June 1931

"Questions of Law" in Lake Cargo Coal Rate Regulation

David F. Cavers
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Commercial Law Commons, and the Constitutional Law Commons

Recommended Citation
David F. Cavers, "Questions of Law" in Lake Cargo Coal Rate Regulation, 37 W. Va. L. Rev. (1931). Available at: https://researchrepository.wvu.edu/wvlr/vol37/iss4/4

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
On February 15, 1911, shippers of lake cargo coal in the Pittsburgh district filed a complaint with the Interstate Commerce Commission alleging that the rate on their shipments was "excessive and unreasonable in and of itself" and that it had "been fixed by agreement among the railroads so as to discriminate against the Pittsburgh field in favor of the West Virginia fields". On May 8, 1931, the Interstate Commerce Commission was advised by its examiner to dismiss complaints brought by lake cargo coal shippers in the Pittsburgh and Ohio districts alleging that the current rates thereon, established by agreement among the defendant carriers serving the complainant and the West Virginia and Kentucky fields, were unduly prejudicial to complainants and preferential to West Virginia and Kentucky coal interests.

* Assistant Professor of Law, West Virginia University.

1 "Lake cargo coal" is coal moved by rail to lower Lake Erie ports (Ashtabula, Cleveland, Conneaut, Erie, Fairport, Huron, Lorain, Sandusky, and Toledo), there dumped into the holds of vessels and transshipped as cargo to Great Lakes ports, Lake Superior and Lake Michigan ports receiving 70% of the shipments.


3 In 1927 the Interstate Commerce Commission had ordered the reduction in rates on coal from Pennsylvania and Ohio fields, establishing thereby a rate differential in favor of the Pittsburgh district of 45 cents a ton over the Kanawha, Kenova and Thacker districts of West Virginia and the Big Sandy, Kentucky, Hazard, McRoberts, Harlan, and South Jellico districts of Kentucky, and a differential of 60 cents over the New River, Tug River and Pocahontas districts of West Virginia, the Clinch Valley and Stonega districts of Virginia, and the Oakdale district of Tennessee. The differential of 3 cents enjoyed by Ohio districts over Pittsburgh was untouched. Lake Cargo Coal Rates, 1925, 126 I. C. C. 309 (1927). A rate reduction of 20 cents by the southern carriers restoring thereby the differentials of 25 and 40 cents, which had been in force ten years, was cancelled by the Commission in Lake Cargo Coal, 139 I. C. C. 367 (1928). This order was enjoined by the statutory court in Anchor Coal Co. v. United States, 25 F. (2d) 462 (S. D. W. Va. 1928). Before an appeal was heard, the carriers serving both fields agreed in the summer of 1928 on compromise differentials of 35 and 50 cents a ton. The Supreme Court held that this compromise rendered the controversy moot and reversed the decision below with directions to dismiss the bill. United States v. Anchor Coal Co., 279 U. S. 512 (1928). The present complaints are brought against the rates established pursuant to this compromise. Complaint is also made of the 20 cent differential which the Fairmont field in northern West Virginia is granted over Pittsburgh. This differential, after having been increased from 15 to 25 cents by the reductions in northern rates ordered in 1927, was reduced to 20 cents by agreement in 1929.

4 Ohio Lake Cargo Coal Rate Committee v. B. & O. R. R., Docket No. 23340;
Twenty years and more have thus elapsed between the opening gun and the latest finding in this economic war which has been waged before the Interstate Commerce Commission and the courts. During that time the prize at stake, the lake cargo coal traffic, has grown to tremendous proportions. During the same period the bituminous coal industry has fallen on evil days, and the competitive struggle for markets has been correspondingly sharpened. These factors have accentuated the intensity of feeling which has marked this litigation. These same factors demonstrate, moreover, that it is not only the fortunes of the embattled operators which are at stake, for to their fortunes is inextricably linked the economic welfare of two populous regions in which coal is king.

I

It may at some future time be considered a curious commentary on the present stage of our economic and political ontogeny that interests of such magnitude should be dependent on the issue of a law suit. Yet, interesting as are the tendencies in our governmental development which have engendered this situation, their investigation would call for a penetration into that substratum of political and social belief the relevance and importance of which the lawyer persistently chooses to ignore. The Western Penna. Coal Traffic Bureau v. B. & O. R. R., Docket No. 23241. The examiner's opinion appears in full in U. S. Daily, May 9, 1931, at 585.

*The total tonnage of lake cargo coal shipped from all district has increased over a period of twenty years as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Tonnage (in millions of tons)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1909</td>
<td>15.3</td>
</tr>
<tr>
<td>1911</td>
<td>21.6</td>
</tr>
<tr>
<td>1913</td>
<td>26.8</td>
</tr>
<tr>
<td>1921</td>
<td>22.3</td>
</tr>
<tr>
<td>1923</td>
<td>29.8</td>
</tr>
<tr>
<td>1925</td>
<td>26.3</td>
</tr>
<tr>
<td>1927</td>
<td>32.3</td>
</tr>
<tr>
<td>1929</td>
<td>37.9</td>
</tr>
</tbody>
</table>

Of this tonnage a percentage which has increased from about 10% in 1923 to approximately 20% in 1929 consists of low volatile coal, produced chiefly in the New River, Pocahontas, Tug River, Clinch Valley, Stonega and Oakdale districts. This coal, because of its special quality, is less competitive and therefore is not so directly affected by rate adjustments.

Although lake cargo coal amounts to little more than 10% of the total coal mined in the fields engaging in this traffic, nevertheless its economic importance is greatly disproportionate to its volume. This coal is mined and shipped in the months from April to November when the demand for coal is lowest. It affords to many operators, therefore, a means of keeping their mines in operation throughout the year. The significance of this to miners and mining communities as well as operators, is self-evident. Moreover, in an industry so depressed as the bituminous coal industry, margins of profit, if any, are low, and the shift in a relatively small volume of business may spell failure to the operators losing it.

Considerations of this nature are to be distinguished from argument based on the immediate economic consequences of the Commission's decision. These, of course, are duly emphasized in briefs of counsel in the current Lake Cargo Coal Case. Moreover, a brief has been filed by a group of large consumers of lake cargo coal in the Northwest, urging the Commission to consider the public interest in the continuance of the southern fields in the competitive
legal technique, devised for the adjudication of the conflicting claims of A, landlord, against B, his tenant, of C, purchaser, against D, vendor, lends itself effectively to this endeavor to insulate the questions formulated for decision from the grave problems of social policy which do in fact underlie them. The congruities (which might be imperilled were counsel for the X Coal Company to advise court or commission on fundamentals of national social policy) are thereby preserved. The lawyer can evade the ultimates because in lieu of reasons he can proffer decisions, or more frequently the formulae into which decisions, after they have passed current for a time, tend to degenerate. If perforce he must go behind these, it will be to the decisions or formulae from which they in turn were drawn.

Obviously this methodology does not exclude considerations of social policy from the actual determination of cases of this nature. Some room for play must be left in the articulation even of the most rigidly systematized branches of private law. This freedom grows progressively greater as the transition is made into the domain of public law. In the field of commerce regulation where statutes for the most part are no more than letters patent issued to the courts and commissions by legislatures of lawyers charging them with the duty of law-making, this opportunity for the introduction of the non-legalistic determinant is at its widest. Some observers conclude, therefore, that such factors alone are operative; that the lawyer, aside from his work of fact-gathering, ministers only to the maintenance of a mystery whereby the uninitiate are shielded from the truth that administrative and judicial tribunals are, within their ever-widening jurisdiction, determining as they see fit the economic destinies of the nation.

If this were the whole truth, then it would be barren labor to study a problem of the nature of the Lake Cargo Coal Case in its legalistic aspects. But this view, in its denial of any inter-

market. The "public", as is customary, is identified with these consumers whose object is, of course, to secure the lowest possible coal prices.

The Supreme Court has charged itself with the preservation of the doctrine of separation of powers deemed implicit in the Constitution. Nevertheless, it has shown a marked tendency to relax the doctrine forbidding the delegation of legislative powers. The pretence of preserving the doctrine is maintained by the requirement that Congress establish legislative standards to govern administrative bodies in the exercise of their rule-making and regulatory powers. See Note (1914) 28 Harv. L. Rev. 95. The essentially formal nature of this requirement becomes most patent in the delegations of power to the Interstate Commerce Commission where the standards, "reasonable", "just", "undue", etc., have no content other than that given by their application to the facts of successive cases. They are, in substance, directions to legislate wisely.
action of the legalistic factors with the socio-economic, ignores one of the realities of the situation. In their insistence that we have in truth a government of men and not of laws, its proponents forget that those men are lawyers, that the lawyer is legalistic in his mental processes, that he is disciplined to defer inquiry and judgment where judgment, if not inquiry, has been made before him, that his reluctance to assert an uncontrolled discretion is as real as the considerable, if unavowed, indulgence therein is inevitable. To one who must employ the legal technique, no question is res integra in its broadest implications. It must always fall within a zone of uncertainty demarcated by two or more judicially determined points. And however adroit the skilled advocate or judge may be in shaping his argument or opinion to evade the unfavorable implications of such predetermined positions, the very fact that he must and does take them into consideration vouches for their significance. Precisely how great that significance may be is a question not susceptible of determination for its answer depends not only on the facts of the case and the nature of the problem but also on the intellectual processes of the persons who decide it. In any event, on the threshold of an inquiry into the legalistic aspects of the current Lake Carge Coal Case, it is enough to know that the formulation of the legal problem, however much it may serve to conceal the vital issues that underlie it, will, nevertheless, be of some importance in their determination.

II

Except in 1917 the Interstate Commerce Commission has heretofore addressed itself to the problem of whether the lake cargo coal rates under attack violated the injunction of Section 1 (5) of the Interstate Commerce Act that "all charges made for

Lake cargo coal rates have been subjected to Commission scrutiny in the following cases: Boileau v. P. & L. E. R. R., supra n. 2; In re Advance in Rates on Coal, supra n. 2; Clyde Coal Co. v. P. R. R., 23 I. C. C. 135 (1912); Boileau v. P. & L. E. R. R., 24 I. C. C. 129 (1912); New Pittsburgh Coal Co. v. H. V. Ry., 24 I. C. C. 244 (1912); Pittsburgh Vein Operators of Ohio v. Penna. Co., 24 I. C. C. 280 (1912); San Toy Coal Co. v. A. C. & Y. Ry., 24 I. C. C. 93 (1915); Lake Cargo Coal Rates, 46 I. C. C. 159 (1917); Lake Cargo Coal Rates, 1925, 101 I. C. C. 513 (1925); Lake Cargo Coal Rates, 1925, 126 I. C. C. 309 (1927); Lake Cargo Coal, 139 I. C. C. 367 (1928).

In the 1917 case, although the allegation of discrimination was abandoned by the complainants during the course of the proceedings (46 I. C. C. 159, 163), the Commission nevertheless undertook a general investigation of the lake cargo coal rate structure and, in establishing differentials to be observed thereafter, expressly found the existing differential unduly preferential and prejudicial (46 I. C. C. 159, 189).
any service rendered or to be rendered in the transportation of passengers or property . . . shall be just and reasonable." No question of its power to act in the premises could be raised in such proceedings. Since 1906 the Commission has enjoyed, under Section 15 (1), the power to "determine and prescribe what will be the just and reasonable rate . . . to be thereafter observed in such case as the maximum to be charged". And in 1920 it was granted by the Transportation Act amendment to the above section the further power to designate the maximum or minimum or maximum and minimum rates to be charged.

The reasonableness of a rate, we have been repeatedly informed by both the Commission and the courts, is a "question of fact". It happens, however, that reasonable men tend to differ as to this "fact" of reasonableness; in the lake cargo coal cases the opinions of reasonable men seem with marked uniformity to have depended on whether, between the 79th and 85th parallels of longitude their interests lay north or south of the line established successively by Messrs. Mason and Dixon and the Ohio River. In other words, it is a "fact" which does not preexist the determination of those appointed to decide it. To term the reasonableness of a rate a question of fact is merely to epitomize the proposition that what a rate shall be rests in the discretion of the "fact-finding" body. The evidentiary facts presented for its consideration do not speak for themselves, and for a commentator to call in question a Commission decision as to the reasonableness of a rate establishes only his belief in the superiority of his own judgment over that of the Commission. The lawyer has therefore primarily the task of persuasion, of influencing the judgment of the Commissioners in accordance with his desires.

Where, however, he fails in that task, he has another string to his bow. Questions of fact, so runs the formula, are for the Commission; questions of law, for the courts. To secure the review of an unfavorable exercise of the Commission's power, the

---

11 Section 15, as originally enacted, 24 STAT. 384 (1887), was held not to empower the Commission to fix maximum rates. I. C. C. v. Cincinnati, N. O. & T. P. Ry., 167 U. S. 479 (1897). The Hepburn Act added the provision quoted above. 34 STAT. 589 (1906).
13 Illinois Central R. R. v. I. C. C., 206 U. S. 441 (1907). See cases collected in 1 INTERSTATE COMM. ACts ANN. 326. (This valuable digest "prepared by and under the direction of" Commissioner Clyde B. Aitchison in response to Senate Resolution No. 17, Dec. 6, 1927, was published in 1930 by the U. S. Government Printing Office.)
lawyer must show that that body erred in the determination of some question of law. Since, in the lake cargo coal rate proceedings brought under Section 1, the Commission's jurisdiction to act has been undisputed, counsel have been faced with the difficult task of bringing to light errors of law in the exercise of that jurisdiction. The courts have steadfastly repeated their refusal to look behind determinations of fact by the Commission provided more than a scintilla of evidence could be found to sustain them. But they have been equally steadfast in their assertion of power to review errors of law, and the significance of this refusal becomes evident when one recalls that there is no inherent distinction between questions of fact and of law. A question of law is a question of fact writ large—"a ground of difference between court and fact-finding body which can be isolated and expressed as a general proposition applicable beyond the particular case to all similar cases." To effect the transmutation calls merely for a certain verbal dexterity, and counsel in seeking the review of Commission decisions have been adept in alchemy of this sort.

Yet it was not until 1928 that the Lake Cargo Coal Cases

11 In I. C. C. v. Union Pac. R. R., 222 U. S. 541, 547 (1912), Mr. Justice Lamar, while disclaiming an intent to be exhaustive, summarized the situations in which Commission orders might be set aside as follows: "... the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory ...; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

12 This dichotomy has been a convenient tool to which the courts have recourse at several points in the judicial process. See Green, Judge and Jury (1930) 268. Its significance can be appreciated only in relation to the specific functions for which it is employed. See Thayer, "Law and Fact" in Jury Trials (1890) 4 Harv. L. Rev. 147; Cook, Statements of Fact in Code Pleading (1921) 21 Col. L. Rev. 416. Its employment in the review of administrative decisions is discussed in Dickinson, Administrative Justice and the Supremacy of Law (1927) 50-55, 151-153, 167-170, 318-319.

13 Dickinson, op. cit. supra n. 15, at 168.

14 In St. Louis & O'Fallon Ry. v. U. S., 279 U. S. 461, 492 (1929), Mr. Justice Brandeis, in his dissent, lists instances in which the Supreme Court has set aside the Commission orders on the ground of erroneous consideration of evidence: "Orders have been set aside because entered without evidence; or because matters of fact had been considered which were not in the record; or because the Commission excluded from consideration facts and circumstances which ought to have been considered; or because it took into consideration facts which could not legally influence its judgment." He argues that the O'Fallon decision constituted an invasion of the Commission's previously recognized power to determine "to what extent, if any, weight should be
yielded an example: the statutory court in the Anchor Coal Co. case enjoined the enforcement of the order of the Commission forbidding the reductions in rates proposed by the southern carriers which were designed to restore differentials enlarged by the previous reduction in the northern rates ordered by the commission in the 1927 proceedings. One of the grounds of decision was that "the Commission exceeded its powers, in that its action was based, in part, at least, upon industrial conditions, and was essentially an effort to equalize industrial conditions or offset economic advantages through adjustments of rates." It would not be profitable here to subject this decision to critical scrutiny. It constitutes, however, a graphic illustration of the technique whereby the seemingly plenary powers of the Commission over this question of fact may be controlled by the courts.

In the current Lake Cargo Coal Case the challenge of the complainants does not go to the reasonableness of the rates. The complainants instead assert that they are in violation of Section 3 (1) of the Interstate Commerce Act which declares unlawful the giving by a carrier of "any undue or unreasonable preference or advantage to any particular person . . . or locality . . . in any respect whatsoever, or to subject any particular person . . . or

---

Supra n. 3.

25 F. (2d) at 471.

The decisions of the Commission and the court have been commented on in a previous volume of the LAW QUARTERLY. See Arnold, The Lake Cargo Rate Case of February 1928 (1928) 34 W. VA. L. Q. 272; Note, ibid. 404. The so-called doctrine of relative reasonableness the scope of which the Anchor Coal Co. case seems to limit is discussed at length in an excellent note entitled "Consideration and Control of Commercial Conditions in Railroad Rate Regulation", (1931) 40 YALE L. J. 600. See also Mansfield, The Hoch-Smith Resolution and the Consideration of Commercial Conditions in Rate-Fixing (1931) 16 CORN. L. Q. 339; Robinson, The Hoch-Smith Resolution and the Future of the Interstate Commerce Commission (1929) 42 HARV. L. REV. 610, 623.

With reference to the analogous process of controlling the discretion of a jury on questions of reasonableness, Professor Thayer observed " . . . such questions become, from time to time, the subject of more specific legal rule or definition . . . But where that has happened is a change in the legal rules; the rule of 'reasonableness' is either displaced or narrowed. When once the exacter rule is known, what is left is none the less a mere question of fact." Thayer, op. cit. supra n. 15, at 170. This equanimity is comprehensible when the only question at issue is the redistribution of functions between judge and jury. But the significance of the process is heightened when its result is not the mere narrowing of a legal rule but the transfer of power from Commissioners "informed by experience" to judges informed by counsel.

given to the evidence" (p. 494). Considering only the last two situations in the enumeration quoted, one is struck with the freedom thus reserved by the Court to restrict Commission action.
locality . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Here, again we encounter a question of "fact." The existence of a "preference", "advantage", "prejudice" or "disadvantage" may be subject to objective demonstration, but the Act denounces only the "undue" and the "unreasonable". The insertion of these adjectives operates as a grant of discretionary power to the Commission, and, for the reasons adverted to above with respect to determinations of reasonableness, it would be supererogatory to inquire into the wisdom of its exercise in this or, indeed, any similar case. But inquiry is pertinent as to the means available for its control. To fetter the exercise of this discretion, if it be within the jurisdiction of the Commission, counsel must, in the present case as in the past, discover some "ground of difference" which may be magnified into "a general proposition applicable beyond the particular case". A question which may prove susceptible of such enlargement can already be discerned in the current proceedings, but whether it will ever emerge as an issue to be carried to the courts depends first on the determination of a much more significant question of law—the jurisdiction of the Commission to apply Section 3 (1) to the lake cargo coal rate structure.

It is this question which renders the legal element in the present case of unusual interest, for the power of the Commission to act in the premises is vigorously contested. It has in fact been expressly disclaimed by the majority of the Commission in the 1925 and 1927 and, by implication, in the 1928 proceedings before it. Yet, curiously, in 1917, the Commission exercised this disputed power without discussion and, apparently, without evoking any protest. In recent years, however, Section 3 has been the

---

24 41 STAT. 479 (1920), 49 U. S. C. A. § 3(1) (1929).
26 See p. 418, infra.
27 See Lake Cargo Coal Rates, 1925, 101 I. C. C. at 545.
28 See Lake Cargo Coal Rates, 1925, 126 I. C. C. at 304.
29 See Lake Cargo Coal, 139 I. C. C. at 330, 332.
30 See n. 9, supra. In Lake Cargo Coal Rates, 1925, 126 I. C. C. at 304, the Commission said: "It is true that undue prejudice and preference were found in the Lake Cargo Coal Case of 1917, but it does not appear that the question here raised was considered in that case; and, moreover, the finding there applied to the differential over the Ohio No. 8, Cambridge, and Hocking districts, which all take the same rates, but the last mentioned district is served by the Hocking Valley, so the situation was different." The Hocking Valley Ry., then an independent, is now controlled by the C. & O. Ry.
object of considerable judicial scrutiny. Doubtless these decisions, coupled with the repeated assertions of Commissioner Eastman that the Commission has power to act under Section 3, have determined the change in strategy of complainants' counsel. In view of the pendency of the case before the Commission, a consideration of the merits of this problem of statutory interpretation would be of dubious propriety, but there is room for an inquiry into precisely what are the questions which may now or in some future litigation under Section 3 arise for determination.

III

The nub of the contention that the Interstate Commerce Commission lacks power to charge the defendant carriers with a violation of Section 3 lies in the fact that the same carriers do not participate in both the allegedly preferential and prejudicial rates. A glance at the various fields and the routes serving them will illustrate the difficulty. One of the complainants is the Western Pennsylvania Coal Traffic Bureau. It represents operators in the Pittsburgh, Butler-Mercer, Freeport, and Connellsville producing districts located in south-western Pennsylvania. These fields are served, either directly or under through routing arrangements, by the Pennsylvania, New York Central, Baltimore & Ohio, Erie, Bessemer & Lake Erie, Montour, Pittsburgh & Lake Erie, Pittsburgh & West Virginia and Wheeling & Lake Erie Railroads. The other complainant, the Ohio Lake Cargo Coal Committee is an association of coal operators in producing districts in eastern and southern Ohio. The eastern Ohio districts are served by the Pennsylvania, N. Y. Central, B. & O., Erie, P. & W. Va., and the W. and L. E. Railroads. The southern Ohio districts are served by the Pennsylvania, N. Y. Central, B. & O., and the Chesapeake and Ohio Railroads. The carriers are, of course, the parties defendant, but the operators in southern West Virginia, Kentucky, Virginia and Tennessee have joined forces to intervene in the proceedings. Lake cargo coal shipments are originated in these

---


30 See Lake Cargo Coal Rates, 1925, 126 I. C. C. at 371; Lake Cargo Coal, 139 I. C. C. at 400.

31 The Fairmont Coal Traffic Bureau, an association of operators in the Fairmont district, has also intervened to protest against any increase in the existing Fairmont differential of 20 cents over Pittsburgh. Since the Fairmont field is served by carriers which also serve the northern fields, its
fields by the following railroads: Norfolk & Western, Chesapeake & Ohio, Louisville & Nashville, Virginian, and the Southern. A substantial proportion of these shipments reach the lake at Toledo over the rails of the C. & O. The N. Y. Central also originates and delivers some southern coal. The balance reaches the lake over through routes established by the above lines with the Pennsylvania, B. & O., and N. Y. Central.

This complex network of carriers resolves itself for the purpose of this case into four groupings: (1) the northern independents, i. e., those roads serving only northern fields which, incidentally, have not been joined as parties defendant, (2) the northern participants, i. e., the Pennsylvania, Baltimore & Ohio and New York Central, which serve directly or join in through routes from both the northern and southern fields, (3) the southern participants, i. e., the Norfolk & Western, Virginian, Louisville & Nashville, and the Southern which join in through routes from the southern fields; and (4) the Chesapeake & Ohio which alone of the southern carriers maintains a direct route to the lake, although it is also a participant in certain through routes with the carriers in the second group.

If there were but a single system of railroads in the United States, that system would be obliged to treat all similarly situated and competing localities with substantial equality. But can there be discrimination in a situation where the X R. R. charges a higher rate from point A to point C than the Y R. R. demands for an approximately similar haul from B to C? Looked at from the standpoint of the shipper, the effect is the same whether one or two roads perform the service. If the purpose of the statutory prohibition is to insure equality of treatment to competing localities, then it becomes immaterial whether either of the carriers can justly be charged with responsibility for its violation; the only problem is whether power is vested in the Commission to correct it. But if unjustly discriminatory rates are to be considered, under Section 3, as a breach of duty on the part of the carrier, then the question of responsibility becomes of the essence, and in the hypothetical case, neither carrier could be held liable.

Prior to the Transportation Act the question, as to rates at least, was not susceptible of conclusive determination. Unless an order could be directed against a single carrier or group of carriers directing the removal of the discrimination, the Commission was powerless to correct it, for where the situation prejudicial to the complainant arose out of the acts of independent carriers,
it would be necessary to establish minimum as well as maximum rates in order to insure the preservation of such differential as might be indicated to effect an equalization. But the Commission did not obtain power to prescribe even maximum rates until the adoption of the Hepburn Act in 1906, and the minimum rate power was not obtained until the enactment of the Transportation Act in 1920. Thus even had Section 3 been given the former of the two possible constructions, the power to effectuate its purpose would have been wanting.

The Commission was keenly aware of this limitation upon its ability to correct rate inequalities. Several opinions contain expressions indicating a belief that the grant of the minimum rate power would remove the only obstacle to action. In several of its Annual Reports in which the Commission urged this extension of its authority, a similar attitude seems implied. Commissioner situation does not present the problems of law discussed hereafter which are raised by any attempt to apply Section 3 to rates on coal shipments from southern West Virginia districts.

34 STAT. 589 (1906).

With respect to alleged discriminations in the granting and refusal of services, the Commission was given the same remedial powers it now exercises by the Hepburn Act amendment to § 15 of the Interstate Commerce Act. 34 STAT. 589 (1906). The Commission may "determine and prescribe . . . what regulation or practice . . . is just, fair, and reasonable to be thereafter followed?". The decision in Penn Refining Co. v. West. N. Y. & P. R. R., 208 U. S. 208 (1908), holding that the defendant carrier which joined in a through rate with another carrier alleged to be rendering preferential service was not itself guilty of discrimination in refusing to render such service, lends considerable support to the view that lack of responsibility on the part of the carrier and not lack of power on the part of the Commission was the basis for denying reparation to the complaining shipper.

One of these dates from 1897. In Savannah Bureau v. Charleston & S. Ry., 7 I. C. C. 458, 475, 476 (1897), the Commission observed, with reference to a charge of discrimination: "Each line is an independent line and may fix its own rate wherever it pleases, and we have no power whatever over that rate when established. It is manifest that a wrong like that complained of in this case could not be corrected without authority to establish both the maximum and the minimum rate. And we can establish neither." It added that this same limitation of power rendered it helpless to correct a situation where the defendant carrier participated in both rates but made the allegedly preferential rate in response to an independent carrier's competition. This view is repeated in Roberts Cotton Oil Co. v. I. C. R. R., 21 I. C. C. 248, 251 (1911) where the following statement appears: "If we were authorized to fix a minimum rate, or to treat the carriers collectively as a single unit or system, the adjustment complained of is one which might call for correction." The statement is repeated verbatim in Memphis Freight Bureau v. B. & O. R. R., 28 I. C. C. 543, 547 (1913). See also Boileau v. P. & L. E. R. R., 24 I. C. C. 129, 133 (1912).

This first extended discussion is to be found in the Seventh Annual Report of the Commission. See 1893 ANN. REP. I. C. C. 38. A vigorous argument that the minimum rate power be granted to correct discriminatory
Clark appearing before the Committee on Interstate Commerce of the United States Senate in 1919 submitted a memorandum collating a number of such expressions. Yet the Transportation Act which added the minimum rate power by amendment to Section 15 (1) of the Interstate Commerce Act made no alteration of substance in Section 3 (1) prohibiting unlawful preferences or prejudices, and in the reports and debates on the former in the course of its passage, its relationship to the latter was not made evident.

In Central R. R. Co. of N. J. v. United States, the contention was made that participation by a carrier in a joint rate obliged it to render to shippers on its lines the same privileges accorded to shippers by the connecting lines. The court, relying on a decision

differentials maintained by independent lines was embodied in the Eleventh Report. See 1897 ibid. 23-26. See also 1894 ibid. 26; 1901 ibid. 82.

29 See CLARK, INTERSTATE COMMERCE (1919) 214.

In his speech of Dec. 4, 1919, explaining the provisions of the bill containing this amendment, Senator Cummins of Iowa, Chairman of the Senate Committee on Interstate Commerce, said merely: "As it is now, the Commission is not given express power to prescribe minimum rates. The Commission has the power to prescribe the rate at which an article shall be moved, in order to enforce the law against discrimination, but there is no authority for a schedule of minimum rates. This bill adds to the present law the power on the part of the Commission to prescribe such rates as well as maximum rates. This is particularly important with reference to the division of rates as between connecting carriers whether they be land carriers or whether one of them be a land carrier and the other a water carrier." 59 Cong. Rec. 141 (1919). Representative Esch, presenting the bill to the House on Nov. 11, 1919, made a very similar and equally brief statement. 58 ibid. 8317 (1919). The Committee reports are little more enlightening. In H. R. Rep. No. 456, 66th Cong. 1st Sess., submitted with the House bill, the following statement is made at p. 19 concerning the grant of the minimum rate power: "With this power the Commission could prevent a rail carrier from reducing a rate out of proportion to the cost of service, by establishing a minimum below which such carrier could not fix its rate. It would also prevent a rail carrier from destroying water competition between competitive points by prohibiting such carrier from so reducing its rates as to destroy its water competitor . . . . The power to fix minimum rates will also enable the Commission to adjust many cases under the fourth section of the Commerce Act, known as the "long and short haul clause". The Senate Report contained no reference to this amendment. Sen. Rep. No. 304, 66th Cong. 1st Sess. The conference report repeated in substance the above statement.


A lively debate arose in both House and Senate with respect to the long and short haul clause which led to its amendment. 41 Stat. 480 (1920), 49 U. S. C. A. § 4 (1) (1926). However, the analogous problem of discrimination under Section 3 does not seem to have been adverted to. The senators and representatives from the mountain states sought to withdraw the Commission's discretionary power to permit exceptions to the rule forbidding a greater charge for a long than for a short haul. See 58 Cong. Rec. 8593-8592 (1919); 59 ibid. 641-660 (1919), 3344-3348 (1920). The effect of competition by the water carrier remained in the forefront of the discussion, to the exclusion of a thorough consideration of the problem in all its aspects.

30 Supra n. 29.
antedating the Transportation Act, held that this participation in the joint rate did not render the defendant's refusal discriminatory since it did not participate in the grant of the privilege alleged to be preferential. Moreover, Mr. Justice Brandeis, speaking for a unanimous court, made the following significant observation with reference to Section 3:

"What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act 1920, February 28, 1920, c. 91, 41 Stat. 456, nor any earlier amendatory legislation has changed, in this respect, the purpose or scope of § 3."

If the views of the Supreme Court have changed since this enunciation of the doctrine that discrimination in rates may be effected only by the same carrier or carriers, then the Lake Cargo Coal Case may afford to it an opportunity to repudiate its earlier position. But until such an alteration of opinion is made evident, it remains necessary to examine the implications of the principle embodied in the passage quoted above.

---

20 Penn Refining Co. v. West N. Y. & P. R. R., supra n. 34.
22 The belief that the Transportation Act in granting to the Commission power to prescribe maximum and/or minimum rates whenever it "shall be of the opinion that any individual or joint rate . . . is or will be . . . unjustly discriminatory or unduly preferential or prejudicial", 41 Stat. 484 (1920), 49 U. S. C. A. § 15 (1) (1926), has enlarged the Commission's control over alleged discriminations by independent carriers, retains considerable vitality despite the Central R. R. Co. case. In Jefferson Island Salt Mining Co. v. United States, 6 F. (2d) 315 (N. D. Ohio 1925), a three judge court held valid a Commission order setting minimum rates for the transportation of salt in the face of the argument that this was an improper exercise of the Commission's powers under Section 3 since the defendant carriers were independent. The Commission had found that a rate war impended and that the rates on salt tended to place an undue burden on other items of traffic. Salt Cases of 1923, 92 I. C. C. 388, 410 (1924). The court invoked Section 15 (1) and also Section 15a (2), 41 Stat. 488 (1920), 49 U. S. C. A. § 15a (2) (1926), which empowers the Commission to establish rates so that the carriers as a whole will earn a fair return on their aggregate value. On p. 318, the court stated: "In the present case, the evidence is ample that ruinous rate wars can only be avoided and a reasonable relationship between rates collected and service rendered can only be maintained by the power exercised by the Commission. If plaintiff's contention were sustained, it would cut the heart out of the 1920 amendments to the Interstate Commerce Act. The new objects and purposes to be accomplished . . . would
We start then with the assumption that the X R. R. cannot be guilty of discrimination in fixing a rate between A and C, however glaring may be the discrepancy between this rate and that charged by the Y R. R. between B and C. Suppose, however, that the Y R. R. reaches C from B only over the rails of the X R. R. and that there is a joint rate for the through route. In such a situation may the X R. R. be held subject to a Section 3 order? Since it controls both rates there is no doubt but that it may. There is open to it the alternative of reducing the higher rate or increasing the lower. If the offending rate is the joint rate, the X R. R. may withdraw therefrom if it cannot put an end to the discrimination otherwise. But is this control over the rates essential to liability under Section 3? If it be, then may the Y R. R., which can effect only one of the two rates whose relation gives rise to the complaint, be subjected to a Commission order?

Until recently the requirement of control over both rates seemed firmly established. Its basis, however, was uncertain. There is some evidence that it was deemed to arise out of the limitations on rate-making power of the Commission. Indeed, it was held in an early decision that the Commission’s orders under Section 3 must afford the carrier the alternatives of abandoning the preference, abolishing the prejudice, or establishing some new basis of equality. Obviously this could be done only where one carrier was responsible for both the preference and the prejudice. The Commission has, on occasion, sought to adjust rate discriminations nullified. New section 15a would be read out of the act. Apparently it is only where rates are noncompensatory or rate wars are threatened that Section 15a becomes pertinent. Perhaps this fact will serve as the basis for reconciling this decision with the Central R. R. Co. case, which was not mentioned by the Court. On the other hand, it may point to a trend away from that decision. Certainly it goes farther than the Illinois Central case, supra n. 29, discussed infra p. 412 on which the court relies. A later Commission-order prescribing minimum salt rates was rested on a finding of unreasonable and not discrimination. Eastern Salt Cases, 122 I. C. C. 21, 36 (1927), injunction denied, sub nom. Akron, C. & Y. Ry. v. United States, 22 F. (2d) 199 (W. D. N. Y. 1927).

United States v. Illinois Central R. R., supra n. 29. It is not essential that the defendant carrier reach the prejudiced or preferred community on its own rails. St. Louis S. W. Ry. v. United States, supra n. 29; cf. Chicago, I. & L. Ry. v. United States, supra n. 29. An early lower federal court decision had held to the contrary, Allen & Lewis v. Ore. R. & Nav. Co., 98 Fed. 16 (C. C. D. Ore., 1899), and this view was at one time adopted by the Commission. See Biale & Wyman, Railroad Rate Regulation (2d ed. 1915) § 773.

Detroit, G. H. & M. Ry. v. L. C. C., 74 Fed. 803 (C. C. A. 6th, 1896). This decision, of course, antedated even the maximum rate powers of the Commission.
tions by prescribing differentials, but this did not obviate the necessity that the order be directed to a carrier able to put it into effect by virtue of its control over both rates. Yet in at least one older case the Commission seems to have dealt with a discrimination by ordering a reduction in rates although a dissenting Commissioner complained that there was no finding of unreasonableness. But such an order, though it need be directed to a road controlling only the prejudicial rate would, of course, remain effective only so long as the preferential rate remained unchanged.

As has been indicated above, this maladjustment of legal machinery for combatting rate discriminations in situations involving more than one carrier persisted until the enactment of the Transportation Act which by an amendment to Section 15 (1) of the Interstate Commerce Act vested in the Commission the power “to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge . . . to be thereafter observed . . . or the maximum or minimum, or maximum and minimum, to be charged” in cases where Commission is of the opinion that the rate attacked “is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial.” But while this amendment augmented the remedial machinery at the disposal of the Commission, it did not expressly purport to broaden the definition of “unjustly discriminatory or unduly preferential or prejudicial.” If the basis of the requirement that a carrier, to be subject to Section 3, must control both rates lay

---

48 In N. Y. C. & H. R. R. v. I. C. C., 168 Fed. 131 (C. C. S. D. N. Y. 1909), a Commission order establishing a relation of rates instead of a maximum rate was upheld on the ground that it merely required the equalization of charges for similar services and did not prescribe how the charges should be equalized. The court said, at p. 136 “It is not to the specific power to prescribe maximum rates, but to the broad powers, applicable in the case of violations of the act by unjust discriminations, conferred by section 12 . . . and, by section 15 . . . that resort must be had”.

49 This limitation on the employment of differentials was recognized in one of the early lake cargo coal cases. Boileau v. P. & L. E. R. R., 24 I. C. C. 129, 133 (1912). Commissioner Meyer pointed out, moreover, that a differential based on an absolute maximum rate from one district would operate to establish by indirection absolute minimum rates from the others.


49 In its Eleventh Annual Report, the Commission cites an instance in which a subsequent rate reduction by a competing carrier frustrated the Commission’s attempt to put an end to a rate discrimination by ordering a lower differential. 1897 Ann. Rep. I. C. C. 24.

not in the limitations of the machinery of enforcement but rather in the definition of the offense, then of course the amendment of Section 15 (1) would not effect any substantive change.

The latter construction of Section 3 seems for a time to have been adhered to by the Commission. That body in the much-cited *Ashland Fire Brick Co.* case had already enunciated the proposition that "the test of discrimination is the ability of one of the carriers . . . to put an end to the discrimination by its own act". Although this doctrine had its origin, as will be seen, in a case presenting substantially different considerations, the formula lent itself to the question under discussion. If a carrier did not control both rates it could not put an end to the discrimination. If it could not do that, how could it be held responsible for its maintenance? But if such control were a requisite of liability, under what circumstances could it be said to exist? The difficulty of answering this question with assurance injected one more element of uncertainty into an already complicated problem.

A series of Supreme Court decisions seems at length to have dissipated the requirement of control over both rates. It is unnecessary either that a carrier actually reach both the preferred and the prejudiced points with its own rails or that it control the rates to both. Thus, in the hypothetical case which served to pose this problem, it would seem that the Y R. R. could be held responsible for a discrimination arising out of rates in fact fixed by the X R. R. with which it formed a through route under a joint rate from the preferred point alone. Discrimination is looked upon as something in the nature of a tort. It is effected by the disparity between the two rates and to one of these the Y R. R. is a party. It is, therefore, a joint tortfeasor and will not be heard to object that it is not in a position to correct the situation by an alteration in its own rates.

---

60 *Ashland Fire Brick Co. v. Southern Ry.*, 22 I. C. C. 115 (1911).
61 *Ibid.* at 120.
62 See infra, p. 410.
63 St. Louis S. W. Ry. v. United States; United States v. Illinois Central R. R.; Virginian Ry. v. United States, all *supra* n. 29.

In the Illinois Central case referred to above, two appeals were disposed of in the single opinion. In the second of these, discussed in its final paragraph, the only appellant was the short line which participated solely in the prejudiced traffic and could not comply with the order by its own act, as could the appellee Illinois Central in the first appeal. Yet a similar result was reached. See the discussion of this case in *Galveston Comm. Assn. v. Galveston, H. & S. A. Ry.*, 160 I. C. C. 345, 358 (1929).

64 This conception seems to underlie *Mr. Justice Brandeis' language in Chicago, I. & L. Ry. v. United States*, *supra* n. 29 at 293. "Unjust discrimination may exist in law as well as in fact, although the injury is in-
If participation in rather than control over the discriminatory rates is the criterion, may it be applied without any qualification as to its degree? Some limitations seem to have been established. Thus, mere participation in a joint rate will not be a basis for liability where some practice of the connecting carrier rather than the joint rate gives rise to the discrimination complained of. The participation must be in the discriminatory act or practice. Yet the establishment of a through rate which is merely a combination of local rates and not a joint rate seems to suffice. And where the participation in the preferential rate arises out of a trackage agreement with the carrier establishing it, a finding of discrimination will be sustained. On the other hand, when a mere participation in a switching movement is the only connection between the carrier granting the alleged preferential rate and that demanding the prejudicial one, the Commission has refused to find participation. Moreover, as recently as 1929, Commissioner Eastman, who suffers from a chronic incapacity to be doctrinaire, made in the course of a dissent in a discrimination case in which all defendants actually participated in the rates at issue, the following comment:

"... there are court decisions which point to the conclusion that this fact affords a sufficient basis for the application of Section 3... On the other hand it may be argued with force that it is our duty to look to the substance rather than to the form and to consider the extent to which defendants participate in what are in reality the rate-making routes to and from the rival ports. In other words, the question is whether mere participation in rates to both is enough if it is a participation which could be eliminated without particular sacrifice and without materially changing the situation."

In so far as the carriers serving the southern field participate

---

flicted by a railroad which has no such direct physical connection. Wherever discrimination is, in fact, practiced, an order to remove it may issue; and the order may extend to every carrier who participates in inflicting the injury. Here each of the steam railroads was an effective instrument of the discrimination complained of. Discrimination between persons by a carrier was held illegal at common law in some jurisdictions. This did not extend to discrimination between localities. See BEALE & WYMAN, op. cit., supra n. 48, §§ 619, 752.

22 Central R. R. Co. of N. J. v. United States, supra n. 29.
24 Virginian Ry. v. United States, supra n. 29.
in the alleged rate discrimination, their position is substantially that of the Y R. R. in the hypothetical case. But even though Commissioner Eastman's doubts be resolved in favor of requiring that participation be material in order to subject a carrier to a Section 3 order, is it likely that the southern roads can at present avail themselves of this relaxation of the rule? The volume of lake cargo coal shipped over through routes established by the N. & W., L. & N., Virginian, and even the C. & O. in conjunction with the northern carriers, the B. & O., N. Y. Central and Pennsylvania, may be found too considerable for them to obtain aid and comfort from Commissioner Eastman's suggested invocation of de minimis. But that refusal to be satisfied by the showing of a technical complicity in a discriminatory rate relationship which is implicit in Commissioner Eastman's attitude may be of vital importance to the southern interests. The contention that Section 3 is not applicable to the lake cargo coal rate structure rests in the main on the assumption that the C. & O. R. R. is, or can become by ceasing its present concurrences with northern roads, an independent carrier, free from any Commission control and capable of serving the southern field exclusively by the means of its route over the Hocking Valley lines to Toledo. Now this route also serves the Hocking and Crooksville fields in southern Ohio, and although these fields do not make important contributions to the lake cargo tonnage, they have been induced, possibly for reasons of legal strategy, to join with the northern Ohio complainants. The service which the C. & O. affords them is direct access to the lake over its own lines. It cannot, of course, withdraw from this service. It is therefore clearly liable to a Section 3 order with respect to this traffic, but this might be met by a reduction of those rates only. Is it thereby rendered equally subject to a charge of discrimination against all the northern fields? This would destroy its claim of independence for the Toledo route and, with that claim, the very foundation of the defendants' case.

---

Another aspect of this problem is considered infra, p. 01

In the six-year period, 1924-1929, 141,869 tons were shipped from these districts from mines on the Hocking Valley R. R. and 296,824 from mines on the N. Y. Central R. R. In 1929 their total contribution to the lake cargo coal traffic amounted to less than one half of one per cent. See Brief for Defendants, Docket Nos. 23240, 23241, Vol. I, p. 53. Complainants allege that prejudicial rates are responsible for the small volume of this traffic which prior to 1924 was of substantial proportions. See Brief for Complainants, Docket No. 23240, pp. 47-52.
The theory on which that case is based centers on the proposition that no discrimination can be unduly prejudicial unless the preferred shippers must necessarily employ the carriers against whom the prejudiced shippers complain. An amplification of our previous example will serve to illustrate this theory. Assume once more that the X R. R. serves the A-C route and joins with the Y R. R. in the B-C route. Transportation conditions are similar, yet the A-C rate is higher than the B-C rate. If the Z R. R. also runs from B to C and yet has no connection with either the X or the Y R. R.s, then under the above doctrine, even though the latter roads were to withdraw from their discriminatory joint rate, still the discrimination in fact would persist by reason of the lower rate on the Z route of which shippers at B could take advantage to the detriment of shippers at A.

This theory is derived from the Ashland Fire Brick Co. case decided in 1911. Commissioner Lane's statement of the doctrine ran as follows:

"It is true that we have held in cases where joint or proportional rates were made by all of the carriers leading to certain points of destination that it was within our power to end a discrimination as between points of origin by a reduction in the rate from a certain point that was discriminated against... This principle, however, only has application where the traffic from both groups of origin is necessarily transported to destination by the same connecting carrier or carriers and where it is possible for the delivering carriers to put an end to the discrimination by the exercise of their power to refuse to enter into preferential joint or proportional rates... The test of the discrimination is the ability of one of the carrier participating in the two through routes... to put an end to the discrimination by its own act."

The statement must be read in the light of the facts of the Ashland case. They are substantially those of the hypothetical case. Substitute L. & N. for the X R. R., C. & O. for the Y R. R., and Mobile & Ohio for the Z R. R., Ashland, Ky., for A, St. Louis, Mo., for B, and Birmingham, Ala., for C. The St. Louis rate on fire brick was less than the Ashland rate for a longer haul yet, as Commissioner Lane remarked, "this contrast arises out of the desire of the Louisville & Nashville to compete with the other carriers out of St. Louis, whereas it is not compelled to compete

\(^{22}\) Supra n. 50.
\(^{24}\) 22 I. C. C. at 120.
out of Lexington with either the Frisco or the Mobile & Ohio. It manifestly would do Ashland no good whatsoever for the Louisville & Nashville to withdraw from the St. Louis business.

Once more it becomes necessary to press behind the formula to the reasons for its employment in order to determine whether they still retain validity in the light of subsequent statutory changes and the interpretation thereof by the Supreme Court. The central question obviously is whether this is a rule which delimits the wrong or the remedy. Counsel for the defendant carriers stoutly maintain the former, and in their position have the support of a decision of the Supreme Court in which Mr. Justice White argues that the granting of a preferential rate to meet the low rates of an independent competitor cannot, as a matter of law, constitute "unjust discrimination." The injury is caused by the lawful act of the competitor, not by the justifiable efforts of the defendant to secure some shares of the business. Reference at this juncture to the elusive "principles" of legal cause does not afford much assistance. True, courts have not consistently required that

---

84 Ibid. at 121.
85 In a consideration of this question as a problem of legal doctrine, it is, of course, important to inquire into its legal bases. That is not to assert, however, that the legalistic explanation is the controlling one.

---

In East Tenn. etc. Ry. v. I. C. C., 181 U. S. 1 (1901), an order of the Commission granting relief under the "long and short haul clause" (Section 4) was under review. It was urged that even though competition by independent carriers justified under that section the rate for the longer haul to Nashville, nevertheless this rate operated as an illegal discrimination against Chattanooga under Section 3. To this argument Mr. Justice White responded, at page 18 of the opinion (which, incidentally, is a chef d'oeuvre of the White manner): "In a supposed case when, in the first instance, upon an issue as to a violation of the fourth section of the act, it is conceded or established that the rates charged to the shorter distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer distance point, it must result that a discrimination springing alone from a disparity in rates cannot be held, in legal effect, to be the voluntary act of the defendant carriers, and as a consequence the provisions of the third section of the act forbidding the making or giving of an undue or unreasonable preference or advantage will not apply. The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers."

The Supreme Court, relying on English authority, had first decided that competition even by carriers not subject to the Act, was a factor which the Commission might consider in determining whether a rate was prejudicial. Texas & P. Ry. v. I. C. C., 162 U. S. 197 (1896). The view was reiterated in I. C. C. v. Ala. Midland Ry., 168 U. S. 144 (1897), but the Court still deemed the effect of competition a question of fact for the Commission. In the East Tennessee case above, Mr. Justice White elevated the question of fact into a rule of law.
a defendant's act be a cause *sine qua non* of an injury. Where the acts of two independent wrongdoers concur to effect a result which either of their acts would have sufficed to produce, either or both may be held liable. Yet when one of the concurrent causes is the act of an innocent person or is a natural force, it has been suggested that this rule will not be applied. As far as the fact of causal relationship is concerned, it seems obvious that no difference springs from the guilt or innocence of the actor, but it is equally apparent that in such cases the courts are not concerned with the logical niceties of causation but rather with the redistribution of tort losses and the exaction of criminal penalties for anti-social conduct. The distinction suggested may be seized upon or ignored by a court, depending upon whether it wishes to narrow or enlarge the scope of responsibility for the harm complained of. Moreover, in the case of Commission action, it is not enough that legal responsibility be fixed upon a defendant. The Commission's work is essentially pragmatic, and its orders must find their *raison d'être* in the termination of a continuing business injury.

To the extent then that the doctrine of the *Ashland* case merely marks the limits of effective Commission action, it becomes pertinent to inquire whether the enlarged powers of the Commission have thereby extended the scope of Section 3. We have already seen that the rule that a carrier must have control over both preferential and prejudicial rates, (an outgrowth, incidentally, of the *Ashland* formula, if not decision) did not survive the extension of the Commission's rate-fixing power. But here an adjustment of the rates of the participating lines will not cure the discrimination attacked unless the Commission can also secure jurisdiction over the independent road. Were the Commission to order any decrease in the prejudicial rate, the competitor might nullify it by a corresponding reduction of its preferential rate.

---

7See Corey v. Havener, 182 Mass. 250, 65 N. E. 69 (1902); Anderson v. M. St. P. Ry., 146 Minn. 430, 179 N. W. 45 (1920). See Smith, *Legal Cause in Actions of Tort* (1912) 25 HARV. L. REV. 303, 312; Beale, *Proximate Consequences of an Act* (1920) 33 HARV. L. REV. 633, 639; McLaughlin, *Proximate Cause* (1925) 39 HARV. L. REV. 149, 153. When two independent acts concur to effect a result which neither alone would have sufficed to produce, the question whether each actor may be held responsible for the entire damage involves somewhat different considerations, and authority is divided. See (1920) 29 YALE L. J. 935.


9Cf. GREEN, RATIONALE OF PROXIMATE CAUSE (1927) 147; Edgerton, op. cit. supra n. 68, at 347.

10See p. 406, supra.
Obviously an increase in the preferential rate by the defendant carrier would not be effective. Only if the Commission by a minimum rate order could prevent a reduction or compel an increase in the rate charged by the independent line would its order be more than a gesture.

Such a minimum rate order is precisely what Commissioner Eastman suggested in his special concurrence in the 1927 Lake Cargo Case in which the majority were content to rest their reduction of the northern rates on Section 1. After adverting to the contention that the C. & O. formed, with the Hocking Valley, an independent competitor of the other roads for the southern lake cargo traffic, he nevertheless insisted that if "reductions in the rates over these competitive routes were proposed corresponding to the reductions which are required from the complaining districts, the power to suspend and pass upon such reductions brings the situation within our control . . . Here we would be dealing with what is practically one route out of many, and the rates would be governed by an order under Section 3. Under such conditions resort to the minimum rate power can readily be justified." Again in the 1928 decision countermanding the rate reductions made by the southern carriers to restore differentials widened by the previous decision, Commissioner Eastman refused to agree that this action was proper as an exercise of the minimum rate power under Section 1. He argued that this same power might, however, be invoked as an adjunct to the Commission's powers under Section 3. "I rest this conclusion", he added, "squarely upon the language of the Supreme Court in United States v. Illinois Central R. R."  

Although counsel for complainants do not adopt Commissioner Eastman's rationale, they do urge that the Illinois Central case put an end to the doctrine of the Ashland case. Counsel for defendants are at pains to distinguish it. The case merits examination in detail. Knexo, situated on the Fernwood & Gulf R. R. complained of discrimination against it by the Illinois Central R. R. which excluded Knexo from a surrounding blanket rate terri-
tory which included points not only on its own lines but also on connecting short lines. The joint rate paid by Knoxo for shipment over the Fernwood & Gulf and Illinois Central was higher than the blanket rate accorded three points alleged in the complaint to be unjustly preferred thereby. Alternative routes did exist from points in the blanket territory. If these were independent routes which might have persisted in maintaining the discrimination despite the order directed to the Fernwood & Gulf and the Illinois Central, then in disregarding the existence of such routes, the Commission and the Supreme Court, which sustained the former’s order, would seem to have departed from the doctrine of the Ashland case. But counsel for defendants refer to the records before the Commission in seeking to establish two contentions: first, that these alternative routes were not independent routes since rates from the Fernwood & Gulf were in effect over them, and, second, that there were in fact no alternative routes whatsoever from the three points alleged to have been preferred to the prejudice of Knoxo and to which the complaint and the Commission’s order were exclusively confined.

Apparently the question of the independence of the competing carriers was not urged before the Supreme Court. The existence of competition was, nevertheless, relied on to justify the preferential rates. Mr. Justice Brandeis expressly denied that this competition, as a matter of law, established the “innocent character of the discrimination practiced by the Illinois Central” although competition was a factor to be considered by the Commission in determining whether the discrimination was just. “The newly conferred power to grant relief against rates unreasonably low may’, he continued, “afford protection against injurious rate policies of a competitor, which were theretofore uncontrollable.” By restricting this language to the confines of the fact situation which prompted it, counsel for defendants can, of course, distinguish the lake cargo situation. Thus, suppose that that proceeding were directed only against the N. & W. and the Pennsylvania with which, let us assume, it joins in granting allegedly preferential rates. The fact that those rates were granted to compete with the rates established over the through route of the L. & N. and the N. Y. Central could not as a matter of law justify the discrimination against the northern fields since the L.

---

78 Ibid.
& N. and the N. Y. Central were themselves party to a similar discrimination and their rates could consequently be controlled by the Commission. It is the competition of an allegedly independent carrier not, for that reason, itself subject to Commission discipline upon which the defendants rely to exonerate them from responsibility. Competition that is lawful, they argue, may lawfully be met. But to Commissioner Eastman who has found in the necessities of the situation as he conceives them the justification for an exercise of the minimum rate power giving control over the independent carrier, this distinction would doubtless be without persuasive significance. The competition of the independent furnishes an excuse, he argues, only when it cannot be controlled.

What support has Commissioner Eastman’s view in the decisions subsequent to the Illinois Central case from which it derives its inspiration? Counsel for both parties seize upon the latest case in the Galveston-New Orleans litigation. For several years, in proceedings before the Commission under Section 3, Galveston has sought to bring an end to the equalization of rates between Galveston and New Orleans and certain Oklahoma points. Because of the greater distance from New Orleans to those points, the complaining Galveston shippers alleged that this equality operated to prefer New Orleans. In 1925, the Galveston interests were successful, but on a further hearing in 1927 the Commission excepted from its order rates from points on the Texas & Pacific R. R. and Louisiana Ry. & Nav. Co. whose lines did not reach the Texas ports or control the rates thereto. In 1929, the exception having been challenged, the Commission reversed itself, expressly repudiating the doctrine which it attributed to the Ashland case that a defendant carrier in a Section 3 proceeding must control both the preferential and the prejudicial rates. The defendants in the principal case contend, however, that since New Orleans

---

80 Galveston Comm. Assn. v. Galveston, H. & S. A. Ry., 160 I. C. C. 345 (1929), injunction denied, sub nom. Texas & Pac. Ry. v. United States, 42 F. (2d) 281 (S. D. Tex. 1930). The Court briefly dismissed the contention of the carriers that they were not liable for undue prejudice because their rails did not reach the Texas ports on the authority of the cases cited in note 28, supra. Foster, J., dissented on the ground that the Commission had attempted to equalize port advantages and that unjust discrimination could not arise where the carriers charged the competing ports equal rates. Cf. Anchor Coal Co. v. United States, supra n. 3, at 471.
carriers participated themselves in the preferential rates and since there were no independent roads operating from those points on their lines whose rates were in question, the Commission's decision and that of the statutory court affirming it cannot be said to alter the doctrine of the Ashland case in so far as it concerns the effect of independent, competing routes.\textsuperscript{22}

The Commission itself, in cases decided since the Galveston case, seems to have been guilty of taking inconsistent positions with respect to this narrower aspect of the doctrine. In at least two cases involving rate discrimination the doctrine has been applied,\textsuperscript{22} and in one of these the Ashland case was cited.\textsuperscript{23} Yet in a still later case, Inland Empire Mfrs. Assn. v. A. & S. Ry.,\textsuperscript{24} in which a refusal by the Chicago, Milwaukee & St. Paul to accord transit on lumber at Spokane was held unduly prejudicial to western shippers when it accorded the privilege at midwestern points, it was shown that it accorded this service to the latter only because of the competition of independent lines. The Commission, nevertheless, found the refusal unduly prejudicial. It did so on the authority of a case, Duluth Chamber of Commerce v. Chicago N. W. Ry.,\textsuperscript{25} decided in 1929 shortly before the Galveston case, in which the Commission had refused to apply the Ashland doctrine to a discrimination arising out of the granting of concentration arrangements on a route subject to independent competition and the refusal to accord such arrangements on a non-competitive route. The majority in neither case vouchsafed reasons for this departure. It evoked vigorous protests in the earlier case from three Commissioner,\textsuperscript{26} and Commissioner Eastman, concurring specially, conceded that the dissenters made "a strong technical case" and rested his concurrence on the assumption that the competition in fact was not sufficiently strong to compel the preferential practice.\textsuperscript{27} In the later case, two Commissioners concurred separately, echoing wistfully the sentiments previously expressed in dissent.\textsuperscript{28}

If one were to attempt the task which the majority were content to eschew and venture a reconciliation of this apparent incon-

\textsuperscript{22} Brief for Defendants, Docket Nos. 23240, 23241, Vol. I, p. 86.
\textsuperscript{23} Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 161 I. C. C. 176 (1930); Eastern Class Rate Investigation, 164 I. C. C. 314, at 416 (1930).
\textsuperscript{24} Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., supra n. 32, at 179.
\textsuperscript{25} 165 I. C. C. 53 (1930).
\textsuperscript{26} 156 I. C. C. 156 (1929).
\textsuperscript{27} Ibid. at 170, 171.
\textsuperscript{28} Ibid. at 169.
\textsuperscript{29} Inland Empire Mfrs. Assn. v. A. & S. Ry., supra n. 84, at 63.
sistency, it might be found in the nature of the discrimination. If the defendant carrier were to grant the complaining shippers the transit service they sought, the discrimination would be terminated once and for all, for services of this nature are not susceptible of indefinite extension and consequently the independent competitor would not be likely to revive the discrimination by a further preference. Rates, however, may always be lowered so that the reduction of a preferential rate carries with it no guaranty of continued equilibrium if there is competition on the prejudicial route. Certainly, whatever explanation for the present course of the Commission's decisions may eventually prove to be valid, one cannot consider the question foreclosed. The ultimate fate of the Ashland doctrine must wait upon the action of the Supreme Court.

This detailed analysis of the significance of the independent carrier has, of course, been premised on the assumption that the C. & O. route to Toledo over its Hocking Valley lines would meet the requirement of independence. The question raised by its service to the complaining Hocking and Crooksville fields has already been mentioned. Three others must be decided. First comes a question purely of fact. Could the Toledo route haul the entire southern lake cargo coal traffic if the other southern carriers were to withdraw from their concurrences with those northern roads which also serve the southern field? On this issue, testimony is sharply in conflict. The examiner does not seek to resolve the difference. Assume, for the purpose of the next questions, that the Commission finds it impracticable for the C. &

---

The existence of independent carriers serving only the northern fields has been mentioned. See p. 399, supra. Considerable evidence has been offered by defendants to show that the participating northern carriers "originated" a relatively small proportion of the lake cargo coal from the Pennsylvania districts although the B. & O. and Pennsylvania "originated" a major portion of the Ohio production. The purpose of this testimony was to prove that these participating carriers were not the "rate-making lines" from the complaining districts. Brief for Defendants, Docket Nos. 23240, 23241, Vol. II, 104-119. Unless this evidence can sustain an allegation that their participation was not material in the sense suggested by Commissioner Eastman in the Baltimore Chamber of Commerce case, supra n. 59, it is difficult to appreciate its value in the light of the Galveston case, supra n. 80. Moreover, does the existence of competition with independent lines serving the prejudicial districts provide any basis for an application of the doctrine of the Ashland case? Would not the effect of this competition be nullified by the lowering of the prejudicial rate? Yet the Commission has referred hortefore to the existence of these lines in this connection without disclosing precisely how it considered them significant. See Lake Cargo Coal Rates, 1925, 101 I. C. C. at 545; Lake Cargo Coal Rates, 1925, 126 I. C. C. at 385.

---

See p. 408, supra.
O. to haul all the southern coal. Does the fact that it joins with roads participating in the preferential rate in establishing its own competing rate render it also a participant in the illegal discrimination? This seems to carry the doctrine of participation a step further than the cases have yet done. The Commission has always considered the Toledo route free from Section 3 orders even though the C. & O. has joined therein with carriers which in turn participated in joint rates with the northern carriers.\(^2\) If it would not itself be subject as a guilty participant to the Commission's control, then it would seem to meet the requirement of independence. This opens the way for the final question: Assuming its independence in the sense that it would not be subject itself to a Commission order, would its inability to haul all the traffic from the preferred point deprive its competitors, the participating defendants, of the protection of the Ashland doctrine? Probably in the lake cargo coal traffic alone could this question arise. Few commodities tax so severely the carrying powers of the carriers. However, the same principle would be involved were the question whether the independent line would in fact be able to draw away the traffic from the defendant by reason of its being able to maintain the preferential rate or practice. In the Duluth case discussed above,\(^2\) it will be recalled that that consideration was raised in Commissioner Eastman's special concurrence. The fact basis for the answer to either question must of necessity be more or less speculative. In view of that uncertainty perhaps the capacity of the independent carrier to attract and handle a very large proportion of the preferred traffic will answer the requirement of the Ashland doctrine. But here once more is a question for which resort to the cases will not provide an answer.

VI

The path of this inquiry into the limitations which the Supreme Court or the Commission itself may impose upon the

\(^2\) In Lake Cargo Coal Rates, 1925, 126 I. C. C. at 364, the following statement was made with reference to the Hocking Valley Ry., now a part of the C. & O.'s Toledo route: "The fact the latter [H. V. Ry.] joins with certain of the lines serving the complaining districts in joint rates from some of the preferred districts does not make it responsible for the rates maintained by the other lines from the complaining districts, but even if it did, the Hocking Valley's withdrawal from the joint rates referred to would not effect the same rates maintained by it in connection with the Chesapeake & Ohio or Norfolk & Western." See also Lake Cargo Coal Rates, 1925, 126 I. C. C. at 364, Lake Cargo Coal, 139 I. C. C. at 403.

\(^2\) See p. 415, supra.
application of Section 3 of the Interstate Commerce Act has been a tortuous one. A recapitulation is indicated. The questions which may be raised in the current or some future attempt to apply that provision to the lake cargo coal rate regulation comprise, in summary, the following:

(1) Must the Commission find participation by the same carrier or carriers in either the preferential or the prejudicial rates?

(2) If participation be required, is this requirement satisfied by any participation, however slight, or must it be "material", either in the sense of a substantial participation or one sufficient to insure the participant a voice in the rate-making?

(3) Is the granting of a preferential rate a ground for liability on the part of the participants thereto when a competing carrier not so participating is in a position, if permitted, to maintain the preference at the same or a lower rate, or does the competing carrier thereby become subject itself to the minimum rate power of the Commission?

(4) If the competition of a non-participating carrier be an excuse for the continuance of a preferential rate by a participating carrier, must it be shown that the competing carrier can and will move all the traffic from the preferred point if the participant should withdraw its preferential rate?

The examiner, in the pending case, evaded these thorny issues by finding that the lake cargo coal rate differentials now in effect were not, as a matter of "fact", unduly prejudicial. Suppose the Commission itself comes to an opposite conclusion. Assume, further, that, confronted as it would then be by these legal questions, the Commission resolved them in favor of its own jurisdiction. On appeal counsel for defendants would, of course, assign this decision as error, but an attack on the finding of fact itself would call for the successful manipulation of that process, already described, whereby errors of law are revealed to have taken place in the determination of what is uniformly recognized as a question of fact.

An opportunity for the application of this process in the present case may be latent in the question whether evidence as to conditions in the coal industry in the northern and southern fields may properly be admitted or considered by the Commission. The uninformed might suppose that the grant of power to determine

\[^{30}\text{U. S. Daily, May 9, 1931, at 588.}\]
\[^{31}\text{See p. 395, supra.}\]
a question of fact would carry with it the power to decide what
evidence is relevant to the determination of that question, but that
separation of function between judge and jury which is funda-
mental in our trial procedure has been carried over into adminis-
trative law. It affords a convenient lever with which to dislodge
an adverse Commission finding.

In earlier lake cargo coal cases evidence of industrial condi-
tions had been considered by the Commission in determining
whether the rates from the competing fields were reasonable. Indeed, this consideration was one of the grounds on which an
injunction was granted following the review of the statutory
court of the Commission’s decision in favor of complainants in
1928. In these Section 1 proceedings, evidence disclosing greater
industrial handicaps born by the northern operators was doubtless
of persuasive influence in their favor. But now that Section 3 is
invoked, the southern interests are the parties who support its
relevance. Their theory is this: discriminatory rates may not be
disturbed unless injury is shown to have resulted therefrom. Com-
plainants have introduced evidence showing a diminution in the
volume and proportion of tonnage moving from their fields to
prove that the present and past differentials have worked them
injury. It is therefore permissible for defendants to submit
evidence tending to show that this shift in traffic was due not to

---

17 See note 17, supra.

The most receptive attitude toward evidence of this nature was displayed
said: "We interpret his [counsel for defendants] argument to mean that all
conditions of every kind whatsoever surrounding this coal industry, which
may be directly or indirectly affected by the rates, such as the profits of
the operators and carriers, the wages and standard of living of the miners
and railway employees, may be rightfully considered. Whatever legal limita-
tions may be imposed upon this view by the act to regulate commerce as at
present interpreted, from the point of view of public policy and humanity,
considerations like those adverted to by counsel most assuredly should not be
ignored."

7 Anchor Coal Co. v. United States, supra n. 3, at 470. In Lake Cargo Coal
Rates, 1925, 126 I. C. C. at 362, the Commission sought to justify its con-
sideration of industrial conditions in reliance upon the Hoch-Smith Resolu-
tion, 43 Stat. 801 (1925), 49 U. S. C. A. § 55 (1926), which directed the
Commission to investigate and revise the freight rate structure, with "due
regard to the general and comparative levels in market value of the various
classes and kinds of commodities . . . to a natural and proper development
of the country as a whole, and to the maintenance of an adequate system
of transportation." For a discussion of the Resolution and the recent de-
cision of the Supreme Court construing it, Ann Arbor R. R. v. United States,
281 U. S. 658 (1930), see Mansfield, op. cit. supra n. 20. In its 1928 de-
cision, Lake Cargo Coal, 139 I. C. C. at 373, the Commission disclaimed any
concern in evidence as to industrial conditions except in so far as it might
explain the shift in the lake cargo traffic.
transportation charges but to industrial conditions militating against the northern operators over which the carriers had no control.\(^9\) To this contention, complainants' counsel would no doubt respond that if, from a study of transportation conditions, it was shown that the rate structure did not adequately reflect the services rendered the respective parties, then inevitably this discrimination must have augmented whatever loss was suffered by complainants by reason of their industrial handicaps. Consequently an inquiry into the nature and extent of those handicaps would be superfluous and irrelevant.

A court so inclined might dispose of complainants' objection by declaring it to go to the weight and not to the relevance of the evidence in dispute. The weight to be accorded relevant evidence is within the discretion of the Commission, and is held not to present a question of law.\(^9\) It is difficult to suppress the suspicion that whether this question is to be held one of fact or of law depends ultimately on whether the reviewing court is or is not in agreement with the result reached by the Commission. This power of materializing questions of law out of the determination of questions of fact for the purpose of controlling administrative action is too valuable a weapon for the courts to blunt its edge by unnecessary use.\(^10\)

At the threshold of this essay in legal question-finding, recognition was accorded the force exerted by the nonlegalistic factors operative in this field of law, and the impossibility of appraising their relative weight was duly confessed. The known existence of these unknown factors would vitiate any attempt at prediction which, but for its debatable propriety in the present circumstances might here be hazarded. When one bent on prophecy consults the omens and \textit{auspices} of these Court and Commission decisions, he is

\(^9\) The recent gain in the northern field's share of the lake cargo traffic is also explained on the ground that industrial conditions in the respective fields are now more nearly equalized. Brief for Intervening W. Va., Tenn., Ky. and Va. Coal Operators, Docket Nos. 23240, 23241, pp. 157-176.


\(^10\) Another potential question of law is one suggested by the Anchor Coal Co. case. There Judge Parker argued that there could be no injury arising from an alleged discrimination in rates where the preferential rate was in fact higher than the prejudicial one. Anchor Coal Co. v. United States, 25 F. (2d) at 471. This view disregards, of course, the difference in treatment arising out of the exaction of a higher rate per unit of service from one shipper than from another. A contrary position has been taken by the Commission in its construction of the Act. Elk Cement & Lime Co. v. B. & O. R. R., 22 I. C. C. 84 (1911).
impressed with the difficulty of applying to them the technique which is employed with varying success in the domain of private law; and this is not because the Commission decisions are subjected to the condescension of "administrative interpretations" nor because the problems of law are either new or recondite. The explanation lies in the fact that the underlying considerations of economic policy may at times be found by those vested with the power of decision to be so overwhelming as to break down the trammels of analogy and to dwarf into relative insignificance the language of previous opinions. *Stare decisis* is here revealed as an instrumentality of rather than a limitation upon the judicial process. The technique of the lawyer remains of value in the formulation of the issues, but it is the economist, the political scientist, the statesman who, clothed with the judicial power, renders the decision.

301 For the rules evolved by the Supreme Court in its reference to administrative construction as a guide in the interpretation of statutes, see Note (1927) 40 Harv. L. Rev. 469. Just how effective a long-sustained course of administrative action is as a deterrent upon a court inclined to reach a contrary result is but another legal immeasurable. Certainly the rules themselves allow the court ample freedom.