. But to transfer this jurisdiction to the Circuit Courts would make uniformity almost impossible. Just as the Circuit Courts now frequently come to conclusions quite different from those reached by the Commission, after an investigation of the very same facts, so the various Circuit Courts would be likely to differ from each other; for, in deciding matters of fact, precedent counts for little, and on questions depending almost entirely on judgment, courts are always apt to differ. Nor, for the same reason, would an appeal to a higher tribunal, apart from the difficulty which would attend such a proceeding in matters of this kind, be of much avail in securing uniformity.

It would seem, therefore, that the efficient administration of the Act to Regulate Commerce requires the establishment of one Court, whose members shall be learned in the law and hold their offices during good behavior, and which shall have power to hear and determine all matters of fact arising under that Act. It would not be necessary, or, perhaps, wise, to give such a Court the power to enforce its own decrees. All that is needed is one tribunal, in which the evidence shall be produced once and for all, and which shall have authority to pass finally upon matters of fact, and possibly also upon mixed matters of fact and law. To this end the findings of the Court might be given the effect of a verdict of a jury, or of a judgment of a Court of a sister State, which could be enforced in the regular judicial tribunals, to whose decision it would, perhaps, be wiser to leave pure questions of law, such as the construction of the Act, the jurisdiction and authority of the special tribunal, etc. To give such a Court authority to enforce its own decrees would be open to the great objection of placing enormous power in the hands of a few men, and even the proposition to confer upon it the powers above outlined is one which should receive very serious consideration, but into a discussion of the policy of which it is not our province to enter.

FRANCIS COPE HARTSHORNE.