UNIVERSITY OF PENNSYLVANIA
LAW REVIEW
AND AMERICAN LAW REGISTER
FOUNDED 1852

VOLUME 60 OCTOBER, 1911 NUMBER 1

JURISDICTION OF CERTAIN CASES ARISING UNDER THE INTERSTATE COMMERCE ACT.

The great purposes of the Act to Regulate Commerce were to prevent unjust and unreasonable rates, to secure equality of rates as to all and to destroy favoritism.[1] To the end that these purposes might be accomplished, Congress created the Interstate Commerce Commission and by the original enactment and subsequent amendments thereto endowed it with vast powers calculated to secure an effective enforcement of the act.[2] It is intended to consider in this article the extent to which the grant of these powers to the Commission affects, modifies or circumscribes the jurisdiction of the courts with respect to matters within the purview of this federal legislation. No effort will be made to define the precise jurisdiction of the newly created Commerce Court, or to ascertain the extent to which this Court and the Supreme Court of the United States will review decisions and orders of the Interstate Commerce Commission, but consideration will be given to the limitation of the powers of the courts generally, resulting from this legislation of Congress, to deal in

[1] New York, New Haven & Hartford R. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, at page 391 (1906).

[2] Acts of Congress to Regulate Commerce, approved February 4, 1887, and in effect April 5, 1887 (24 Statutes at Large, 379), as amended by an act approved March 27, 1889 (25 Statutes at Large, 855); by an act approved February 10, 1891 (26 Statutes at Large, 743); by an act approved February 8, 1895 (28 Statutes at Large, 643); by an act approved June 29, 1906 (34 Statutes at Large, 643); by a joint resolution approved June 30, 1906 (34 Statutes at Large, 838); by an act approved April 13, 1908 (35 Statutes at Large, 60); by an act approved February 25, 1909 (35 Statutes at Large, 648), and by an act approved June 18, 1910.

the first instance with certain issues or to entertain certain causes.

With reference to this question the first decision in point of importance is Texas and Pacific Railway Company v. Abilene Cotton Oil Company.[3] This decision, commonly known as the Abilene Oil Case, stands at the head of the decisions dealing with the various phases of this question and furnishes the basis upon which the subsequent cases rest. In this case "the oil company, the defendant in error, sued to recover $1,951.83. It was alleged that on shipments of carloads of cottonseed made in September and October, 1901, over the line of the defendant's road from various points in Louisiana east of Alexandria, in that state, to Abilene, Texas, the carrier had exacted, over the protest of the oil company, on the delivery of the cottonseed, the payment of an unjust and unreasonable rate, which exceeded in the aggregate, by the sum sued for, a just and reasonable charge." [4]

The trial court made findings of specific facts from which it deduced the following conclusions:

"1st. The facts so found show that this was an interstate shipment.

"2nd. The facts so found show that the defendant complied with the interstate commerce law, and said rates and classifications were thereby properly established and in force, except that the rate charged on cottonseed in carload lots was unreasonable and excessive.

"3rd. I find that the rate charged by the defendant was that established under the interstate commerce law." [5]

Judgment was entered for the Railway Company, and from this judgment the Oil Company appealed to the Court of Civil Appeals. This court took the view that there was only one question for decision, viz., " . . . whether, consistently with the act to regulate commerce, there was power in the court to grant relief upon the finding that the rate charged for an interstate shipment was unreasonable, although such rate was the one

[3] 204 U. S. 426 (1907).
[4] 204 U. S., at page 430.
[5] 204 U. S., at page 432.

fixed by the duly published and filed rate sheet, and when the rate had not been found to be unreasonable by the Interstate Commerce Commission." [6]

With respect to the unreasonableness of the rate the Court of Civil Appeals said:

"So that [*i. e.*, since the rate had been found unreasonable by the court below] we are relieved from a consideration of the difficulties discussed in some of the cases in ascertaining the fact, and therefore now have squarely before us the questions whether in a state court a shipper in cases of interstate carriage can, by the principles of common law, be accorded relief from unjust and unreasonable freight rates exacted from him, or shall relief in such cases be denied merely because such unreasonable rate has been filed and promulgated by the carrier under the Interstate Commerce Act?" [7]

Answering this question the Court of Civil Appeals unanimously held that there was jurisdiction to grant the relief asked, and entered judgment in favor of the Oil Company upon the findings of fact made by the trial court.

A writ of error was thereupon taken by the Railway Company to the Supreme Court of the United States, where the judgment of the Court of Civil Appeals of Texas was reversed, the Supreme Court holding that, " . . . a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable." [8]

From this principle it follows that the courts, whether state or federal, are without power to assume cognizance in the first instance of an action brought to recover because of the exaction of unreasonable freight charges on interstate shipments when such charges are in accord with the tariffs of the carriers duly

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[6] 204 U. S., at page 432.
[7] 85 S. W. 1052, at page 1053.
[8] 204 U. S., at page 448.

published and on file with the Interstate Commerce Commission.

It is not proposed to discuss at length the course of reasoning by which the Supreme Court arrived at this conclusion, nor to consider the justification for the apparent disregard of the provisions of Sections 9 and 22 of the Interstate Commerce Act, which is necessitated thereby. It will be sufficient for the purposes of this article to quote the following passage from the opinion of the Court, an opinion delivered by the present Chief Justice, then Mr. Justice White:

"When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because unless the requirement of a uniform standard of rates be complied with it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate was unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless

all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed no reason can be perceived for the enactment of the provisions endowing the administrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible." [9]

It follows, therefore, that no action can be maintained in the courts because of the exaction of alleged unreasonable freight charges on interstate shipments, if the charges actually made are prescribed by, and in accordance with, tariffs duly published and on file with the Interstate Commerce Commission. The only

[9] 204 U. S., at page 439.

course of action available to the shipper asserting, under such circumstances, the exaction of unreasonable charges is a proceeding before the Commission for the determination of the unreasonableness of the charges in question and for the award of reparation in the event that the charges collected are found to have been unreasonable. In short, the Commission has exclusive jurisdiction of cases of this class.[10]

"When the act to regulate commerce was enacted there was contrariety of opinion whether, when a rate charged by a carrier was in and of itself unreasonable, the person from whom such a charge was exacted had at common law an action against the carrier because of damage asserted to have been suffered by a discrimination against such person or a preference given by the carrier to another. Parsons v. Chicago & Northwestern Ry., 167 U. S., 447, 455; Interstate Commerce Commission v. Baltimore & Ohio R. R., 145 U. S., 263, 275." [11]

No attempt will be made in this article to solve this interesting question, or the collateral question of the right to recover at common law because of the exaction by common carriers of rates unreasonable *per se*, or to discuss the bearing of these questions on the constitutionality of the Interstate Commerce Act, further than to point out that if, prior to the passage of this Act, shippers could maintain in the courts actions at law based upon the exaction of unreasonable freight charges on interstate shipments, they are now precluded by this legislation from having submitted to a jury the vital issue in such controversies, and, furthermore, have not as yet discovered any form of redress in the event of a finding by the Interstate Commerce Commission adverse to their claims.[12]

But whatever other conclusions may properly be predicated upon this fact, it is manifest that the jurisdiction of the courts

[10] This is believed to be a correct statement of the law, though it may be argued that the courts still have *jurisdiction* of these cases, but are bound to assume that the published charges are just and reasonable in the absence of any finding to the contrary by the Commission. For practical purposes there is but little to choose between the two modes of stating the situation, though the theory which underlies the latter form of the proposition is possibly more consistent with the constitutionality of the Interstate Commerce Act.

[11] 204 U. S., at page 439.

[12] See, however, note 35, *infra*.

in the premises has been definitely circumscribed by the Interstate Commerce Act, and that resort to the Commission is the remedy which shippers must adopt if they desire to recover because of the exaction of unreasonable freight charges. In brief, an interstate freight rate prescribed in a tariff on file with the Interstate Commerce Commission [13] is as little open to question in an action at law as though it were prescribed by an Act of Congress.[14]

Whether the same rule should prevail in equity is a question which has not as yet been definitely decided by the Supreme Court of the United States,[15] though it has been presented in a

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[13] The publication is not essential to the validity of a rate; Texas and Pacific Ry. Co. v. Cisco Oil Mill, 204 U. S. 449 (1907).

[14] In this connection reference may be made to the interesting and suggestive statement of Mr. Commissioner Harlan in Poor Grain Company v. C. B. & Q. Ry. Co., 12 I. C. C. 418 (1907).

"When once lawfully published, a rate, so long as it remains uncanceled, is as fixed and unalterable, either by the shipper or by the carrier, as if that particular rate had been established by a special act of Congress. When regularly published, it is no longer the rate imposed by the carrier, but the rate imposed by the law."

See also Texas & Pacific Ry. Co. v. Mugg, 202 U. S. 242 (1906), where the Supreme Court of the United States holds that a mis-quotation of an interestate rate duly published and filed with the Commission, furnishes no sufficient ground for exemption from liability to pay the tariff rate, and no basis for a suit to recover damages resulting from reliance and action upon such a mis-quotation.

Cf. Melody v. Great Northern Ry. Co. (S. Ct. of South Dakota), 127 N. W. 543 (1910).

See also the following cases in which the principle of the Abilene Oil Case is applied: Clement v. L. & N. R. R. Co., 153 Fed. 979 (1907); American Union Coal Co. v. Pennsylvania R. R. Co, 159 Fed. 278 (1908); Howard Supply Co. v. C. & O. Ry. Co., 162 Fed. 188 (1908); Erie R. R. Co. v. Wanaque Lumber Co., 75 N. J. Law, 878 (1908); Dickerson v. L. & N. R. R. Co., 187 Fed. 874 (1910); B. & O. R R. Co. v. La Due, 112 N. Y. Supp. 964 (1908); Atchison, Topeka, etc., Ry. v. Superior Refining Co., 83 Kans. 732 (1911); Robinson v. B. & O. R. R., 64 W. Va. 406 (1908).

In Hite v. C. R. R. of N. J., 171 Fed. 370 (1909), the United States Circuit Court of Appeals for the Third Circuit affirms the opinion of the Circuit Court expressed in C. R. R. of N. J. v. Hite, 166 Fed. 976 (1909), to the effect that the courts may *construe* the carriers' tariffs, but the decision of the lower court is reversed on other grounds.

[15] The Supreme Court's decision in Southern Ry. v. Tift, 206 U. S. 428 (1907)—decisions below reported in 123 Fed. 789 (1903); 138 Fed. 753 (1905)—has been frequently referred to in this connection, but this decision must be interpreted in the light of what the present Chief Justice, then Mr. Justice White, said in the susequent case of Baltimore & Ohio R. R. Co. v. U. S., 215 U. S. 481, at page 500:

"Nor is there anything in the contention that the decision in Southern Ry. Co. v. Tift, 206 U. S. 428, qualifies the ruling in the Abilene Case, and is an authority supporting the right to resort to the courts in advance of action by the Commission for relief against unreasonable rates or unjust dis-

number of instances to the United States Circuit Courts and Circuit Courts of Appeals, and is now pending in the Supreme Court on appeal in the case of the Wickwire Steel Co. v. New York Central & Hudson River R. R. Co., decided by the Circuit Court of Appeals for the Second Circuit on June 14, 1910.[16]

The customary form of resort to a court of equity is by a bill to restrain the enforcement and collection of alleged unreasonable freight rates. The application may be made at three stages: *First,* before the filing with the Interstate Commerce Commission of the tariff establishing the rates complained of; *second,* after the filing but before the rates have become effective; *third,* after the rates have become effective. Usually the basis of the demand for equitable relief is the allegation that irreparable damage will ensue to the complainant from the enforcement of the rates in question.[17] The practical difficulties which follow the granting of an injunction and the different considerations which present themselves at the different stages above referred to are relevant by way of interest rather than by way of logical importance, since the general principle involved renders these matters of minor importance. The decisions to which reference will be made furnish ample discussion thereof.

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criminatory practices, which, from their nature, primarily require action by the Commission. While it is true that the original bill in the Tift Case sought relief from alleged unreasonable rates before action by the Commission, yet, as said by the court (p. 437):

"'The Circuit Court granted no relief prejudicial to appellants on the original bill. It sent the parties to the Interstate Commerce Commission, where, upon sufficient pleadings, identical with those before the court, and upon testimony adduced upon the issues made, the decision was adverse to the appellants. This action of the Commission, with its findings and conclusions, was presented to the Circuit Court, and it was upon these, in effect, the decree of the court was rendered. There was no demurrer to that petition, and the testimony taken before the Commission was stipulated into the case, and the opinion of the court recites that, "with equal meritorious purpose, counsel for respective parties agreed that this would stand for and be the hearing for final decree in equity".'"

[16] 181 Fed. 316 (1910).

[17] To what extent the courts may restrain an advance in rates alleged to have been made by the concerted action of the carriers in violation of the Sherman Act will not be discussed in this article, since the disposition of the action begun by the Government in June, 1910, in the Circuit Court of the United States for the Seventh Circuit, to restrain on this ground the general advances in freight rates then proposed to be made by the carriers of the country, leaves the question entirely in the realm of speculation; and the jurisdiction to issue an injunction on this ground would obviously be derived wholly from the Sherman Act,

With regard to the general principle, however, almost all the decisions agree in holding that the Abilene Oil Case is so far effective as to prevent the courts from issuing injunctions restraining the collection of freight charges on interstate shipments, where such charges are duly published and on file with the Interstate Commerce Commission. The cases, which will be referred to in the note,[18] furnish reasonable grounds for believing that this will be the holding of the Supreme Court of the United States, particularly since the Mann-Elkins Amendment of 1910 to the Interstate Commerce Act now vests in the

[18] Wickwire Steel Co. v. New York Central, etc., R. R. Co. (C. C. A., 2nd Circuit), 181 Fed. 316 (1910), (rates filed and published, but not in effect when the injunction was applied for); Atlantic Coast Line R. R. Co. v. Macon Grocery Co. (C. C. A., 5th Circuit), 166 Fed. 206 (1909), overruling 163 Fed. 738 (1908) (rates filed and published, but not in effect when the injunction was applied for), and see the dissenting opinion of Mr. Justice Harlan when the case, having reached the Supreme Court, was disposed of on a question of jurisdiction, 215 U. S. 501 (1910); Columbus Iron & Steel Co. v. Kanawha, etc., Ry. Co., 178 Fed. 261 (1910), affirming 171 Fed. 713 (injunction applied for to restrain the filing of proposed tariffs advancing certain rates); Great Northern Ry. Co. v. Kalispell Lumber Co. (C. C. A., 9th Circuit), 165 Fed. 25 (1908), overruling 157 Fed. 845 (1907) (rates in effect when the injunction was applied for); Houston Coal & Coke Co. v. N. & W. Ry. Co. (C. C. A., 4th Circuit), 178 Fed. 266 (1910), affirming 171 Fed. 723 (1909) (injunction applied for to restrain the filing of proposed tariffs advancing rates); Powhatan Coal & Coke Co. v. N. & W. Ry. Co. (C. C. A., 4th Circuit), 178 Fed. 266 (1910), affirming 171 Fed. 723 (1909) (the bill herein was to enjoin the "establishment" of an increased rate or to enjoin its "enforcement"; it does not clearly appear at what stage it was filed); Tennessee Central R. R. Co. v. Southern Ry. Co. (C. C. A., 4th Circuit), 178 Fed. 267 (1910) (it does not clearly appear at what stage application was made in this case for an injunction); Sandusky Portland Cement Co. v. B. & O. R. R. Co. (C. C. A., 7th Circuit), 187 Fed. 583 (1911) (the bill filed in this case contained an application for a mandatory injunction to compel the railroad company to put in effect a schedule of rates which it was alleged the railroad had agreed in 1900 to maintain for a period of twenty years); Potlatch Lumber Co. v. Spokane Falls, etc., Ry. Co. (U. S. C. Ct., E. D. Washington, E. D.), 157 Fed. 588 (1907) (the rates were in effect at the time the court disposed of the question); Thacker Coal & Coke Co. v. N. & W. Ry. Co. (S. Ct. of App. of W. Va.), 68 S. E. 107 (1910) (injunction applied for to restrain the filing of tariffs containing increased rates).

Contra: Northern Pacific Ry. Co. v. Pacific Coast Lumber, etc., Assn. (C. C. A., 9th Circuit), 165 Fed. 1 (1908); Union Pacific Ry. Co. v. Oregon, etc., Lumber Assn. (C. C. A., 9th Circuit), 165 Fed. 13 (1908) (rates filed but not in effect at the time these two injunctions were applied for and granted); Kiser Co. v. Central of Ga. Ry. Co. (U. S. C. Ct., N. D. Ga.) 158 Fed. 193 (1907) (the injunction in this case was granted before the increased rates had gone into effect); Macon Grocery Co. v. Atlantic Coast Line R. R. Co., 163 Fed. 738 (1908), overruled in 166 Fed. 206 (1909), *vide supra;* Arlington Heights Fruit Co. v. Southern Pacific Co. (U. S. C. Ct., S. D. of California), 175 Fed. 141 (1909) (the injunction in this case was issued after the rate had been published, but before it had gone into effect); A. T. & S. F. Ry. Co. v. Interstate Commerce Commission (U. S. C. Ct. of

Commission power to suspend a proposed rate between the date of its filing and the date on which it becomes effective.[19]

It is apparently conceded that, but for the Interstate Commerce Act, the courts could award injunctions in cases of this character; so that it comes to pass that this federal legislation has in this regard practically transferred this entire body of jurisdiction from the courts and has vested it in the Commission.

The cases thus far considered have been founded primarily on allegations of the unreasonableness of freight rates, but the decisions have not stopped here. In Baltimore & Ohio Railroad Company v. United States *ex rel.* Pitcairn Coal Company,[20] commonly known as the Pitcairn Case, the principle of the Abilene Oil Case is extended to a mandamus proceeding instituted in a Circuit Court of the United States to compel the respondent railroad company to apply a certain rule in the distribution of its freight cars intended for the use of coal shippers, and it is decided that the courts have no jurisdiction of the subject matter of the proceedings in advance of a decision by the Commission as to the proper rule of distribution to be applied in a case of this character.

This decision in turn has furnished authority for the decisions of certain of the lower federal courts which have dismissed, for want of jurisdiction, actions brought to recover damages because of alleged discrimination in the distribution of freight cars intended for the use of coal shippers,[21] it being

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Kans.), 182 Fed. 189 (1910) (injunction granted after schedule filed restraining the enforcement of the increased rate until it could be considered by the Commerce Court).

Cf. Jewett Bros. & Jewett v. Chicago, etc., Ry. Co. (U. S. C. Ct., D. South Dakota), 156 Fed. 160 (1907).

[19] The power is not available after the rate has become effective, but the freedom with which it is being used by the Commission prior to the time when rates become effective justifies the belief that the public interest will not on this account be prejudicially affected.

[20] 215 U. S. 481 (1910).

[21] Morrisdale Coal Co. v. The Pennsylvania Railroad Company (U. S. C. Ct., E. D. Pa.), 176 Fed. 748 (1910); affirmed by the Circuit Court of Appeals for the Third Circuit, 183 Fed. 929 (1910); Mitchell Coal & Coke Co. v. Pennsylvania Railroad Co. (U. S. C. Ct., E. D. Pa.), 183 Fed. 908 (1911).

obvious that until a proper determination is reached as to the correct rule of distribution it is impossible to determine whether there has been any discrimination or, if so, to what extent.

The same compelling reasons, which require the decision of the Abilene Oil Case in respect to freight rates, apply with equal force in respect to car distribution, for obviously no satisfactory solution of this transportation problem is possible so long as the question may be passed upon by different tribunals, whether juries in different cases or courts of different states. It is only by entrusting the whole matter of car distribution to a single definite tribunal that a result can be obtained, fair alike to the shippers and the carriers.

At this point there arises an interesting question, viz., whether an action can be maintained in a state court to recover damages for alleged discrimination in the distribution of cars to coal shippers for intrastate shipments? It is probably true that it is impracticable to have different rules of distribution dependent upon the contingent future use of the cars by the shippers; in other words, that a carrier must, in making distribution, deal with its entire car supply as a unit, and cannot divide it into two parts, apportioning a part for use in interstate commerce and another part for use in intrastate commerce, subject to different rules of distribution. If this can be established to the satisfaction of the courts it would seem to withdraw such actions from the cognizance of the state courts in so far as they involve the determination by those courts of a proper rule of distribution.[22] This, however, is at present an undecided question, but its practical importance is obvious and no doubt it will sooner or later require determination.

If it shall be held by the Supreme Court of the United States that the lower courts have correctly applied the decision in the so-called Pitcairn Case, it is apparent that a vast field of jurisdiction has been withdrawn from the courts, certainly in respect to discrimination in the distribution of cars for use in interstate commerce and possibly in respect to discrimination in

[22] Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission, 221 U. S. 612 (1911); Shepard v. Northern Pacific Ry. Co., 184 Fed. 765 (1911), and cases cited.

the distribution of cars for use in intrastate commerce. Furthermore, unlawful discrimination may be alleged to arise from other practices than the distribution of freight cars, and it is extremely probable that in most instances the same considerations that require a resort to the Commission rather than to the courts, in order to secure a determination with respect to the presence or absence of unlawful discrimination in car distribution cases will necessitate a submission to the same tribunal of other cases founded on this basis. The decision of the United States Circuit Court for the Eastern District of Pennsylvania, in Langdon v. The Pennsylvania Railroad Company,[23] was apparently not intended and cannot be regarded as a determination to the contrary, particularly since that case involves largely, if not wholly, Section 2 of the Interstate Commerce Act (the section having more immediate relation to rebates), and not primarily Section 3, which is more closely concerned with preferences and discriminations generally.[24]

Whatever may be finally determined with regard to cases founded on discrimination, other than discrimination in the distribution of cars, it is obvious that the decisions have already gone a long way in requiring a primary resort to the Commission in cases of this character, and have circumscribed, to an important extent, the jurisdiction of the courts in this regard, and while jurisdiction of all cases, other than criminal cases, arising under the Interstate Commerce Act cannot be predicated upon the decisions thus far rendered, the manifest tendency has been in this direction with regard to cases, involving rates and regulations of the carriers, which arise under Sections 1 and 3 of the Act; and it is believed that the same conclusion will be reached ultimately, certainly with regard to cases of this character which arise under Section 4 and probably with regard to those which arise under Section 2.

But what is the remedy available before the Commission? Necessarily that body has power to prescribe the reasonable rate

[23] 186 Fed. 237 (1911).

[24] See also Lyne v. D. L. & W. R. R. Co., 170 Fed. 847 (1908). It is obvious that this decision cannot be regarded as throwing much light on this question, since it was made prior to the decision of the Pitcairn Case.

and the reasonable regulation affecting the rate, which, as has been held in the Pitcairn Case, includes the right to determine the basis of car distribution. But what is its power with regard to damages for past unlawful rates and discrimination? It will be remembered that the Commission has held, in Joynes v. The Pennsylvania Railroad Company,[25] that it has no jurisdiction to award damages other than "rate damages." Unless this decision be modified it would seem to leave the unfortunate shipper in the predicament of finding, in certain cases, that the courts are without jurisdiction to determine the primary issues in his case, and that the Commission is without power to award damages. One solution would be to send the case back to the courts after the Commission has passed upon that portion of the case requiring expert determination of some general matter, or even to allow the Commission's determination of the general question to form a basis for actions on behalf of others than the parties actually complaining before the Commission;[26] but this procedure would be cumbersome, and decisions made since the Joynes Case indicate, apparently, that the Commission will eventually assume jurisdiction to award damages in all cases in which it has primary jurisdiction to determine general questions of unreasonableness or discrimination.[27] To what extent this power may be open to constitutional criticism as denying the right of trial by jury constitutes another of the many difficult questions arising under this law.

The foregoing discussion relates primarily to cases in which the construction of the Interstate Commerce Act has resulted in precluding the courts from considering the very foundation of a plaintiff's or complainant's case, and may, perhaps, properly be described as decisions limiting and circumscribing the body of the court's jurisdictional powers generally; but there is another important class of cases in which the courts are not ousted, as it were, from the power to assume cognizance of the primary basis of the suit or action, but, while retaining this power,

[25] 17 I. C. C. R. 361 (1909).

[26] In this connection see Southern Ry. v. Tift, 206 U. S. 428 (1907).

[27] Hillsdale Coal & Coke Co. v. P. R. R. Co., 19 I. C. C. R. 356 (1910); Jacoby, etc., Co. v. P. R. R., 19 I. C. C. R. 392 (1910).

they are precluded from a consideration of the reasonableness or legality of certain secondary elements which affect or modify the redress which they may accord to litigants.

This class of cases can be only suggested, for thus far the decisions are few and inconclusive, though the principles resulting from the cases actually passed upon by the United States Supreme Court seem to leave little doubt as to what will finally prove to be the law applicable to the questions necessarily involved therein.

An apt illustration is found in an action brought to recover damages on account of the loss of an interstate shipment. Two rates are established by the carriers' tariffs, the one applicable in connection with a shipment made under the terms of the so-called Uniform Bill of Lading, the other, ten per cent. higher, applicable in connection with the same shipment if made on the carriers' common law liability. The terms of the bill of lading include this provision: "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of 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, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

It is apparent that this provision of the bill of lading, and the others which form the so-called "conditions" thereof, constitute regulations affecting the carriers' rates and must, under the Interstate Commerce Act, be strictly observed by the carrier equally with the rates. Moreover, just as the reasonableness of the rates may not be questioned by any tribunal other than the Commission, so also these regulations are not open to attack in a court so long as the Commission has not condemned them.[28] There seems to be no escape from this conclusion, and it has been accepted by at

[28] As a matter of fact, the Commission has specifically approved the provision in question; Shaffer & Co. v. C. R. I. & P. Ry. Co., 21 I. C. C. R. 8 (1911).

least one court of first instance.[29] This question remains undetermined in the appellate courts, but it is difficult to construct a theory, at the same time in accord with the decisions of the United States Supreme Court, and leading to a conclusion other than the one suggested.

But if this conclusion is correct it overturns some well-established cases, when it is sought to apply them to interstate shipments. And by the same token, where rates on interstate shipments are established with reference to agreements as to definite amounts to be recovered in case of loss or damage, and the basis of these rates is clearly set forth in the carriers' tariffs, the reasonableness of these agreements may not be drawn in question in the courts so long as they have not been condemned by the Commission. This seems an absolutely necessary corollary to the Abilene Oil Case, and the other decisions of the United States Court referred to; but it practically sets aside—so far as interstate shipments are concerned—the decisions of those states which condemn agreed valuations where carriers have been guilty of negligence.[30]

These are mere illustrations, but they serve to make clear the important class of questions which may arise in actions in the courts, and yet prove to be outside the power of the courts to consider. Or perhaps it is more accurate to say that the courts must presume that all rates or regulations affecting rates which are contained and properly included in tariffs actually filed with the Interstate Commerce Commission are conclusively presumed to be reasonable until they have been condemned by the Commission. Until that event happens, the Interstate Commerce Act requires that they be strictly observed and no court has power to relieve the carrier from its right or duty, resulting from this statutory requirement, to insist on the observance of such rates and regulations.[31]

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[29] Muncipal Court of Chicago in Raphael Co. v. C. R. I. & P. Ry. Co., decided December 1, 1910. See the report of this case in *The National Corporation Reporter* of February 2, 1911. The decision, though proceeding from a court of inferior jurisdiction, is a clear and forcible judicial deliverance.

[30] See in particular Hughes v. P. R. R., 202 Pa. 222 (1902); 191 U. S. 477 (1903).

[31] In this connection should be noted the following statement of the Su-

In short, strict obedience to the provisions of duly filed tariffs is the imperative mandate of the Interstate Commerce Law, and no court can relieve the carrier, or by the same token the shipper, from their necessary and proper operation. Relief is obtainable only from the Interstate Commerce Commission, and then only in those cases where the rate or regulation in question is, in the judgment of that tribunal, unreasonable. The decisions are well summarized by the United States Circuit Court of Appeals for the Third Circuit in Morrisdale Coal Co. v. The Pennsylvania Railroad Company, in which case the Court says: [32]

"These cases [the cases referred to in the opinion] conclusively establish the doctrine that the Interstate Commerce Commission alone has original jurisdiction to determine whether an existing rate schedule, or an existing regulation or practice affecting rates, or an existing regulation or practice of any other kind affecting matters sought to be regulated by the Act, is unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or prejudicial, and that the courts cannot, by mandamus, injunction, or otherwise, control or modify any order of the Commission made by it in the due performance of its merely administrative functions."

It does not seem necessary to pursue this branch of the subject further. It is hoped that the principle involved has been made clear. As yet there are practically no decisions which tend to illuminate in a satisfactory way the specific questions arising in connection with cases relating to regulations of the latter class above referred to.[33] The instances which involve the

preme Court in Louisville & Nashville R. R. v. Mottley, 219 U. S. 467 (1911), at page 475:

"But the Act of June 29, 1906, made a material addition to the words of the Act of 1887; for, it expressly prohibited any carrier, unless otherwise provided, to demand, collect, or receive 'a greater or less or *different* compensation' for the transportation of persons or property, or for any service in connection therewith, than the rates, fares and charges specified in the tariff filed and in effect at the time."

[32] 183 Fed. 929, at page 936 (1910).

[33] In this connection attention is directed to the following decisions, which to a certain extent, involve the principle under discussion: Louisville, etc., R. R. Co. v. Cook Brewing Co. (C. C. A., 7th Circuit), 172 Fed. 117 (1909); Kirby v. Chicago etc., R. R. Co. (Supreme Court of Illinois), 90 N. E. 252 (1909). Both of these cases were decided before the United States Supreme Court decided the Pitcairn Case, and it may well be doubted whether, in the light of this latter decision, they can be regarded as a sound exposition of the law.

Cf. Harris v. Great Northern Ry. Co. (Supreme Court of Washington), 96 Pac. 224 (1908).

application of the doctrine are numerous and diverse and will readily occur to the reader.

The illustrations which have been suggested are, it is believed, sufficient to demonstrate the importance of this group of cases, and when consideration is given to them in conjunction with the cases first referred to, which the Interstate Commerce Act has practically entirely withdrawn from the consideration of the courts and has confided solely to the Commission, it becomes at once apparent that there has been an important delimitation of the powers of the courts and the creation of a tribunal with exclusive and extensive powers in matters of vast public importance.

Further significance is given to this phenomenon when attention is directed to the decisions of the United States Supreme Court defining the limits within which the determination by the Commission of the issues presented to it is conclusive and non-reviewable in the courts, since it is becoming more and more clear that the scope of the so-called "court review" is materially limited,[34] and, in so far as the shipper is concerned, practically *nil;*[35] and it becomes patent even to the most casual observer that the power lodged in the members of the Interstate Com-

[34] East Tennessee, etc., Ry. Co. v. Interstate Commerce Commission, 181 U. S. 1 (1901); Interstate Commerce Commission v. Clyde Steamship Co., 181 U. S. 29 (1901); Illinois Central R. R. Co. v. Interstate Commerce Commission, 206 U. S. 441 (1907); Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452 (1910); Interstate Commerce Commission v. Chicago & Alton R. R. Co., 215 U. S. 479 (1910); Interstate Commerce Commission v. Chicago, etc., Ry. Co., 218 U. S. 88 (1910); Southern Pacific Co. v. Interstate Commerce Commission, 219 U. S. 433 (1911). *Cf.* the later decision of the Commission in Oregon, etc., Assn. v. Southern Pacific Company, 21 I. C. C. R. 389 (1911); Interstate Commerce Commission v. Delaware, Lackawanna & Western R. R. Co., 220 U. S. 235 (1911). And see the very able article on "Court Review of Orders of the Interstate Commerce Commission," by the Hon. Charles A. Prouty in the Yale Law Review for March, 1909.

[35] But see the recent decision of the Commerce Court in Proctor & Gamble Company v. United States, No. 9, May Session, 1911 (not yet reported), in which it is decided that in certain cases (apparently those involving a question of law only), the complainant is entitled to have the court pass upon the legality of the Commission's order; and that an order of the Commission dismissing a complaint is one that may be thus reviewed in the Commerce Court. It is not believed, however, that there are many cases in which this limited review will prove practically available.

One of the most important questions in this connection is whether, when the Commission has found a certain rate unreasonable, but has denied reparation, a shipper has any standing in court to recover amounts paid in excess

merce Commission, touching as it does the daily life of all the people and affecting intimately the commercial relationship of cities and communities generally, discloses a vesting of authority in individuals to an extent hitherto unknown in these United States. A study of the decisions of the Commission will only confirm the belief that the power is of a magnitude which is seldom fully realized by the community.[36]

The wisdom of this centralization of power in seven men who may initiate investigations and whose decisions are subject to this limited control on the part of the courts is not within the purview of this discussion. So long as this power shall continue to be wielded by Commissioners distinguished alike by the ability and integrity which characterize the present members of the Commission, the interests of neither the public nor of the carriers are endangered. But should it come to pass hereafter that the great powers of this body should be perverted for personal or party ends by unscrupulous men who might perchance find a place in its councils, it cannot be doubted that a situation would arise which would be fraught with grave consequences for the welfare of the nation and the prosperity of its people.

For these reasons it is important that the relation between the courts and the Commission should be clearly understood, and it is with a view to presenting one aspect of this subject that the present article has been written.

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of the rate found by the Commission to be reasonable. It is doubtful whether he has since the finding by the Commission that the rate is *now* unreasonable furnishes no predicate for the assumption that it *was* unreasonable during the past period when the freight charges in question may have been paid.

[36] It is not intended to include in this article a discussion of the *extent* of the power lodged in the Interstate Commerce Commission, but it may not be amiss to call attention to the following decisions which furnish impressive evidence of the vast power with which the Commission has been endowed: *In re* Investigation of Advances in Rates, 20 I. C. C. R. 243, 307 (1911); Railroad Commission of Nevada v. Southern Pacific Company, 21 I. C. C. R. 329 (1911); Spokane v. Northern Pacific Ry. Co., 21 I. C. C. R. 400 (1911). These last two decisions will, if they ultimately form the basis for the adjustment of freight rates, exert upon the relative commercial strength of the communities of this country an influence which cannot now be forecast with any degree of accuracy. It cannot be doubted, however, but that their effect, though ever so limited, is bound to be profound and far-reaching.