REGULATION OF RAILROAD RATES.

SPEECH

OF

HON. STEPHEN B. ELKINS,

OF WEST VIRGINIA,

IN THE

SENATE OF THE UNITED STATES,

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SPEECH

OF

HON. STEPHEN B. ELKINS.

The Senate having under consideration the bill (H. R. 12987) to amend an act entitled "An act to regulate commerce," approved February 4, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission—

Mr. ELKINS said:

Mr. PRESIDENT: I desire to approach the consideration and discussion of this most important subject in a spirit of fairness and impartiality, with a sincere purpose to do justice to all interests concerned, and above all to secure to the people a prompt and adequate remedy for the evils, injustices, abuses, and wrongs of every kind practiced by railroads, or in any way growing out of their operation.

I stand first for the interests of the people of my own State, which I am proud to represent in part on this floor, and after that for the interests of all the people of the United States. I have no interest that can affect my judgment or prevent me doing my duty as a Senator as I see it. My desire and highest purpose is to secure and serve the public interest.

Because of my supposed interest in railroads, it is charged and believed that I favor the railroad side of this question. This has been so often repeated that I am sure it will be pardonable if I say, in justice to myself, that my interest on the side of the shipper is ten times greater than on the side of the railroads, and that my interest in railroads is confined to those in my own State.

There is a pressing demand by the people for rate legislation that the highways of commerce be kept open on equal terms and alike to all, and that all wrongs and abuses on the part of railroads should stop.

The bill now under consideration, known as the Hepburn bill, reached the Senate in the form that it was reported to the House by the House Committee on Interstate and Foreign Commerce. No amendments were allowed in the House and none were allowed in the Senate Committee on Interstate Commerce, although there were many submitted to the committee by its members.

The duty now devolves upon the Senate to say whether there shall be amendments to the bill, and to what extent. It is the opinion of many Senators who have given the subject careful consideration that the bill should be amended and in a way that will remove doubts as to its constitutionality and make its provisions clearer and stronger in the direction of affording remedies for existing abuses. I favor heartily the objects and purposes of the bill and I will vote for it, but I want to make it better and stronger.

My chief objection to the bill is that it does not go far enough. It makes no attempt to provide remedies for many existing abuses by railroads. If the bill becomes a law without amendment it will disappoint the people, and they will justly cry out against Congress for not doing its duty, especially against those now most vehement in their denunciation of railroads and their unjust practices, and still refuse to put anything in the bill to correct them.

I believe in rate regulation of interstate commerce by Congress in the interest of the people. I believe Congress has the power to fix rates of interstate carriers, and can authorize, under proper restrictions, a subordinate tribunal to carry out its will in this regard.

I believe in the right of review by the courts of any order of the Interstate Commerce Commission affecting the rights and interests of carriers, shippers, and localities alike, and in the right to suspend the order of the Commission by the court upon a proper showing; but this suspension to be allowed only upon the condition that the rights and interests of the shipper shall be absolutely safeguarded by requiring a deposit of money in the court pending the suspension, to be paid to the shipper in case the court sustains the order of the Commission reducing

the rate. Railway corporations are mere creatures of the law and exist by the will and consent of the people and in the interest of the people; I believe interstate carriers should be prohibited from transacting any other business than carrying freight and passengers and from doing any business in competition with shippers; that they should make a fair distribution of cars, put in upon reasonable terms necessary switches and sidings to accommodate the needs of shippers, and promptly make connections and fair and just prorating arrangements with branch and lateral lines. The time has come when the people demand that railroads shall be law-abiding.

I am in hearty accord with the President in his position on the subject of rate regulation and his desire to secure to the people correction of all abuses by railroads.

And in his message to the present Congress he says:

> Above all else, we must strive to keep the highways of commerce open to all on equal terms.
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> In my judgment the most important legislative act now needed as regards the regulation of corporations is the act to confer on the Interstate Commerce Commission the power to revise rates and regulations, the revised rate to at once go into effect, and to stay in effect unless and until the court of review reverses it.

And in his message to the present Congress he says:

> In my judgment the most important provision which such law should contain is that conferring upon some competent administrative body the power to decide, upon the case being brought before it, whether a given rate prescribed by a railroad is reasonable and just, and if it is found to be unreasonable and unjust then, after full investigation of the complaint, to prescribe the limit of rate beyond which it shall not be lawful to go—the maximum reasonable rate, as it is commonly called—this decision to go into effect within a reasonable time and to obtain from thence onward, subject to review by the courts.

No words could be more forceful, clearer, or more direct than those used by the Chief Executive just quoted.

SUBSTITUTE BILL.

After giving the subject my best thought, I prepared a bill embodying, as I think, the demands of the people and the ideas of the President on the subject of rate legislation, and have offered this bill (S. 4382), with some changes, as a substitute for the bill now under consideration.

The first four sections of this substitute deal with the rate question.

Briefly, the substitute provides that whenever any rate, fare, charge, or regulation established by any common carrier shall be unjust or unreasonable, or otherwise contrary to law, the Commission, after hearing, shall have power to make an order directing the carrier to modify the same in the manner and extent to be specified therein; and if the modification requires the change of any rate, fare, or charge, the order shall specify the maximum rate to be put in force by the carrier in lieu of that found by the Commission to be unjust, unreasonable, and otherwise contrary to law. It is provided further that—

> The Commission shall not have power to modify any rate, fare, or regulation established by a carrier or carriers to a greater extent than shall be necessary in order to remove the injustice, unreasonableness, or other unlawfulness thereof.

Then follows the clause prescribing a review of the orders of the Commission by the courts, and in case the court suspends such orders during the pendency of the suit to set them aside it shall do so only upon the condition that the carrier deposit in court such sum of money as may be necessary to protect the shipper and to be paid to him in case the order of the Commission changing the rate is sustained.

The remedy afforded in the first three sections of this substitute embodies clearly, definitely, and logically the ideas of the President and the demands of the people, as I understand them, and in a way that escapes all constitutional objections. It provides, in a constitutional way, for a review by the courts on behalf of any shipper, carrier, or locality affected, of the orders of the Commission and for a suspension of the same pending the suit for review.

The alternate remedy provided in the fourth section, which the Commission can pursue or not in its discretion, has the merit of expedition, does away with the delay incident to a long hearing before the Commission, taking sometimes more than a year. This time is saved to the shipper. Under this section the Commission at the cost of the United States can go immediately to the courts on complaint or on its own motion and institute a suit to enjoin any excessive or unlawful rate or unjust practice on the part of the carrier, the case can be advanced. If the court decides the rate is excessive and enjoins the carrier

from charging the same it then orders the carrier within a short time to make a substitute rate, the same to be approved by the Commission, and if the carrier refuses or fails to make such substitute rate, then the Commission is authorized to make the rate, unless upon review by the courts the order should be set aside or modified.

The carrier, with all the facts before him and the decision of the court to instruct him, would hardly fail to make a proper rate and one that would be approved by the Commission. If he should fail to do so, then the Commission makes the rate.

No constitutional question can be raised under this substitute; there are no doubtful provisions that make it difficult to understand and construe. It provides remedies for existing abuses and evils that should be corrected and about which there are just complaints.

It will be observed that the Commission is not authorized under the substitute to fix the rate for the future because this power belongs to Congress and can not be delegated; but it is authorized to modify the rate made by the carrier to the extent and so far as may be necessary to remove the injustice, unreasonableness, or unlawfulness thereof and no further. Whether the Commission does this or not becomes a judicial question.

OMISSIONS OF PROVISIONS IN THE HEPBURN BILL TO CORRECT ABUSES.

I desire now to bring to the attention of the Senate what I consider omissions of necessary provisions in the Hepburn bill, and discuss the same from a practical and legal standpoint.

The main purpose of the Hepburn bill, among other things, is to provide a more efficient remedy against excessive rates in which all agree. I regret to say, however, that there are evils, injustices, and abuses by railroads for which the bill does not even attempt to provide a remedy. It makes no provision:

First. To prevent interstate carriers producing, mining, and selling coal, iron ore, and other products which they transport in competition with shippers, thereby oppressing and driving out of business the independent operator and absorbing his business.

Second. To oblige interstate carriers, on application of shippers of interstate commerce, to put in when needed, upon rea-

sonable terms, switches to enable such shippers to get their products to market. There are instances where shippers have spent hundreds of thousands of dollars in equipping mines and mills to do business, and railroads have denied them switches and connections.

Third. To compel interstate roads to make prompt and suitable connections with connecting branch and lateral lines, as well as just, fair, and reasonable prorating arrangements with the same and allowances for originating freight.

Fourth. To require interstate carriers to make a fair and just distribution of cars among shippers on their lines.

These four omissions and, I may say, abuses on the part of the railroad have aroused public sentiment almost to an alarming degree in West Virginia, and the chief objection of her people to the bill is that no remedy whatever is prescribed in the bill to correct all or any one of these abuses.

Mr. TILLMAN. Mr. President——

The VICE-PRESIDENT. Does the Senator from West Virginia yield to the Senator from South Carolina?

Mr. ELKINS. Certainly.

Mr. TILLMAN. It is three or four years, I think, since the Senator brought in a bill from the Interstate Commerce Committee, of which he is chairman, which was declared at the time and supposed to be for the purpose of remedying all evils attending the railroad situation. Did the Senator know then that these abuses of which he speaks and which are now so glaring were in existence? If not, how long since has this condition of coal monopoly and coal production been in existence in West Virginia?

Mr. ELKINS. Mr. President, some of them were known, but they were not so accentuated as they are now; besides, the bill the Senator refers to was more particularly aimed at correcting rebates and discriminations.

The people are entitled to protection against these abuses, which exist generally and work so much injustice to shippers and independent operators, especially in the State of West Virginia. And I will say, by the way, that there is no argument in the Senator's question. Because evils and abuses exist and

have not been corrected heretofore furnishes no reason why they should not be corrected now. If the Senator goes much farther, Mr. President, I shall think he is on the side of the railroads.

Mr. TILLMAN. Mr. President, if the Senator will pardon me——

Mr. ELKINS. I must proceed. I have a long speech, and I am sure the Senator wants to hear it.

The VICE-PRESIDENT. The Senator from West Virginia declines to yield.

Mr. TILLMAN. I hope the Senator will not throw a rock and cut me off from the opportunity of even catching it.

Mr. ELKINS. Later on I will give the Senator ample opportunity to put his question.

The people demand absolute protection against excessive rates, but there is little complaint on this score. What they complain of most and what they desire Congress to do is to provide adequate remedies for the correction of abuses I have mentioned and others that might be named.

As to all these abuses the bill is silent. It may be said that the States should legislate to correct these evils. In the State of West Virginia, and nearly all the States, there has been legislation on these subjects, but for many reasons the law is not invoked. In the first place, a shipper, single handed and alone, can not afford to sue a great interstate railroad; in doing so he is bound to incur large expense, great delay, and is sure to incur the hostility of the great through line, which may work irreparable injury to his interests.

I have introduced amendments covering these omissions in the bill and sincerely hope they will be adopted by the Senate. Nothing short of their adoption and becoming law will satisfy the shippers, independent operators, and the people generally of my State.

Mr. PATTERSON. Mr. President——

The VICE-PRESIDENT. Does the Senator from West Virginia yield to the Senator from Colorado?

Mr. PATTERSON. I hope I will not interrupt the flow of the Senator's thought, but——

Mr. ELKINS. I yield to the Senator.

Mr. PATTERSON. I think I will bring out the Senator's position even more clearly than the Senator has brought it out by the question I put. Is it the opinion of the Senator that to regulate the evils the country is laboring under from railroad practices the bill reported from the committee is not nearly drastic enough for the Senator?

Mr. ELKINS. Is that your question?

Mr. PATTERSON. Does the Senator want a more far-reaching and more comprehensive bill, so as to eliminate more of the evils than are reached in that measure?

Mr. ELKINS. In reply to the Senator I will state that I do. I have said that the bill, though containing many excellent provisions, does not go far enough; that as to these omissions and abuses I have named it is silent and does not attempt to provide any remedy whatever.

Mr. PATTERSON. I will suggest that I do not believe the Senate is giving very close attention to that part of the Senator's speech. I was attracted by it, and I should like the Senator to repeat in what respect, in his opinion, the measure now before the Senate is not drastic enough and what evils it does not reach.

Mr. ELKINS. I have just named four omissions in the bill: First, the interstate railroads do not put in switches and sidings upon a reasonable request from the shippers to enable them to do their business; secondly, they do not make connections with branch or lateral lines and prorating arrangements, so that the branch line can live and shippers on those lines ship their products to market. They do not provide a fair distribution of cars. There is no provision in the bill to correct these abuses. Another thing is that there is nothing in this bill to prohibit a railroad from owning, mining, and selling coal in opposition to shippers.

Mr. BEVERIDGE. If the Senator will permit me, does he have an amendment which will compel the proper distribution of cars?

Mr. ELKINS. I have amendments covering all these points.

Mr. FORAKER. Mr. President——

The VICE-PRESIDENT. Does the Senator from West Virginia yield to the Senator from Ohio?

Mr. ELKINS. Certainly.

Mr. FORAKER. If the Senator will permit me, I will say for the benefit of the Senator from Indiana that the Supreme Court has recently decided that there is power under the so-called "Elkins law" to enforce a distribution of cars among operators that will be fair and just. Suit was brought in the State of the Senator from West Virginia for a mandamus to compel the furnishing of cars on a just basis to operators who were complaining that they could not get a just distribution of cars, and the relief was granted.

Mr. SPOONER. The proceeding for mandamus was authorized by existing law.

Mr. FORAKER. By existing law, and so far as the distribution of cars is concerned there is legislation on the statute books now that is efficient to correct that evil, as in the past it has been an evil; but for a number of years past there has been no occasion for anybody to suffer in that way who saw fit to resort to the courts for redress.

Mr. ELKINS. The Senator from Ohio is slightly mistaken.

Now, let me answer the Senator from Ohio. The Supreme Court, I do not think, has decided that question, but the circuit court of the United States, Judge Goff rendering the opinion, and the circuit court of appeals has done so.

Mr. FORAKER. It was decided in the circuit court and also in the circuit court of appeals, with the Chief Justice of the Supreme Court as the presiding judge in the court of appeals.

Mr. ELKINS. But that is not the Supreme Court of the United States.

Mr. FORAKER. I was in error in that respect; I was confusing that case with the recent Chesapeake and Ohio case, but it is now pending in the Supreme Court, and I do not think, in view of the two decisions below, that the decision is likely to be reversed.

Mr. ELKINS. This decision was rendered in West Virginia, and in the circuit court of appeals, and the court found power enough in what is known as the Elkins law to compel a fair

distribution of cars by preventing discrimination which would work an unfair distribution of cars. That is the only case that has arisen under that law as yet, but there is no mention of distribution of cars nor anything like it in the Hepburn bill. That is the point I want to make.

Mr. BEVERIDGE. I should like to ask the Senator whether he thinks that existing law or any that could be devised could compel what the shipper himself would think to be a proper distribution of cars?

Mr. ELKINS. In the opinion of the shipper, I do not think Congress could so frame a law that compliance with it would satisfy every shipper. Shippers can hardly ever get enough cars, especially when there is a demand for coal and coke. If shippers could get all the cars they wanted, then the market would soon be glutted—the supply would become greater than the demand and the price of coal go down—perhaps it would not be a good thing to give all the shippers all the cars they might want all the time. The railroads could not do it; they don't have enough cars to go around, and if they did the market would be congested and prices fall, but there should be no discrimination in the distribution of cars.

Mr. TILLMAN. I should like to ask the Senator from West Virginia, or the Senator from Ohio, or the Senator from Wisconsin——

Mr. ELKINS. Will the Senator allow me to answer the question, as I have the floor?

Mr. TILLMAN. All right. I wish to ask anyone who is able to answer, how long it will take by this method of procedure in the courts to get relief on the question of the distribution of cars by a mandamus proceeding after a hearing before the district court or the circuit court and then before the court of appeals, and then on to the Supreme Court? I just want to know what time it will occupy. I think the Senator from West Virginia is entirely correct in saying there is nothing in the Hepburn bill which will reach this abuse.

Mr. ELKINS. There is nothing in the Hepburn bill. Under existing law the right to advance a case is given and it would

not take so long. In the case that came up from West Virginia it was a very short suit, and it reached the circuit court of appeals in due season, and the railroads were satisfied with the judgment of the court in its decree as to the distribution of cars.

Now, to reply more definitely to the Senator from Indiana, as I said, it is a very difficult thing to provide in the bill for a fair distribution of cars. We can have the wording that upon a reasonable request or upon request the carriers shall furnish cars and distribute them fairly and justly among shippers. Then there is a provision in the Hepburn bill that makes it an offense not to carry out any of the provisions of the act. That leaves it to the Commission to say what is a fair distribution of cars. I do not think that you can probably go any further than that. The Senator from South Carolina [Mr. TILLMAN] asks how long it will take. We ought to have a remedy even if it does take a long time. Is not that better than not to have any remedy at all. As his bill fails to provide any remedy whatever I do no know what he is complaining about. He does not want any law or he objects to a law that allows a long time. Now, if the Senator from South Carolina stands by his bill, then he does not want any law.

Mr TILLMAN. This is the Hepburn bill. I am only in charge of it. It is not my bill. I do not want you to try to put any paternity of that sort upon me.

Mr. ELKINS. You have its paternity fastened on you, whether you consent or not.

Mr. TILLMAN. I am not speaking of any disgrace that attaches at all, because there is some effort to do something for the people. I repudiate any assumption that there is any disgrace in trying to help to get a reasonable railroad-rate bill. But I want to ask the Senator whether he does not consider that if we could by some machinery of the courts or the law prevent railroads from engaging in producing coal and other things, would there be any row or any complaint about not furnishing cars? If the carrier was confined to the business of transportation, would he not be anxious to furnish all the cars that anybody would load for him, because that would be his occupation and his income would depend upon the amount of traffic?

Mr. ELKINS. I will reply to the Senator that I have another amendment here meeting this very point in order to facilitate and to help out the people that he seems always to have in his particular keeping. The Senator takes the dear people out of his vest pocket every morning and puts them down on his desk and says, "Dear things, I will have charge of you and not allow the bad corporations and railroads to get you this day of our Lord." Then he puts the dear people back in his pocket, to be securely kept over night, and says, "Now, I have done my duty." Nobody looks after the people.

Now, Mr. President, I am trying to look after the people just as much as the Senator. I have just as much interest in them and love them just as much as he does, and so does every other Senator on this floor. I am trying in what I have to say to suggest means in his bill to guard and protect the rights of the people, and I want his able cooperation to provide proper remedies. One of my amendments goes right to that point, that the carrier shall be confined to doing the business for which it is incorporated, namely, to transport freight and passengers and do no other business, and, as the Senator has said, that would be very helpful in the line of securing a fair distribution of cars.

Mr. TILLMAN. The Senator has grown facetious at my expense. He talks about my taking the dear people out of my vest pocket every morning and then saying to the dear people, "I am going to take care of you," and all that kind of thing. I hope the Senator is not disgruntled because the dear people who voted for him, under a misconception possibly, have been sending me petitions which they would not send to him.

Mr. ELKINS. There is no argument in the world in that. The Senator can have all the petitions and all the letters he wants to print in the RECORD, if that pleases him, but I protest against the Senator constantly assuming that he has a monopoly of caring for the people's interests all the time, everywhere, and on every occasion, and no other Senator has any interest in the people, declaring often, in substance, "I am the blunt, plain, rugged, and honest Senator, and take care of the people." Now, every Senator wants a reasonable share in taking care of the

public interests and the interests of the people, and I hope the Senator will not forget in his zeal that other Senators care for the people quite as much as he does.

Mr. TILLMAN. Mr. President——

Mr. ELKINS. Mr. President, I think I have given the Senator enough time.

Mr. TILLMAN. If you want to shut me off——

Mr. ELKINS. It will take me some time to finish, even without further interruptions.

The Supreme Court of the United States has recently intimated that an interstate carrier could not engage in the business of selling coal. This decision would seem to cover one of my amendments, yet I feel it would be well to incorporate this amendment in the law, and hereafter plainly prohibit railroads from engaging in any other business than that of transportation of freight and passengers to follow the suggestions of the Supreme Court.

The most important amendment is the one providing that interstate lines shall make prompt connections with connecting branch or lateral lines, and fair, just, and reasonable prorating arrangements with them. It can hardly be hoped that another trunk line will be built to New York, Boston, Philadelphia, or Baltimore. Entrance into these cities by another trunk line is almost impossible. The cost and obstacles to be overcome make it prohibitory. In a less degree the same might be said of the great cities of the Union, especially Chicago, St. Louis, San Francisco, and Cincinnati. The people must, therefore, in the future depend largely for the further development of the country and continued increase in business upon short lines of railroad reaching rich sections. This is especially the case in the great State of West Virginia, one of the richest in the Union.

Unless the interstate railroads, reaching all the large cities and markets, make fair connecting and prorating arrangements with branch and lateral lines, the business and development of the country must be retarded. These great railroads already have immediately along their lines all the business they can do at present, and they hold that no one else should build necessary branch and lateral lines in what

they term their territory. That is the assumption of these great lines, that it is "their territory," and if anyone attempts to build a branch or lateral line it is an invasion of this territory. There are many men who can build 10, 20, 50, or 100 miles of railroad to connect with interstate lines who could not possibly build a trunk line.

In the State of West Virginia and other States there are many men who have made large investments in agricultural, coal, timber, iron-ore, and other lands who are able and desirous of building short lines from 10 to 100 miles long to reach these lands and find a market for their products, but they will not build them under present conditions because of the difficulties in the way of getting switches and connections with the interstate lines, and, when they do get them, securing fair treatment. Men can not afford to take this risk without the law guarantees them protection, and the people look to Congress to provide this protection in the bill under consideration.

As matters now stand it is in the power of the great through lines to largely prevent the building of branch or lateral lines or to utterly crush them out when built or make them unprofitable. If there is not a provision in this bill compelling connections and fair treatment to short lines, the certain result will be that people who have made investments in lands will lose their money, fewer railroads will be built, and there will be less business and less development of the resources of the country.

Railways are entitled to all the protection under the law that other property enjoys. No well-minded citizen wishes to make war on railroads; an injury to the railroads would be an injury to the country; but the great lines should not be permitted to absorb the transportation of the country, prevent smaller lines being built, impair large investments, and compel rich sections of the country to remain undeveloped.

HEPBURN BILL EMPOWERS COMMISSION TO FIX RATES BETWEEN LOCALITIES.

All agree that the power to fix rates between localities should not be conferred on the Commission for many and obvious reasons. I refer to this because there is a marked difference of opinion among Senators on this point. It is claimed

by the able Senators who helped to formulate and draft this bill that this power is not conferred, and that it would be dangerous if conferred. My purpose is to show that it is conferred, and I agree that it is dangerous. It would place in the hands of five or seven men the power to impair the growth of one section of the country and build up another. Railroads are vitally interested in building up communities and localities which they reach and serve; their interests are mutual and there should be no antagonism between them. All things being equal, carriers are prosperous just as communities on their lines flourish. A railroad can not prosper by oppressing localities on its line; therefore railroads can better adjust rate differences between communities on different lines than a Commission, they can give and take in a contest about rates; there is an elasticity in the operation of railroads by their officers and employees that the Commission does not and can not possess. If a railroad attempts to favor a particular city or locality on one line against a city or locality on the other line, the power railroads have of lowering or advancing rates can compel consideration and attention to the complaints of the injured community and in the end it can get a fair adjustment, and generally does. Railroad rates, like water, seek a level, an equilibrium, which in the end, sooner or later, brings substantial justice and satisfaction to the public.

The differentials that now exist on the Atlantic seaboard are the result of a contest of a quarter of a century, largely between communities, and at times, railroads. A commission never could reach the result worked out by railroads, because it only has the power to reduce rates, and in dealing with differentials in order to get an adjustment it has to cut down and never can advance the rate. If it lowers the rate from Chicago to New York, then it must do the same to Philadelphia and Baltimore.

Differentials concern communities more than they do railroads, and communities, through their boards of trade, chambers of commerce, and commercial organizations, take an active interest whenever there is a proposed change in rates. In the

case of differentials between New York, Boston, Philadelphia, and Baltimore submitted to the Interstate Commerce Commission as arbitrators and lately decided, the railroads were almost passive, while the boards of trade and chambers of commerce of the respective cities conducted the arguments. They seemed much more interested than the railroads. It is a remarkable fact that after the hearing and consideration of this case for months by the Commission there was no substantial change in the adjustment of the differentials made by the railroads.

The power conferred upon the Commission by the bill that whenever it finds any regulation or practice whatsoever of such carrier or carriers affecting rates unjust or unreasonable, or unjustly discriminatory, it is to determine and prescribe what will, in its judgment, be a "just and reasonable rate or rates, charge or charges," to be thereafter observed, and what regulation or practice is just, fair, and reasonable to be thereafter followed, unquestionably it gives the power to the Commission to fix and determine rates between localities. Under the words "regulation or practice" the Commission might determine largely how railroads should be run and operated.

While it is claimed that the Hepburn bill does not give the Commission discretionary power to revise or prescribe differentials or to readjust the relative commercial location of competing cities, it is very clear that the bill does confer such power. But more than this the bill, as well as all others, necessarily vests in the Commission the power to prescribe rates in terms of other rates, thus prescribing differentials which will be automatic in their operation.

For example, the rate from New York to Chicago on first-class freight is 75 cents per 100 pounds. On first-class freight the rate from New York to St. Louis is 116 per cent of the New York-Chicago rate.

Allow me to explain just here that the New York-Chicago rate is made the basis of the rates this side of the Mississippi River, and the rates to the various cities are percentages above and below the New York-Chicago rate. For instance, East St. Louis is 116 per cent. Then it takes 2 cents per hundred pounds on first-class freight to get across the bridge and into the

city. To Cincinnati it is 85 cents; in Detroit, 60 cents, and in Pittsburg, 50 cents—I mean of the New York-Chicago rate—and the Pittsburg rates govern all the points in my State west of the mountains. If the Commission lowers the percentage of the New York-Chicago rate to Cincinnati, say, 9 per cent, that would absolutely affect the rates between Chicago and Cincinnati and New York and Cincinnati, and it can not be avoided.

Suppose a man has an iron or steel plant in Cincinnati and ships to New York. The very moment you lower that rate 9 per cent, I mean of the Chicago-New York rate, the Detroit man, who has a similar factory, complains and says: "I can not get to New York on my rate and compete; I established my factory here on a certain percentage rate. I built my plant on this rate, and I can not permit this, because I can not compete, and I must have a lower rate or go out of business." Now, what does this bring about? It brings about the very thing deprecated by the junior Senator from Iowa [Mr. DOLLIVER] in his very eloquent periods describing the antagonism and war between cities and localities that would follow if the Commission should have the power to fix rates between localities. I could amplify this. The Peoria rate is the Missouri River rate; and see what a far-reaching thing it is to disturb that rate. The Ohio River and the Missouri River rates include nearly all the rates in the Middle West and upon the Atlantic seaboard, or they are affected by any change that may be made.

But, Mr. President, to proceed with the St. Louis differential, where I was interrupted.

The 16 per cent constitutes the differential of St. Louis over Chicago. It is open to jobbers in St. Louis to complain that this differential is unduly prejudicial to St. Louis. Under the Hepburn bill it is in the power of the Commission, if it finds the rate to St. Louis unduly prejudicial as compared with the rate to Chicago, to prescribe a maximum rate to St. Louis. It is not necessary for the Commission to prescribe this rate in figures independent of other rates. One of the most usual ways in determining rates is to describe them in terms of percentage of other rates; therefore the Commission, if it agrees with the St. Louis jobbers, can provide that the maximum rate from New

York to St. Louis shall be not more than 105 per cent of the rate from New York to Chicago. Any subsequent reduction in the rate from New York to Chicago will automatically reduce the rate from New York to St. Louis, so as to preserve the new differential of 5 per cent thus established by the Commission.

You see, if you change the New York-Chicago rate to 70 cents, the East St. Louis rate would still be 105 per cent of that rate.

Mr. ALLISON. Mr. President, I desire to interrupt the Senator to ask him a question on that point.

The VICE-PRESIDENT. Does the Senator from West Virginia yield to the Senator from Iowa?

Mr. ELKINS. Certainly.

Mr. ALLISON. Do I understand that the Hepburn bill, or the amendments to that bill, change existing law on that subject? Is it not true now under existing law that that question can be raised, if it can be raised, under this bill? I have endeavored to ascertain what changes have been made in the pending bill in that respect, but I do not find that the law on that subject is changed in any way by this proposed amendment of the statutes. In other words, if this bill authorizes the Commission to deal with these questions they have that authority now, and this bill does not change it.

Mr. ELKINS. I think the Senator has misapprehended the law, if I understand it. Of course I say this with due deference to the Senator. This question was raised in the maximum rate case, and the court would not allow the Commission to do that very thing—I mean fix the rates between localities—and under this bill, without a right to review, and the right expressly given to change any rule or regulation affecting rates, the power, to my mind, is clearly conferred on the Commission to fix rates between localities.

The maximum rate case stopped the change of ninety-six rates, I believe it was, because the court decided the power was not in the Commission to enforce its orders and make these rates; but if the right of review is not allowed the courts, then the Commission can fix them.

I think the Senator will find, on a more careful examination of the bill, that the existing law will be changed to that extent. At least, that is the way I understand it.

If the power to prescribe practices is constitutional, then, in all probability, that power would in itself give the Commission far-reaching power over the question of differentials and relative rates. An established custom of the railroads to allow Philadelphia a differential of 2 cents under New York on business from Chicago is, in one entirely natural sense, a "practice affecting rates."

There is where this power is again conferred. The Commission might, therefore, claim with success that it could prescribe a new "practice affecting rates" by ordering a new differential to be observed. I think that is a full answer. This undoubtedly confers on the Commission the power to determine and fix the rates between localities. Then, again, the bill confers power on the Commission to fix rates between localities by further providing that the Commission may inquire into the violation of any of the provisions of this act.

That is section 3 of the old act. If this bill should become a law, then it will be all one law. Now, let us see what section 3 says:

> 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.

Here the power is expressly given to set aside any preference or advantage given to any locality, and fix the rates to such locality, and while the bill attempts but fails to give the carrier the right of review by the courts it denies it to the shipper and localities. There should be a definite provision in the bill denying the power to a Commission to fix rates between localities on different lines and the right given any shipper or locality that may be affected by any order of the Commission to a review by the courts.

Mr. GALLINGER. Is the Senator just quoting from the law?

Mr. ELKINS. Those are my words. I have read section 3. I think those two provisions clearly establish the right under this law to fix rates between localities. I believe even the framers of the bill themselves deprecate this; and all agree that we can not confer upon any tribunal in the world this right,

because, if we did, what would happen? Very soon there would be trouble between cities, then communities, and then between sections—the very thing all seem to wish to avoid. We are in great danger if this power is conferred of getting, say, the Pacific coast and the South Atlantic States into antagonism and trouble of a most serious kind. This is a most delicate matter. You touch one of these determining rates and everything is instantly in confusion. If you disturb the cotton rate from New England, you affect the cotton rate from the South, and I might go on with all the rates from basing points.

Mr. TILLMAN. I am not through at all. I am just beginning to present the question.

Mr. ELKINS. I don't want so many speeches made in my speech. I will answer questions, and I want to oblige all Senators, but I can not yield to Senators to make speeches.

Mr. TILLMAN. But the Senator was sitting down until I got up. Why does he not sit down again?

* * * * * * *

Mr. ELKINS. I do not want the Senator to feel hurt.

Mr. TILLMAN. I must feel that you have not treated me with the same courtesy that you have treated others; but I will get even with you. The Senator had better take care; I will get even with him. [Laughter.]

Mr. ELKINS. The Senator always gets even, but I am ready to meet the Senator on getting even in this debate or any other debate. But I did try to be just as courteous to him as to others, and I sent a page to him to tell him to get in, because I saw he was getting very restless.

Mr. TILLMAN. And as soon as I get in you jerk me off my feet.

Mr. ELKINS. But the trouble with you is you want to make a speech every five minutes while I am speaking. [Laughter.]

THROUGH ROUTES AND THROUGH RATES.

Through routes and through rates are desirable and would furnish shippers and producers wider markets for their products, and I wish the bill provided, in a way free from objections, for establishing through routes and rates. Shippers often on one

line of railroad can not reach points or markets on other lines because there are no through routes and rates established.

If a shipper on one line of railroad finds a market at some point on connecting lines and there is no through route established or rate made to that point, while the connecting line or lines could not refuse to haul his products, they could charge such a rate that would make it impossible to ship as against the shipper on another line who has a through rate to the same point, and therefore he would be excluded from the market.

If a shipper on the Baltimore and Ohio wants to reach a point on the Reading, Pennsylvania, New York Central, or Lehigh Valley, and there is no through route or rate, he is excluded from any point on those lines unless he pays local rates, which would be prohibitive. The bill attempts to afford a remedy by giving the Commission the power to establish through routes and rates, but is so drawn that I fear it defeats the purpose desired.

State laws authorize an intrastate road to make certain charges for transporting freight and passengers. Can this intrastate road, entirely under State jurisdiction, be made a part of a through route and be forced into an arrangement with three or four other roads, whereby it gives up the right to name its local rate, and haul through freight at a rate named by the Commission which it does not agree is profitable or remunerative?

Suppose the carriers refuse to establish a through route from New York to points in Arkansas, Texas, or California, and upon complaint the Commission establishes one and names the rate; and suppose when freight is offered to the Pennsylvania Railroad in New York, being the initial road in the through route named, it says that with the business it has in hand it can not undertake to transport this freight to points in Arkansas, Texas, or California, for the reason that the business demands upon the road in the States of New Jersey and Pennsylvania, where it was incorporated, and other States where its lines reach, are greater than it can do, and if its cars are sent to these distant points it will be compelled to refuse freight offered on its home

lines and subject its charter to forfeiture by a proceeding on the part of the State. Then, again, some of the connecting lines, especially the intrastate lines, might not have the motive power to haul this traffic. Under these circumstances can Congress compel the initial line to furnish the cars and connecting lines the motive power on this through route?

It is difficult to see how one carrier can virtually be given the use of the road and equipment of another carrier without the consent of that carrier and without any judicial determination as to the just compensation to which that carrier is entitled. No tribunal but a court can decide what is just compensation. The terms and conditions under which through routes are operated are essentially matters of contract involving a great many different and difficult details, among them what schedules shall be maintained, what proportion of the equipment each company shall furnish.

SUSPENSION OF ORDER PENDING SUIT FROM A PRACTICAL STANDPOINT.

If the right to suspend the order of the Commission in the discretion of the court should be denied, this might work serious results from a practical standpoint. Should the Commission find the rate named by the carrier excessive and reduce it, and the reduced rate goes into effect at once and remains until the final hearing and determination of the action to set it aside in the circuit court, then this new rate, pending the litigation, would have to be published as all other rates, and if the rate reduced affects other rates—and it may affect hundreds of other rates—then all of these rates would have to be reduced, go into effect, and likewise be published.

If the court should hold that the carrier was right and the rate it made in the first instance was not excessive, then the reduced rate and all other rates changed would be restored.

The price of products would have to be advanced or reduced accordingly as the changes might take place in the rates. It takes time for merchants, shippers, and communities to accommodate their business to changed rates, because changes in rates bring about changes in prices. In any event, from a practical standpoint, there should be as few changes in rates as possible. But if the order made by the Commission naming a

substitute rate should be suspended pending a suit, this should be done only upon the condition that a deposit in money is made in court by the carrier sufficient to pay back to the shipper the difference between the rate made by the carrier and the one made by the Commission and suspended by the court. In this way the shipper would be absolutely protected without being required to sue the carrier for the difference he may have paid. For my part I would prefer, if it could be done, that the substituted rate made by the Commission go into effect within a reasonable time and remain in force until the determination of any suit to set it aside; but able lawyers say that the courts have the right upon proper showing to grant interlocutory injunctions, and this right can not be taken from the courts.

DIVIDED RESPONSIBILITY.

If there should be no review by the courts of the orders of the Commission then the rates fixed by the Commission will be final unless its order violates some provision of the Constitution. This leads to a divided responsibility between the railroads and the Government in the management of the railroads. The Commission in effect acting for Congress would do the most important thing connected with the management of a railroad, to wit, fix the price of transportation, the only thing a railroad has to sell. Divided responsibility in business is most always attended with failure, and with the Government is almost sure to be, and this happening, the next move would be to try to secure government ownership of railroads. It may then come about, as it often does in the business, social, and political world, that extremes meet for a common purpose. Those favoring government ownership would join the owners of railroads in imploring Congress to take over the railroads, even at a fair price. Under certain conditions, government ownership of railroads would not be opposed by the owners of railroads as much as by a majority of the thoughtful people of the country.

There is a wide difference between government regulation to prevent excessive rates and correct abuses, and government management of railroads. The power is conferred on the Commission in section 15 of the bill to prescribe what "regulation or

practice affecting rates" is just and reasonable, and to establish through routes and rates and prescribe the division of the same, and the "terms and conditions under which such through routes shall be operated." Just what the words "regulation or practice affecting rates and terms and conditions under which through routes shall be operated" means no one knows, and will not until the courts consider them.

One thing is certain, they mean more than regulating commerce and fixing rates, and seem to go far in the direction of management by the Commission. Operating a route is not clear; operating a railroad is quite clear. The words must apply to railroads and mean the terms and conditions upon which railroads making up the through routes shall be operated. If so, this would be government management, in which the railroads would have little or no part.

The true limit of government regulation should be to secure by proper laws ample protection to the public interests—protection to the shippers and the people against excessive rates and all abuses, wrongs, injustices, and discriminations by railroads. The first and longest step toward government ownership would be government management of railroads. In trying to properly regulate rates we should be careful not to confer power on the Commission, even by implication, to manage railroads.

If we should find the Commission had power even to in part manage railroads, this would not last long. The railroads, in my judgment, would prefer government ownership.

I submit to the Senate that when you confer the power to prescribe the terms and conditions upon which routes shall be operated, you are going a long way. "Routes" means nothing if it don't mean railroads.

Mr. SPOONER. Would it not be subject to judicial review?

Mr. ELKINS. If the power is given to be exercised by the Commission, then the order would be subject to review, unless the orders of the Commission are made final. I do not see how it would be interpreted otherwise. I am strongly in favor of widening markets by allowing shippers to get to all markets alike, but I do not see how, under the language of this bill, this can be done.

Capital is always timid; if it is fettered or handicapped beyond the point that it deems fair treatment it will take wings and fly away. It will not long share a divided responsibility with the Government. It must be free to manage its investments as it sees fit inside the law. If the owners of railroads find they are denied the rights granted other litigants in the courts and can not have the protection of the courts in the management of their property, they may not only consent but seek Government ownership, in order to invest their capital in some branch of business the Government does not undertake in part to control.

REDUCTION OF RATES.

In the United States we have the lowest rate, the highest wages, and the best railroad service in the world. During the last thirty years rates have been reduced from 2 cents per ton per mile to about seven and one-half mills per ton per mile. On some railroads last year the average rate per ton per mile was as low as 6 mills and a fraction per ton per mile. How much further this reduction in the aggregate can go is difficult to tell—possibly if the grades and curves are improved, better equipment and better motive power provided, the average rate might be reduced to half a cent per ton per mile and yet afford a fair return to the carrier, but surely the rate can not go much lower.

When the Windom Commission made its report—and that is within the memory of the senior Senator from Iowa [Mr. ALLISON] and the senior Senator from Rhode Island [Mr. ALDRICH] and many other Senators—the great question was whether the rate could ever get lower than á cent a ton a mile. Now we have about 6 mills a ton a mile on the average and lower still on some railroads. It has been pushed down to that point, but I do not know how much further it can go; I do not think beyond 5 mills per ton per mile. Already we are so near the dividing line that the reduction of a mill or two per ton per mile may mark the difference between profit or loss. It is remarkable what an enormous saving there has been to the people in thirty years in the voluntary reduction of rates by the railroads. Take, for instance, the case of the Great Northern Railroad. A statement prepared by Mr. James J. Hill,

president of the road, shows that on this single road in thirty years the reduction has been over $679,000,000. What a saving to the people.

This reduction applies to all other roads in the country, and the aggregate of the saving to the people from the reduction in rates for the last thirty years reaches figures almost incomprehensible. This saving was not the result of Government regulation, but was due to the voluntary action of the railroads.

Because railroads have constantly reduced rates and developed the country and are the most important factor in our commercial and business expansion furnishes no reason why they should not be subject to proper regulation. With the great benefits and advantages railroads bring to the country there should not follow in their wake evils and abuses that oppress the people.

All property honestly acquired is sacred and entitled to protection under the law, and there ought to be no distinction under the law between different kinds of property, but no class of owners of property should be allowed to do anything against the public interest. The people's rights and the public interests are the first care of the statesmen, and are higher and beyond any special interest or business or all combined. The public weal and public welfare should be the first consideration in all we may do here. There is general unrest among the people all over the world, and more generally than ever in our own country. Just what the outcome of this unrest may be no one can foresee. Many believe that individualism, with its vast benefits, and of late its vast evils to society, has about run its course, and in its stead during the 20th century will come about some form of collectivism which we do not yet understand.

MAKING RAILROAD RATES.

Making and adjusting railroad rates, even by the most experienced traffic managers, is most difficult. Presidents of railroads and boards of directors rarely have anything to say or do about making rates. This intricate and complicated duty is confided to the traffic managers and their subordinates. They must keep their fingers on the commercial and industrial pulse of the

country every moment to know what to do in the matter of adjusting rates; they must confer daily with thousands of business men all over the country and be in touch with every movement of the markets. Generally market conditions and competitive industries determine rates and not traffic managers; they simply respond to these conditions. The Weather Bureau records the weather but does not make it.

Three hundred rate schedules are received daily by the Interstate Commerce Commission; the present annual average is 100,000 schedules. From 1887 to 1904 there were 2,358,960 rate schedules filed in the office of the Interstate Commerce Commission. A rate may be profitable to-day and not profitable to-morrow. Rates reasonable on one line may be unreasonable on another to the same or different points, though the distance be the same. If railroads can have loads both ways for a year or even a month they can make lower rates than if they have loads only one way.

These and many other factors that might be mentioned enter into the making of railroad rates, and make their adjustment complicated, intricate, and difficult. The regulation of rates and the prevention of all sorts of abuses, discriminations, and rebates should be left to the Government—the management of railroads to their owners.

The hearings before the Interstate Commerce Committee show, and all agree, as a general rule the great majority of shippers are satisfied with the rates made by railroads; that rebates and discriminations are growing less, as the present laws are executed and they are being enforced vigorously; but this, as I have said before, is no reason why there should not be the strictest regulation against excessive rates and abuses of every kind, so as to protect the people and minimize evils and abuses. Because people are, as a rule, honest is no reason why there should not be laws against dishonesty, murder, burglary, larceny, embezzlement, etc.

The aim of wise statesmanship should be to so adjust matters by proper legislation that the shipper and producer can make a fair profit on their products, the railroad a fair return for the service rendered, and the consumer get what he buys at a fair price.

I considered some time whether to say "just compensation" or "fair return on capital" instead, as has been suggested by the Senator from Nevada [Mr. NEWLANDS] and the Senator from Texas [Mr. CULBERSON]. But I used the term "fair return for the service rendered" as possibly the best words.

There should be no real antagonism between the shipper, the carrier, and the consumer; their interests should be mutual and not conflicting. Legislators should work to this end and try to promote and safeguard the public interest without feeling, without prejudice, without passion, and without pressure from popular clamor. This would reach the height of genuine statesmanship. For the last eight years I have been a member of the Senate Committee on Interstate Commerce and have had ample opportunity of judging the work of the Commission, which at times has not been fully understood and appreciated. It is needless to say that the Commission is made up of men of fine ability and of the very highest character. They have from the beginning devoted themselves to the important and difficult work in hand with zeal and tireless industry. The Commission has been called upon to treat a most important and difficult subject under new legislation and interpret new laws which had not been passed upon by the courts; they had to trod paths unknown and untried, and the work has at all times been most serious and difficult. The public does not hear or know of the great work of the Commission, by far of the largest part of the work the Commission does. Since its organization it has settled amicably between railroads and shippers nearly three thousand cases without contest, trial, or proceedings in court. In this way a great deal of good has been done and a great many differences reconciled between shippers and railroads under new legislation difficult to interpret and understand. The Commission by law is intrusted with the most difficult and delicate subject in our economic development, and they have met the duties laid upon them with great ability, and an honesty and integrity that has never been assailed.

Mr. President, I now wish to consider some of the legal phases of the rate question.

Mr. FORAKER. If I do not interrupt the Senator, before he takes up this other subject I should like to ask him to tell us why he arrived finally at the conclusion that the proper expression to use in that connection is "a fair return for the service rendered."

Mr. ELKINS. I will say to the Senator, as I tried to explain, that I had some hesitancy about it. I had it "fair return on the capital" at first. Just what words to use gave me some trouble. I finally decided on those I have used, because on the whole I thought "a fair return for the service rendered" covered everything the carrier could justly ask and the words would be fair to the public.

Mr. CULBERSON. Mr. President——

The VICE-PRESIDENT. Does the Senator from West Virginia yield to the Senator from Texas?

Mr. ELKINS. For a question.

Mr. CULBERSON. It is for a question, but the Senator will kindly pardon a sentence or two in explanation of the question. I ask it for the purpose of securing information with respect to the views of the Senator on an important matter with which I am very much concerned—that is, the question which the Senator is discussing as to the rate to be charged by railroad companies.

Under the present law they may charge a just and reasonable rate. Under this bill, which came from the committee of which the Senator is a member, the rate to be fixed by the Commission is to be just and reasonable and fairly remunerative. If the Senator will pardon a further word, the Supreme Court has held that the words "just and reasonable" have relation both to the rights of the public and of the companies, and that the rate must be fixed with reference to the rights of each. Now the committee, or at least the bill—whoever may be responsible for it—adds the words "fairly remunerative," as the measure of the rate which is to be fixed for carrying freight and passengers. I call the attention of the Senator from West Virginia to the definition of "remunerative" in the Standard Dictionary: "Affording, or tending to afford, ample remuneration; giving good or sufficient return; paying; profitable."

Now, what I desire to ask the Senator is this: First, what is the purpose of using the additional words "fairly remunerative," and if, in his judgment, those words do not have the effect of liberalizing the rule rather than of narrowing it or keeping it where it is under the common law and under the decisions of the Supreme Court, and if the words "fairly remunerative" do not have exclusive reference to the interests of the companies? And, lastly, I will ask the Senator if he will join with some of us in striking the words "fairly remunerative" from the bill?

Mr. ELKINS. If the Senator will do me the honor to listen to what I have to say further on, I will try to answer his questions more at length. It is difficult to say what the words "fairly remunerative" mean; whether they lay down a standard by which the courts can determine anything. I fear in the use of these words we get into a wide and unknown sea. I think the words "fairly remunerative" add to the difficulties of the question, as I shall try to show. The words "just and reasonable" furnish a standard by which the Commission is to be guided or to which it must adhere. I will shortly come to the point the Senator from Texas has raised.

LEGAL PRINCIPLES INVOLVED.

The general principles underlying and applicable to the power of Congress over the subject of rates by interstate carriers may be stated as follows:

1. At common law a common carrier is prohibited from making any unreasonably high charge for its services, and this prohibition has been incorporated in section 1 of the act to regulate commerce. (Int. Com. Com. *v.* Railway Co., 167 U. S., 479, 505.) Thus the shipper has a common law and statutory right of protection against unjustly and unreasonably high rates.

2. To decide, upon the evidence, in a case properly before the court, whether any rate charged by a common carrier is unreasonably high, or, in other words, in excess of the maximum rate which would be reasonable, has always been regarded as a judicial function. (Chicago, etc., R. Co. *v.* Iowa, 94 U. S., 155, 161; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S., 413, 458; Reagan *v.* Farmers' Loan & Trust Co., 154 U. S., 362, 397.)

3. Any governmental regulation establishing rates for the transportation of persons or property which will not admit of the carrier's earning such compensation as under all the circumstances is just to it and to the public would deprive such carrier of its property without due process of law. Such regulation, if by State authority, would violate the Fourteenth Amendment to the Constitution of the United States (Smyth *v.* Ames, 169 U. S., 466, 526); and, if by Federal authority, would obviously violate in the same way the Fifth Amendment to the Constitution of the United States. Thus the carrier has a constitutional right of protection against unjustly and unreasonably low rates.

4. The determination of the question whether a governmental regulation establishes rates for the transportation of persons and property so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures is a subject of judicial inquiry. "The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation." (Smyth *v.* Ames, 169 U. S., 466, 526, 527.)

5. There may be, and generally would be, a wide range between, on the one hand, the highest rate which a common carrier could impose on the shipper without violating the shipper's common law and statutory right to be protected against an unjustly and unreasonably high rate, and, on the other hand, the lowest rate which governmental authority could impose on the carrier without violating the carrier's constitutional right to be protected against an unjustly and unreasonably low rate. Between these two extremes there may be many different rates, each of which would necessarily be just and reasonable, because not transgressing either one of the two limits of justice and reasonableness.

6. The governmental power to prescribe rates for carriage by a common carrier is a legislative and not an administrative or judicial function. (Int. Com. Com. *v.* Railway Co., 167 U. S., 479, 505.)

7. Congress having the power to establish the interstate rates of common carriers, it would follow that Congress would have an unlimited discretion to fix any such rate at any point between the maximum rate which the carrier could lawfully charge the shipper and the minimum rate which Congress could constitutionally impose upon the carrier. This would be a wide range of discretion, and would be a purely legislative discretion.

8. That legislative power can not be delegated to any other officer or tribunal is well established and is fully recognized in the case of Clark *v.* Field (143 U. S., 649). Hence it follows that Congress can not delegate to the Interstate Commerce Commission the discretionary legislative power which Congress has under the commerce clause, whereby Congress may fix any interstate rate of a common carrier at any point between the maximum reasonable rate which the carrier could lawfully charge the shipper and the minimum rate which Congress could constitutionally impose upon the carrier.

9. The Attorney-General, in his letter of May 5, 1905, to the chairman of the Senate Committee on Interstate Commerce, holds that the only way in which a rate-fixing power can be conferred upon the Interstate Commerce Commission is for Congress to enact into law some standard of charges which shall control, and then to entrust to the Commission the duty to fix rates in conformity with that standard. In this I fully agree.

10. It would seem to follow from these premises—

First. That any legislation attempting to confer upon the Interstate Commerce Commission the power to fix rates will be unconstitutional unless it prescribes "the standard of charges which shall control," and requires the Commission to conform thereto in fixing rates.

Mr. KEAN. When the Senator concludes, I will submit a few remarks on that subject.

Mr. ELKINS. Second. That any legislation attempting to fix rates would be unconstitutional whose practical effect is to deny to common carriers the right to invoke and obtain, in due time, the protection of the courts from being compelled to transport persons or property at rates which violate the carrier's constitutional rights.

In the light of the principles just stated an examination of the bill under consideration may be instructive.

DELEGATION OF POWER IN HEPBURN BILL.

The only standard of charges prescribed by the act to regulate commerce is the common law standard that rates shall not be unreasonably and unjustly high. This standard is vague, but still it is a standard because it is a thing judicially ascertainable which the courts have always recognized it was their right and duty to ascertain in proper cases. For Congress to enact merely this standard and then confer upon an administrative tribunal the authority to make such changes in rates as are necessary to prevent those rates from being unreasonably high, would delegate a wide discretion and a tremendous power to such a tribunal. The power so delegated to the administrative tribunal would be the greatest power exercised by any administrative tribunal in the world.

Notwithstanding these considerations, it is probable that the courts would hold constitutional an act delegating to an administrative tribunal the power to change rates of interstate common carriers so far as might be necessary to prevent their being unreasonably high in violation of the common law and statutory prohibition, because such act would furnish a judicially ascertainable standard of charges to control, and would require the administrative tribunal to conform to that standard. It is believed, however, that this is the furthest extent to which the courts would go in sanctioning a delegation of the rate-fixing power to an administrative tribunal. The Hepburn bill seems to go far beyond this point.

The bill does not require the Commission to conform to the statutory and judicially ascertainable standard; it does not provide that the Commission shall change rates only so far as to prevent their being unreasonably high. Such a limitation on the power of the Commission seems to be the thing sought to be avoided by the framers of the bill in its present shape, and its language shows an intention to confer power upon the Commission free from any such limitation.

The language of the bill seems designed to turn the entire subject of regulation, which is within the power of Congress,

over to the discretion of the Commission. The Commission is given full authority to act not merely when rates in fact violate the law but whenever the Commission "shall be of opinion" that the rates are unjust or unreasonable.

They determine their own jurisdiction by their own opinion. Thus the Commission's opinion is sought to be made the sole basis of its jurisdiction. When the Commission thus chooses to act, it is authorized not merely to change rates so far as may be necessary to prevent their being unreasonably high, or, in other words, to make them conform to the statutory standard of lawfulness, but the Commission is given full authority to prescribe "what will, in its judgment, be the just and reasonable and fairly remunerative rate," that is final and not subject to review by the courts, without the order of the Commission violates some constitutional provision. Thus it is sought to make the Commission's "judgment" the sole limitation upon the Commission's authority, subject, of course, to the limitation of the carrier's constitutional rights; in other words, the Commission is authorized to change the rate just as far as Congress itself could change the rate. This turns over to the Commission all the discretionary power that Congress itself could exercise.

The introduction of the words "fairly remunerative" does not furnish a statutory standard of charges which is to control. And here I invite the attention of the Senator from Texas [Mr. CULBERSON] to what I am about to say touching the words "fairly remunerative." Nobody knows what the term really means, and it has never been regarded as a judicially ascertainable standard. As already pointed out, any rate between the maximum lawful rate as against the shipper and the minimum lawful rate as against the carrier may be regarded as fairly remunerative, for, if not fairly remunerative under all the circumstances, it would not seem to be the just compensation to which the carrier is entitled under the Constitution.

Moreover, the fact that one rate is fairly remunerative is perfectly consistent with the fact that five or six other rates for the same service may be also fairly remunerative. The Commission may be of opinion that each of five or six differ-

ent rates would be "fairly remunerative;" consequently its choice between these rates would be a matter of arbitrary discretion.

Certainly the bill does not prescribe any "standard of charges which is to control" by introducing the words "fairly remunerative." These words do not and can not establish a legal standard for any purpose.

Under the act to regulate commerce a carrier has the right to charge the highest rate which is not unlawful, or, in other words, the maximum reasonable rate. This bill, however, carefully refrains from limiting the authority of the Commission to determining "the maximum just and reasonable rate," which is the only standard the act to regulate commerce prescribes, but, on the contrary, gives the Commission the right to fix any rate which in its judgment is a just and reasonable and fairly remunerative rate, and prescribes that that rate shall be the maximum.

Mr. CULBERSON. Mr. President——

The VICE-PRESIDENT. Does the Senator from West Virginia yield to the Senator from Texas?

Mr. ELKINS. Certainly.

Mr. CULBERSON. In the bill. I invite the attention of the Senator from West Virginia to this distinction between the character of rates fixed by the railroad companies and the character of rates which the Commission is authorized to fix in lieu of those fixed by the carriers; and I ask him if it does not at least create confusion?

Mr. ELKINS. I think, as I said before, the insertion of the words "fairly remunerative" in this bill in addition to the old law does produce confusion.

Mr. CULBERSON. But the Senator apparently does not catch the point. The point is this: The railroad companies are authorized to fix absolute rates, which must be just and reasonable. The Interstate Commerce Commission is only authorized to fix just and reasonable and fairly remunerative *maximum* rates.

Mr. ELKINS. I do not think this changes it materially, although one rule is laid down for the carriers and a different one as the standard for the Commission. My idea is that the

Commission ought to have the power only to modify a rate made by the carriers to the extent of relieving it of unreasonableness, unlawfulness, and injustice. This is the power which I think the Commission should exercise and go no further, and it ought to be in this bill. Is not that satisfactory to the Senator from Texas? I listened to his speech with great interest.

Mr. CULBERSON. The rate provided by the bill is not at all satisfactory to me, and my constant reiteration of this question to Senators who have spoken is in that way to give notice to those in charge of the bill that in my judgment it must be amended in that particular.

Mr. ELKINS. I agree with the Senator that these words confuse the bill.

But to resume my argument: Thus a rate higher than the rate prescribed by the Commission might be reasonable and just and therefore entirely lawful under the act which Congress has passed; but Congress gives the power to the Commission to repeal this law *pro tanto* by fixing another just and reasonable rate lower than the maximum which is lawful, and making this lower rate thereafter the maximum.

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The bill prescribes no standard of lawful charges which imposes that duty upon the carriers, yet it is proposed to give to the Commission the authority in its unguided discretion to reduce rates to that point if it chooses to do so. I think this answers the questions of the Senator from Texas. A clearer delegation of legislative power, uncontrolled by any standard established by the legislature itself, could not be imagined.

It may be contended that the courts will limit the authority of the Commission to changing rates so far only as may be necessary in order to prevent them from being unreasonably high, and in that way the courts will, by construction, confine the Commission to the only legal standard which the act to regulate commerce prescribes. It would seem clear, however, that the courts would not in this way revise the language used by Congress. In the Trade-mark cases (100 U. S., 82, 98) the Supreme Court said:

> While it may be true that when one part of a statute is valid and constitutional and another part is unconstitutional and void, the

court may enforce the valid part, where they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body.

The question of such a delegation of power under the Federal Constitution is an entirely new question, upon which there is no controlling authority.

It is true the Supreme Court has held that the delegation of rate-making power to State commissions did not take the property of railroad companies without due process of law, contrary to the fourteenth amendment. In those cases, however, the Supreme Court did not undertake to decide whether the State statutes delegated a power to administrative tribunals, which under the State constitutions could only be exercised by the legislatures themselves. The question as to whether the Hepburn bill delegates to the Interstate Commerce Commission a legislative discretion will arise not under the fifth amendment, which prohibits the taking of property without due process of law, but out of the underlying principle of the whole Constitution that legislative power must be exercised by the legislative department of the Government. The question has never been passed upon or considered.

It should further be born in mind that most, if not all, of the decisions relating to State constitutions will not even be persuasive authority with the Supreme Court of the United States to support the delegation of power attempted by this bill, because in many of the cases the State constitutions expressly contemplate the delegation of such a power, and in most, if not all, of the cases the delegation of power is made with limitations, more or less clearly expressed, which are entirely absent from the bill under consideration.

I wanted to introduce here some extracts from the Michigan tax case just decided, but I have been unable to get a copy of the decision, and I will not refer to it further because I have only seen the quotation in the papers. But it seems that it has a direct bearing upon conferring this power, which might be useful and instructive. I am indebted to the Senator from Wisconsin [Mr. SPOONER] for an extract from Judge Brewer's decision.

Mr. SPOONER. As published in the papers.

Mr. ELKINS. As published in the papers.

In the nation no one of the three great departments can assume or be given the functions of another, for the Constitution distinctly grants to the President, Congress, and the judiciary separately, the executive, legislative, and judicial powers of the nation. It may, therefore, be conceded that an attempted delegation by Congress to the President or any ministerial officer or board of power to fix a rate of taxation or exercise other legislative functions would be adjudged unconstitutional.

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Mr. NEWLANDS. Before the Senator goes to this new point, I should like to ask him a question regarding the subject which he has been discussing as to the delegation of power to the Interstate Commerce Commission. Assuming that the words "fairly remunerative" were stricken out and the power was given to this Commission to fix just and reasonable rates, does he regard that as fixing the standard which is to control the action of the Commission, or does he regard that expression as a complete delegation to the Commission of all the power that Congress has regarding the fixing of rates?

Mr. ELKINS. I answered that a while ago when the Senator was not in the Chamber. If Congress fixes a standard by which the Commission is to be governed, and then it is provided that the Commission shall go no further in changing a rate made by the carrier than modifying it to the extent of relieving it of its unreasonableness or injustice or unlawfulness, then that becomes a judicial question, which can be inquired into; but if Congress confers the power upon the Commission to fix what it considers a fair, just, and reasonable rate, in its judgment, that is final and conclusive, as much so as if Congress had said you shall fix a rate of 50 cents a ton.

Mr. NEWLANDS. Does the Senator regard that as a transfer from the legislative department to this administrative board of all the legislative power that Congress has on that subject?

Mr. ELKINS. No; I do not. If Congress should empower the Commission to say what in its judgment would be a fair and reasonable rate, then Congress delegates its legislative discretion, but if Congress confers power on the Commission to modify a rate made by the Commission only to the extent and so far as to relieve it of its unlawfulness, unreasonableness,

or injustice, then this is not final, and Congress does not delegate all of its legislative power, and what the Commission may do can be reviewed by the courts.

JUDICIAL REVIEW UNDER HEPBURN BILL.

With few exceptions all are agreed there should be some provision in the Hepburn bill definitely providing for a review by the courts of the orders of the Commission. The denial of a review by the courts of the orders of the Commission is new and has come about only during this last session of Congress.

In his last two messages the President favored a review of the orders of the Commission by the courts. There have been introduced in the House and Senate during and since 1905 twenty bills on the subject of rate legislation, and all save one provide in some manner or other for review of the orders of the Commission by the courts. Sixteen States legislating on the subject have also provided for court review. The difficulty is just what is the best way to prescribe the terms of this review by the courts. For my part I think a review by the court of the orders of the Commission necessary to make the bill constitutional; beyond this I am not wedded to any particular form or wording of the same. It is contended by some of the advocates of the bill and denied by others that the carrier will have thereunder ample opportunity to prevent the invasion of his constitutional rights; that it is unnecessary to make any express provision for judicial review, and that the right to such review is clearly recognized by the language of the bill.

The only expressions in the bill which can be construed as a recognition of the right in the carrier to obtain a judicial review of an order of the Commission fixing a rate are the following:

> Such order shall go into effect thirty days after notice to the carrier, and shall remain in force and be observed by the carrier unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction.
>
> * * * the orders of the Commission shall take effect at the end of thirty days after notice thereof to the carriers directed to obey the same unless such orders shall have been suspended or modified by the Commission or suspended or set aside by the order or decree of a court of competent jurisdiction. * * *
>
> The venue of suits brought in any of the circuit courts of the United States 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.

The expressions quoted do not confer any jurisdiction upon any courts to entertain proceedings by the carrier to set aside the orders of the Commission, but simply refer to such jurisdiction, if any, as may already exist in the courts. It is so well settled as to need no citation of authorities that the circuit courts of the United States can exercise only such jurisdiction as is conferred upon them by Congress. The only grant of jurisdiction to the circuit courts of the United States which could possibly cover a suit to set aside an order of the Commission is section 1 of the act of March 3, 1875, the material part of which reads as follows:

> That the circuit courts of the United States shall have original jurisdiction, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and arising under the Constitution or laws of the United States.

Thus a circuit court of the United States can not by any possibility have jurisdiction of any proceeding to set aside an order of the Interstate Commerce Commission where the matter in dispute does not exceed, exclusive of interest and costs, the sum or value of $2,000. Under the bill the orders of the Commission are to remain in force only three years. It is entirely possible that an order of the Commission may be a palpable violation of the constitutional rights of the carrier, and yet the loss thus wrongfully inflicted will not equal in three years the sum or value of $2,000. As to every such case it is plain that there is no jurisdiction whatever in the circuit court of the United States to grant relief to the carrier. Of course, a carrier wrongfully threatened with a loss of $1,000 is as much entitled to relief as one wrongfully threatened with a loss of $100,000.

It will be observed, moreover, that if the circuit courts of the United States have jurisdiction of proceedings to set aside orders of the Commission the courts of the several States have exactly the same jurisdiction. This is expressly recognized by the language of the statute which is quoted. That this is true is made plain by the reasoning of the court in Plaqueminas Freight Company *v.* Henderson (170 U. S., 511) and cases there cited.

If, therefore, the jurisdiction exists in the Federal courts to entertain proceedings to set aside orders of the Commission, such jurisdiction equally resides in the State courts and is exclusive in the State courts where the matter in dispute does not exceed, exclusive of interest and costs, the sum or value of $2,000. Of course such a proceeding in the State courts may be removed by the defendants to the circuit court of the United States in any case where the amount involved is sufficient to give the latter court jurisdiction.

This is an anomalous situation as to jurisdiction to set aside orders of the Commission which ought not to exist. If Congress intends the carrier to have any judicial protection an explicit grant of jurisdiction in the Federal courts should be provided, and for convenience should be confined to the Federal courts.

But even if a jurisdiction does reside in the State and Federal courts, as just pointed out, to entertain proceedings to set aside orders of the Commission, the further question remains, Against whom can such proceedings be instituted? Where is the defendant who can be made to respond and required to afford the relief to which the court may determine the carrier is entitled. The bill does not authorize the Commission to be made a defendant in such a suit. A suit against the Commission would be open to the objection that the suit was in effect against the Government of the United States. In Smyth *v.* Ames (169 U. S., 466–518), it was said:

> It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them, as officers of a State, from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff is not a suit against the State within the meaning of that amendment (that is, the eleventh amendment).

It may be assumed that the same rule would apply to a suit against officers of the United States as is thus applied to suits against officers of a State. Therefore, in order to justify a suit against the Interstate Commerce Commission, it would be necessary to show that the Commission was upon the point of enforcing an unconstitutional enactment to the injury of the rights of the plaintiff. Under this bill, however, the primary method of enforcing the orders of the Commission is by heavy forfeitures, which are recoverable by civil suits in the name of the

United States, and it is made the duty of the various district attorneys, under the direction of the Attorney-General, to prosecute for the recovery of such forfeitures. To a suit against the Commission it might therefore very well respond that it had no intention of enforcing the order in question, and that the only purpose of the suit was to have an adjudication upon the constitutionality of an order having the effect of law, and that so far as the defendant was concerned this was a mere abstract question. As it is implied in the language of Smyth *v.* Ames, above quoted, that the only jurisdiction is for the purpose of preventing enforcement of the order by the defendants, it is not improbable that such a response would defeat the jurisdiction entirely. It is therefore a question of grave doubt as to whether the courts could entertain a proceeding against the Commission to set aside one of its orders.

Mr. PATTERSON. Mr. President——

The VICE-PRESIDENT. Does the Senator from West Virginia yield to the Senator from Colorado?

Mr. ELKINS. I wish the Senator would excuse me.

Mr. PATTERSON. I know you are tired.

Mr. ELKINS. Yes; I yield.

Mr. PATTERSON. The Senator is discussing a part of a controversy that is really the only controversy that seems to be occupying the attention of the Senate at this time, and that is the language that will be used in providing for the right of review. There seems to be no longer any controversy on the part of Senators as to the necessity for such a measure or as to the power of Congress to delegate within certain limits the power of rate making to a Commission, and the necessity for doing so. There seems to be a consensus of opinion that there is a right, to a limited extent at least, in the Supreme Court or in other courts to review the action of the Commission. The only controversy now seems to be over the language that will be used in providing for court review. Has the Senator from West Virginia concluded in his own mind what the wording should be or within what limitation the right of review should be kept?

Mr. ELKINS. I have reached a conclusion, but I can not get it put in the bill. I think it can be done by Congress pre-

scribing a standard that the rate should be just and reasonable, and authorizing the Commission, if it should find that the rate made by the carrier is not just and reasonable, then it shall have power to modify the rate to the extent of relieving the rate of its injustice, unreasonableness, or unlawfulness.

But able lawyers say that if the words "laws of the United States" are added to the amendment offered by the Senator from Kansas [Mr. LONG] that would be all that is necessary to authorize a broad review of the orders of the Commission.

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I wish simply to say that, in my opinion, every material right or interest of a carrier, shipper, or locality affected by an order of the Commission should be entitled to a review by the courts.

It may be remarked in passing that if the circuit court of the United States can entertain such proceeding against the Commission then the State courts can equally entertain such proceeding whenever the Commissioners are within the territorial jurisdiction of the State courts. As the Commission travels from place to place and all its members are frequently at points in the various States it is entirely possible that suits could thus be instituted in a State court and jurisdiction of the Commission obtained by actual service of process on all its members within the limits of the State. This is an anomalous condition which Congress should certainly avoid.

Even if the courts, State or Federal, should entertain jurisdiction of a suit against the Commission to set aside an order of the Commission, it is clear that the only relief which could be asked would be against the Commission, for in such a suit only the Commission could be enjoined from enforcing the order. A decree in such a suit would not be binding upon the Attorney-General or the district attorneys, who would not be and who could not be made parties to such a suit; nor would such a decree be binding upon any courts of law in which the district attorneys, under the direction of the Attorney-General, might see fit to prosecute for the recovery of the forfeitures denounced by the act against the carrier which fails to obey the order of the Commission. It would seem clear, therefore, that the relief which could be obtained in a suit against the Commission, even

if such suit could be maintained, would be utterly inadequate. It could not constitute a legal protection to the carrier.

No suit could be brought by the carrier to restrain the Attorney-General and all the district attorneys from prosecuting to recover the forfeitures for the carrier's failure to observe the order. Such a suit would be a suit against the United States. This proposition is clearly illustrated by the case of Fitts *v.* McGhee (172 U. S., 516), where the court held that a suit against the prosecuting officers of the State of Alabama, to enjoin their proceeding to recover penalties denounced for failing to observe the tolls established by the legislature for the use of a bridge, was a suit against the State, of which the court had no jurisdiction. The court therefore declined to pass upon the validity of the act or to entertain the suit for any purpose whatever.

The result is that no procedure is possible under the bill whereby the carrier may initiate any proceeding in which it can obtain adequate relief against an order of the Commission. Of course the carrier can not be compelled to observe a rate which violates the carrier's constitutional rights, but apparently the only way in which the carrier can avail itself of the constitutional protection is simply to refrain from charging a rate which the Commission orders it to charge, and when proceedings are instituted against the carrier to recover the forfeitures denounced by the act for its disobedience of the order to defend these proceedings by showing that the order is unconstitutional. As these penalties are $5,000 for each offense, and as each shipment will constitute a separate offense, the carrier, by adopting this course, would incur in the course of two or three weeks the risk of penalties far greater than the total loss it would sustain if it complied with the Commission's unlawful order. This, of course, amounts to an effort to intimidate the carrier, and these penalties, if constitutional, will have the effect of coercing the carrier into charging a rate fixed by the Commission rather than incur the risk of the enormous loss which would result from refraining from charging the rate for the purpose of inviting a proceeding in which it could contest the constitutionality of the order.

Even if the carrier could avoid the risk of cumulative penalties by refraining from charging the rate fixed by the Commission, and would incur the risk of only one penalty, yet it is clear that a civil suit to recover this penalty would be an inadequate method of determining the constitutionality of the right. Such an action would be triable at law and by a jury. The questions involved are so complicated as to make it utterly impracticable for a jury to pass intelligently upon them. Probably no two juries would entirely agree as to the effect of the proof introduced as to the illegality of a given rate. As was said in Smyth *v.* Ames, 169 U. S., pp. 466–518:

> Only a court of equity is competent to meet such an emergency and determine once for all and without a multiplicity of suits matters that affect not simply individuals, but the interests of the entire community, as involved in the establishment of a public highway and in the administration of the affairs of the quasi-public corporation by which such highway is maintained.

If it be contended that on account of all these difficulties which lead to the conclusion that no adequate judicial review exists, the court will therefore construe the expressions of the bill above quoted, which refer to a court setting aside the order of the Commission, as impliedly granting a jurisdiction to the circuit courts to entertain proceedings in equity against the Commission and to give in such proceedings adequate relief and suspend or set aside the order of the Commission so as to prevent action thereon, not merely by the Commission but by the attorneys of the United States as well, the answer, in the first place, is that any such construction would be a case of judicial legislation; and in the second place, that if it is the intention of Congress to provide an adequate remedy in equity to deal with this situation there is not the remotest excuse for refusing to say so and for trusting that the courts will transcend their proper authority by saying Congress meant what it studiously refrained from declaring.

The bill seems to indicate clearly the intention of Congress that the courts shall not even pass upon the constitutionality of the order of the Commission. The only judicial proceeding expressly authorized to which the Commission is to be a party is a suit by the Commission to compel the enforcement of its

order. This is an additional remedy to the civil suits by the district attorneys to recover the forfeitures. This proceeding is obviously an equitable proceeding, because the court is authorized therein to issue writs of injunction to compel the carrier to obey the Commission's order. A court in construing the bill would certainly be impressed with the fact that in this, the only instance where Congress undertook to confer a jurisdiction upon the United States circuit court sitting in equity to deal with an order of the Commission, the only two points which Congress authorizes the court to consider are, first, Was the order regularly made and duly served? and, second, Is the carrier in disobedience of the order? The court is not authorized by the jurisdiction granted to pass upon the further question whether the Commission's order violates the constitutional rights of the carrier.

If, therefore, the expressions quoted above wherein the act refers to suspending or setting aside an order of the Commission imply the creation of any jurisdiction, will not the courts construe the act as a whole and reach the conclusion that Congress merely intended that the orders of the Commission might be set aside, enjoined, or suspended only on the grounds which would justify the court in refusing to enforce the order at the instance of the Commission, to wit, that the order was not regularly made or duly served?

The conclusion to be drawn from these considerations is that no judicial review is provided for by the bill and it therefore evinces a purpose to prevent the carrier from obtaining such a review and to intimidate the carrier by the imposition of enormous and overwhelming penalties into observing the Commission's order, whether right or wrong. If this conclusion is justified, then it must follow either that the scheme of rate fixing provided for by the bill must fail, or at least the whole scheme of penalties must fail, leaving the orders of the Commission to be enforced only by suits in equity brought by the Commission, in which suits the courts will have to pass upon the lawfulness of the orders before they can take effect at all. The situation certainly calls for an amendment clearly giving an adequate judicial review.

I will conclude in a few minutes on the character and extent of this review. I have been asked by the Senator from Colorado on that particular point, and I tried to answer as briefly as I could.

CHARACTER AND EXTENT OF REVIEW.

Assuming that an express provision for judicial review is to be made, the important question remains, What shall be the character and extent of that judicial review?

It would seem clear, under the bill grant of power to the Commission, that the intervention by the Commission is absolutely dependent upon the will and discretion of the Commission down to the point where the carrier's constitutional rights are invaded. This, as already pointed out, delegates to the Commission, without any legal standard to control it, the full discretionary power which could be exercised by Congress itself. If such grant of power is not unconstitutional, it results that practically arbitrary power is given to the Commission over the property rights of the owners of the railroads and over the interests of all the people dependent upon the railroads, and, to a large extent, over the interests of shippers and localities, which will be vitally affected by the changes which the Commission can and will make in the relative advantages of competing localities. This would give the Commission a power as arbitrary as any Congress could exercise, and it would be wholly free from the constitutional checks which are designed to prevent arbitrary action by Congress.

The action of Congress is subject to veto by the President, but there is no veto power upon the action of the Commission. The creation of such arbitrary powers is wholly unnecessary to the correction of any evil which has been developed. The possibilities of political and sectional strife growing out of its exercise are of the gravest character. Every consideration of justice and expediency demands a more conservative course. The Commission itself should be protected from the temptation of an exercise of such power which will surely come if it realizes that it has been given this authority without any control by the courts until the point is reached where the constitutional rights of the carrier are invaded.

Another very serious consideration, which has an important bearing upon the question of judicial review, is this: Under the power granted in the bill it is assumed the Commission will not undertake to change an entire schedule of rates by a single order. It will change a few rates by one order and a few more rates by another order. It is extremely doubtful, in view of recent decisions of the Supreme Court, as to when an order dealing with only one or a few rates of a carrier can be regarded as violating the constitutional rights of the carrier. This is strikingly shown by the case of Minneapolis and St. Louis R. R. Co. *v.* Minnesota (186 U. S., 257), a portion of the syllabus of which reads as follows:

> A tariff fixed by the Commission for coal in carload lots is not proved to be unreasonable by showing that if such tariff were applied to all freight the road would not pay its operating expenses, since it might well be that the existing rates upon other merchandise, which were not disturbed by the Commission, might be sufficient to earn a large profit to the company, though it might earn little or nothing upon coal in carload lots.

In this connection it is wise to consider the language of the Supreme Court in the case of San Diego Land Co. *v.* National City (174 U. S., 739, 754):

> But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.

Such decisions as these strkingly illustrate the tremendous margin of discretion conferred upon the Commission under any system which leaves to judicial review solely the question whether the constitutional rights of the carrier have been violated.

In order to insure a judicial review which will adequately protect the property and interests involved, and which will operate as a conservative influence over the Commission itself, it is important for the act to define the Commission's jurisdiction and make it depend not upon the Commission's

opinion, but upon the facts, and for the act to show that the Commission shall make no greater change than is necessary to prevent rates from being unreasonably high. This can be accomplished by authorizing the Commission to change rates only when existing rates are unjust and unreasonable, and only so far as may be necessary to remove such injustice and unreasonableness. In this way it clearly becomes a judicial question for the court to determine whether the Commission has exceeded its jurisdiction, and if the Commission has exceeded its jurisdiction its order can be set aside. There is no other way in which Congress can make sure that an adequate judicial review can be provided.

While such provision would probably insure a fairly adequate judicial review, it would still be true that the Commission would possess a very substantial discretion. The courts would not interfere except where the Commission was clearly in the wrong. The carriers would realize that they could get no relief, either temporary or permanent, from the court unless they could show a clear case of abuse of discretion.

One further point to be considered is as to the suspension of the Commission's order pending final determination by the court, provided the court is of opinion that the order should be so suspended. It has been asserted with great confidence that Congress has absolute power to determine all details of jurisdiction and procedure by the Federal courts, and therefore to provide that the Federal courts shall not grant interlocutory injunctions or temporary restraining orders with respect to the rate-making orders of the Commission.

It is indeed a very serious question whether Congress, after it has invested a court of equity with jurisdiction over a given subject-matter, can then trim down that jurisdiction so that it can be exercised only on final hearing. I think the Senator from Wisconsin [Mr. SPOONER] in his very able argument made this very clear, and I do not know but that he used the very words "trimmed down," though I think he said "cut down." But this is a question entirely unnecessary to consider at this time. If it be conceded that under Article III of the Constitution, dealing with the judicial power of the United States, Congress can, in the

way proposed, prohibit the courts from granting interlocutory injunctions or temporary restraining orders in proceedings to review rates made by the Commission, this throws absolutely no light upon what can and can not be done under the fifth amendment to the Constitution. If, by reason of the fifth amendment, it is a deprivation of property without due process of law or a taking of property without just compensation for Congress to compel a carrier perpetually, or for three years, to carry freight for nothing or at less than the compensation which the courts may regard as meeting the constitutional requirements, certainly it is equally unconstitutional to take the property of the carrier in exactly the same way for six months, or three months, or three days.

If Congress, by the provision of heavy penalties, coerces a carrier into temporarily observing an unconstitutionally low rate and thereby in effect temporarily takes the carrier's property without due process of law or without just compensation, or if the result is accomplished, not by heavy penalties, but by depriving the carrier of any right to obtain temporary relief from the courts, there is unquestionably a palpable violation of the fifth amendment to the Constitution, and any act which has this effect would seem to be necessarily unconstitutional. This question would be in no wise affected by the entirely different question whether such action of Congress was or was not a violation of the provisions of Article III of the Constitution relative to the judicial power.

It should be remembered that whenever a carrier is compelled to carry freight for less than the rate which under the Constitution the carrier has the right to charge the loss thereby sustained by the carrier is absolute and irreparable. The observance of a given order might, for example, impose upon the carrier an average loss of $100 every week when compared with the lowest rate which the carrier could be constitutionally required to charge. This would be a loss of approximately $15,000 in the three years during which the order of the Commission was required to remain in effect. It is simply a contradiction in terms to say that the carrier has a constitutional right to be protected from this loss of $15,000 in three years,

but no constitutional right to be protected from the loss of $100 per week for the six weeks or six months or twelve months which must intervene before the carrier can obtain a final determination by the court. The thing that is protected is the use of the carrier's property. The use for a single day is protected just as much as the use for three years. If the bill provided that the orders of the Commission should remain in effect only ten days, the carrier would still be as clearly entitled to judicial protection as it is where the order is to remain in effect for three years, and the case is of a character where the judicial protection must be had before the rate takes effect, because just as soon as the rate does take effect the irreparable loss begins, and where the rate is unconstitutionally low the unwarranted taking of the carrier's property without due process of law and without just compensation begins.

Mr. President, this great debate, which will stand in history as a monument to the ability and conservatism of the Senate, participated in by some of the ablest and most distinguished Senators who have ever adorned this illustrious body, and which has so instructed and illumined the country, has been for the most part along legal lines. In what I have said I have tried in a brief way, imperfect as it may be, to bring to the attention of the Senate and the country some of the practical workings of the bill. I realized, however, that no treatment of this great question, perhaps the most important economic question ever presented to the Senate, could omit some discussion of the legal principles involved. I felt that the subject had been almost exhausted, and I ventured with some hesitancy and much diffidence to follow the great speeches that have been made, knowing that I must touch upon some of the points which have been so ably discussed with more knowledge and far more ability than I possess.

REMARKS

OF

Senators on the Elkins amendments, prohibiting railroads from transporting in interstate commerce, coal, coke, or other commodities mined or produced by them, made during the debate on the amendment and providing for switching connections for shippers of interstate commerce. Also comments on the Elkins law and the pipe-line amendment. First session, Fifty-ninth Congress.

Mr. ELKINS. Mr. President, the purpose of introducing this amendment was to correct an abuse and evil growing up in the State of West Virginia and in other mining States, owing to the fact that railroads engage in competition with producers on their lines. My idea of this is, and it is my judgment, that railroads should be strictly held to doing the business for which they are incorporated—that is, the transportation of freight and passengers—and should be prohibited by law from engaging in any other business, and especially business in competition with the producers and shippers on their lines.

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Mr. ELKINS. Mr. President, I know it is sought to sidetrack this amendment that corrects a great abuse and injustice. I know we are dealing with rates and trying to prohibit excessive rates, but there are abuses and evils produced by railroads far greater than excessive rates. The great evils and abuse are the kind I have mentioned. Rebates and discriminations are prohibited now by stringent laws. Now, another abuse by railroads is they refuse at times to give switches to shippers of interstate commerce. They will not give physical connection. If we are going to regulate railroads, if we are going to correct abuses, let us correct the real abuses that oppress the people and drive them out of business. What I complain of in this bill is that while it is a good bill as far as it goes, it does not go far enough. It does not correct the very abuse I am trying to bring to the attention of the Senate. It does not provide that where an interstate shipper is prepared to operate he shall

have the right of switch connection. It does not provide that connecting lines shall have connections and fair, just, and reasonable prorating arrangements. Those are abuses of which the people of West Virginia complain, and they are evils which I should like to see corrected in this bill.

Mr. DRYDEN. I say this question is so broad that it is not too strong a statement to make to say that it will affect almost every household in this country. This amendment which is now pending is one of the most vital in the whole bill.

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Mr. DOLLIVER. Mr. President, the Senator from West Virginia has introduced a very important practical question, probably a more far-reaching and difficult question than any with which the pending bill undertakes to deal.

No more difficult railway proposition exists than this connection of the carriers with the productive enterprises of the country.

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Mr. BAILEY. The Senator from North Carolina [Mr. SIMMONS] suggests that this question is as important as the main question, and measuring it by its importance we might expect an almost interminable delay.

I believe, Mr. President, that in the history of legislation no greater good was ever sought to be accomplished than the good which will be accomplished by the less than eight lines of this amendment.

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Mr. LODGE. Mr. President, all I desire to say is that it seems to me that the best way to deal with this most important question would be to send it to the committee and have a proper bill presented to the Senate. I personally should not care to vote for that disposition of the subject, unless I could be assured beyond any reasonable peradventure that the matter would be disposed of at this session of Congress.

I think the question involved in this amendment is more important by far than all the local discriminations which this bill undertakes to cure. I do not think that we can afford to adjourn this session without acting on it.

The ownership by the railroad companies of these great properties which comprise the necessities of life is an admitted evil. The attitude of the Supreme Court in the Chesapeake and Ohio case recognizes such ownership as contrary to sound public policy. It is idle to say that we are unable to deal with it or to stop it. If we are to be paralyzed in dealing with such an evil as this, then the interstate-commerce clause in the Constitution is utterly vain.

I should much prefer, as I have said, to see this matter referred to the committee if we can be assured that we shall deal with it conclusively and finally at this session; but, without that assurance and without that understanding, I think the Senate had better deal with it here to-day and to-morrow and for a week, if necessary, until we shall have secured suitable legislation that shall put an end to the operation by the railroads of great natural productions, which are absolutely vital to the well-being of the people of this country.

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Mr. TILLMAN. I do not want to lay this matter on the table. It is too serious and vital an issue, and the people of this country are watching to see whether the Senate, knowing that the evil exists, has not got either the sense or the courage to deal with it. That is my understanding of the situation. We all know there are grave abuses and outrageous conditions not only in West Virginia, but in Pennsylvania, in East Tennessee, in the Indian Territory, and I do not know where else.

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Mr. RAYNER. I am speaking of this provision. This bill has a number of amendments in it, if the Senator from Illinois will allow me to say so, that are very beneficial. You take the amendment of the Senator from West Virginia [Mr. ELKINS]. That is a good amendment, although made by a Senator who has been charged with being a railroad Senator. We have had help from Senators who have been charged with being railroad Senators in clearing up the mysteries of this legislation.

So, in answer to the Senator from Illinois, I will say that some of the best legislation has been put on the bill by the

Senator from West Virginia and by the Senator from North Dakota [Mr. McCUMBER].

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Senators may get up and talk about these cases on the distant frontiers. What I wish to do is to correct the abuses which have grown up; to provide that railroads shall not engage in business in competition with shippers on their lines; that railroads shall not own thousands of acres of coal lands, and mine the coal and ship it over their own lines to market and freeze out and crush independent operators and individuals; that they shall not seize and become owners of whole sections of States, and monopolize the business of mining and shipping coal, when they are organized and incorporated to only transport freight and passengers. If railroads can engage in the coal, coke, lumber, and iron-ore business, it will be only a question of time when they will drive out of business all other shippers of these commodities. The fact is the people do not want and will not permit railroads to engage in business in competition with their own shippers.

This is the main question. If incidentally during production and transportation it works injustice to small enterprises or to large ones the great principle contended for should not be prevented from becoming law.

Mr. President, I insist that this amendment has due regard, so far as it can, to the rights and interests of all railroads and all producers. The question is, Will Congress permit the coal interests in the States of Pennsylvania, Ohio, West Virginia, and other States to be turned over to the railroad interests? Unless we provide some remedy of this kind, that will be the result.

Mr. FORAKER. As the Senator from Iowa well says, Mr. President, everything that is being done to-day to break up the practices about which complaint is made is being done under the Elkins law, and the very best legislation we can enact here is to broaden and strengthen the Elkins law so as to make it still more effective, as we easily can. If we have in view only the correction of evils, that is the sure way to reach them.

Take the report made by Commissioner Garfield a few days ago. I read it through with care, in so far as we have been favored with it. Assuming that all he says is true, about which I do not know anything except that his facts are disputed to some extent, but, assuming for the sake of the argument that they are all true, there is not one thing pointed out by Mr. Garfield, not one evil mentioned by him, that the bill we now have under consideration will reach or remedy—not one. The evils he complains of all consist, in one form or another, of rebates and discriminations, open and secret, practiced under every kind of guise, in every sort of form that the ingenuity of railroad officials and shippers could suggest. Not one of them can you reach by this legislation, upon which we have spent three or four months of time. On the contrary, there is not one of them that you can not reach in fifteen minutes in a court of equity having competent jurisdiction under the Elkins law. There is no rate or discrimination pointed out by him that you can not reach.

I do know that if the Elkins law had been enforced by the officials charged with the duty of enforcing it under the law there would not have continued any such condition of things, and there is no law on the statute book that now provides, and this bill if enacted will not provide, any remedy whatever against rebates. The House committee, in their report, said they did not undertake to deal with rebates and they did not undertake to deal with discriminations between shippers. They did not undertake to deal with anything except only excessive rates, the least troublesome and the least burdensome evil there is.

Mr. President, I have here a statement which I took out of a publication called "Freight"—a statement as to the proceedings under the Elkins law. It gives the number of decisions by the courts sustaining and enforcing that law, and there are quite a number of them, all of them important cases. There was the New Haven Coal case, one of the most important cases decided by the Supreme Court of late years. That was under the Elkins law. There was the Trans-Missouri Freight case, involving a question of discrimination between communities.

That was under the Elkins law. There was the case of the packing houses as against the live-stock men—I have forgotten the style of the case—decided by Judge Bethea last January or February. That was under the Elkins law. There was the case a few days ago of the Chicago, Burlington and Quincy road, where that corporation was fined heavily. That was under the Elkins law. There was the case of the Fairmont Coal Company in West Virginia, where the proceeding was by mandamus to compel equal treatment in furnishing cars. That was under the Elkins law. In every one of these cases there was relief instantly at the hands of the court upon application for a restraining order or a writ, which was finally made permanent.

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Mr. KNOX. Let me suggest to the Senator from Ohio that the very important case of Baer *v.* The Interstate Commerce Commission, which decided that the anthracite coal combination had to expose its books for examination, was under the Elkins law.

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Mr. ELKINS. In connection with the selling of gas for domestic consumption, the words "domestic consumption" have a definite meaning—they mean for lighting and heating purposes, but not for manufacturing purposes. By using the term "for municipal purposes" it might be construed that it will apply only to cities and towns; that they could buy gas for their own use and for public use, but could not allow domestic consumers to have it for purposes of lighting and heating.

Now, Mr. President, on this point of gas for manufacturing purposes, it is a very close question in my State. We are a large gas-producing State. The people of West Virginia are apprehensive and much concerned because States adjoining are taking gas out of the State and using it for manufacturing purposes, for the reason that this helps build up manufactures in Pittsburg, Toledo, and Cleveland and discourages manufacturing interests in the State of West Virginia, where the gas is produced. The legislature has tried, but in vain, as it did in Indiana, to find some way to prevent the exhaustion of gas in

West Virginia by pumping it out of the State into these adjoining States.

To the extent that this amendment might be a help to West Virginia, I would favor it, but I do not want to do anything that will build up the manufacturing interests of Pennsylvania and Ohio with gas taken from West Virginia, if I can help it.

If a man or corporation owns its own pipe line and did not condemn the right of way, but acquired it by purchase, and is transmitting gas through his or its own pipe line, built with his or its money, I do not believe Congress can make the man or corporation a common carrier.

While I do not wish to do injustice to any pipe line in West Virginia or elsewhere, yet I do not wish in any way to aid or facilitate the taking of gas from West Virginia to build up manufacturing interests in other States. I want to preserve and save the gas of West Virginia to build up factories in West Virginia.

THE ELKINS AMENDMENTS.

From and after May, 1908, it shall be unlawful for any common carrier to transport from any State, Territory, or district of the United States to any other State, Territory, or district of the United States, or to any foreign country, any article or commodity 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 or used in the conduct of its business as a common carrier.

Carried by vote of 67 to 6.

Any common carrier subject to the provisions of this act shall promptly, upon application of any shipper tendering interstate traffic for transportation, construct, maintain, and operate upon reasonable terms a switch connection with any 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.

Agreed to without division.

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