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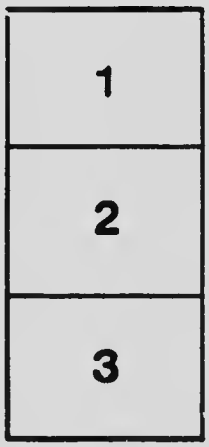

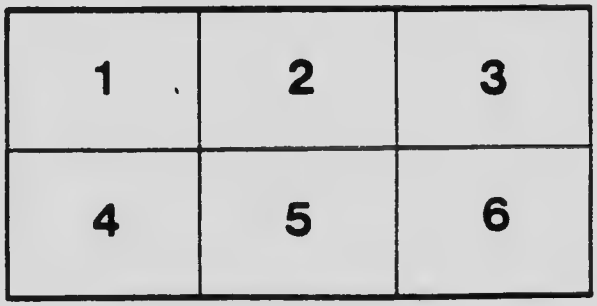

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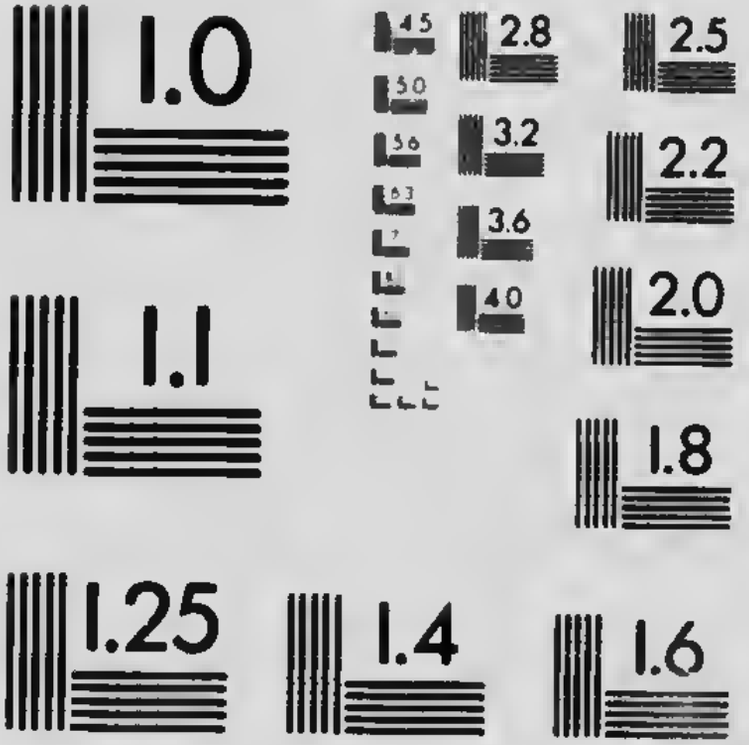

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THE ENGLISH RAILWAY AND CANAL COMMISSION OF 1883

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NOVEMBER, 1905

THE ENGLISH RAILWAY AND CANAL COMMISSION OF 1888.

I.

WHILE the law providing for the Commission of 1873 passed both Houses of Parliament with comparative ease, and received but little opposition from the railway interest the law of 1888 developed by small degrees, and met much opposition. The report of the Committee of 1881 had stated that a permanent railway tribunal was necessary.[1] Railway Commission legislation was introduced regularly between 1882 and 1886. In 1885 the nine principal railways submitted bills to Parliament embodying a general classification and a rearrangement of their maximum rates. But the protests of the traders led to the withdrawal of these measures. The defeat of the government in 1886 on the Irish Question prevented any further action at that time. In 1887 a regulative measure, which in some respects resembled the legislation of the following year, passed the House of Lords.

[1] *Report of Select Committee on Railways*, 1881, Part 1., p. iii.

So far as the form of the Commission is concerned, the most important changes introduced by the legislation of 1888 were the court organization of the Commission and the limitation of the right of appeal. Under the old organization the Commission was considered to be in the same position as any inferior court, and might be prohibited from proceeding in matters over which it had no jurisdiction.[1] Now, by giving the Commission a definite court organization and by making its decisions final on questions of fact, much strength was added.

The new legislation provided for a Commission of five members, composed of two lay and three *ex-officio* members. The *ex-officio* members are superior court judges, one for England, one for Scotland, one for Ireland. The active Commission at any one time has a membership of three, the two lay commissioners presided over by the designated superior court judge of the country in which the Commission is sitting.[2] While the judges who serve on the Commission are appointed for terms of five years, the lay commissioners hold office on a good-conduct tenure. The old provision whereby one of the lay commissioners was to be "of experience in railway business" was continued; and Mr. Price, the railway member of the former Commission, was reappointed. The qualification of the other lay commissioner was not specified. To this position Sir Frederick Peel, whose training was legal and who had been a member of the Railway Commission in 1873, was appointed. The lay commissioners were admonished of their judicial functions, for in their letters of appointment they were informed, "Doubtless you will feel that the judicial nature of your office is also incompatible with any active engagement in political controversies."

[1] *Toomer* v. *L. C. D. Ry. Co. and S. E. Ry. Co.*, 3 Ry. and Canal Traffic Cases, 98.

[2] The draft legislation of 1887 had provided a cumbrous arrangement whereby the judicial commissioner was to preside when a question of law was involved, while in other matters his attendance was to be invited by the lay commissioners, "if it was expedient for the better performance of the Commission's duties."

While the jurisdiction given by the Act of 1888 embraces a variety of functions, the most important of which are undue preference, facilities for traffic, traffic on steamboats, through rates, rate-books, terminals, legality of rates, provisions relating to private branch sidings, and references under the Board of Trade Arbitrations Act, 1874, the most important matters from the standpoint of the traders are (*a*) terminals, (*b*) reasonable facilities, (*c*) through rates, (*d*) undue preference, (*e*) control over actual rates.

The history of the terminal question is a long and involved one. When the earlier railways were chartered, the "canal toll" idea prevailed. For a time carriers, already in existence, quoted through rates over the railway lines, making such arrangements as they deemed proper in regard to payments for special services and for station terminals. It was not long, however, before the railways controlled the forwarding business, and complaint soon arose. The railways claimed the right, in addition to the powers given them under their maximum rates, to make charges for additional services and for terminals.[1] The traders contended that the maximum rates covered all that the railways were legally empowered to collect. It was concerning the station terminals, however, that the keenest contention existed. The Select Committee of 1882 had recommended that terminal charges should be recognized, but that they should be subject to publication by the companies, and that in case of challenge they should be sanctioned by the Railway Commission.[2] A clause to this effect was contained in the regulative measure introduced by Mr. Chamberlain in 1884. In a decision of the Court of Queen's Bench

[1] The question of terminals has come up in the United States. The charter of the Pittsburg & Connellsville Railway gave it the right to charge tolls. It was decided it had the right to charge terminals as well. *National Tube Works* v. *Baltimore & Ohio R.R.* (Penna.), 28 Am. and Eng. R'd. Cases, 13.

[2] *Select Committee on Railways*, 1882, pp. v and xvii.

in 1885 the right of the railways to collect terminals was definitely recognized.[1] But the traders did not recognize this decision as final; for, because of a technical condition, it was impossible to carry the case before the higher courts. While the legislation of 1888 was in committee, various attempts were made to place the control of terminals under the Railway Commission, as well as to provide that in every case the maximum rates should include terminals. But the government took the position that terminals were legally established, and so they were given explicit recognition.

The power to order through rates, on application, which had been placed in the Act of 1873 as an extension of the facilities clause of the Act of 1854, had authorized the Commission to act only when application was made by a railway or by a canal company. The Act of 1888 extended this jurisdiction by empowering the Commission to receive an application from a trader as well.

In every possible way the fact was emphasized that the Commission was a court, and therefore no concerned with rate-making. The control of matters pertaining to rates was divided. Powers in regard to conciliation of rate difficulties were given to the Board of Trade. When the provision placing the revision of maxima and of classification in the hands of the Board of Trade was under consideration, an amendment to place such revision in the hands of the Commission was negatived.

The Act of 1888, while it repealed portions of the railway regulative acts already in existence, did not codify

[1] *Hall* v. *London, Brighton, & South Coast Railway*, 15 Q. B. D. 505. This overruled a decision of the Railway Commission. A discussion of the question from the traders' standpoint will be found in Hunter, *The Railway and Canal Traffic Act*, 1888, pp. 38–50. See also *British Railways and Canals*, by "Hercules," chap. ii. (a pro-trader brochure, published in London in 1885). A summary of the railway point of view will be found in the address of Mr. Pope, Q.C., representing the London & North-western Railway before the Board of Trade, October 29, 1889, reported in *Railway News*, November 2, 1889, pp. 778–780. See also Grierson, *Railway Rates, English and Foreign*, pp. 93–106.

the portions remaining. Consequently there are still in effect sections of the Railway Clauses Consolidation Act, 1845, the Railway and Canal Traffic Act, 1854, the Regulation of Railways Act, 1868, and the Regulation of Railways Act, 1873. Since 1888 jurisdiction in regard to actual rates has been given by an Act of 1894; while, under a law of 1904, the powers of the Commission in regard to private sidings have been made more definite by an interpretation of the "reasonable facilities" clause of the Act of 1854.[1]

II.

Terminals, Reasonable Facilities, and Through Rates.

The Act of 1888 had recognized terminals. The Provisional Orders Acts gave them definite form. The matter was finally passed on by the Commission in 1891 in a decision which upheld that of 1885.[2] Justice Wills, who gave the decision in the former terminal case, was at this time the judicial member of the Commission. On appeal the decision of the Commission was upheld. While the question of the legality of terminals has thus been settled, there still remains the question of the right of the trader to be exempt from the payment of terminals under special conditions. This question is of especial interest in connection with the mining and manufacturing districts, where the establishments furnishing and receiving freight are usually situated on private sidings or on private railways. The importance of these sidings is shown in the fact that, while at the Sheffield freight station the tonnage in 1900 was 580,000, at a near-by siding it was 1,100,000. In 1894 the Commission was given jurisdic-

[1] For detail concerning the unrepealed sections see Woodfall, *The New Law and Practice of Railway and Canal Traffic, etc.*, Appendix A.

[2] *Sowerby & Co. v. Great Northern Ry. Co.*, 7 Ry. and Canal Traffic Cases, 156.

tion in claims for exemption from payment of terminal charges at sidings when it was alleged that the services had not been performed. Under the provision of the Act of 1888, requiring the railway to distinguish conveyance from terminal charges, it had been held that the responsibility of the railway might be discharged by stating that the whole payment was for a conveyance rate.[1] But the Court of Appeal decided in 1897 that it was incumbent on the railway, in such a case, to prove that it did not charge for terminals.[2] The Commission has power to allow a rebate from sidings charges without proof that any definite amount of terminal is included in the rate. A *prima facie* case for such a rebate is made out, if it is shown that, in respect of similar traffic between substantially the same termini, and passing over substantially the same routes, a sidings trader who does not require or use any terminal accommodation or services is charged the same amount as a trader who uses the station.[3] But the latter rate must not be simply a paper rate.[4] In calculating the amount of the rebate, it has, in general, been the practice of the Commission to follow the rule in Pidcock's case; *i.e.*, to assume that the service charges are in the same proportion to the rates actually charged as the maximum service charge would be to the sum of the maximum rates,—*i.e.*, the maximum rate and the maximum terminals.[5]

The through-rate clause of the Act of 1888 provides that through rates, stating the amount, route, and appor-

[1] *New Union Mill Co.* v. *Great Western Ry. Co.*, 9 Ry. and Canal Traffic Cases, 160.

[2] *Salt Union, Ltd.* v. *North Staffordshire Ry. and Others*, 10 Ry. and Canal Traffic Cases, 179.

[3] *Vickers, Sons & Maxim, Ltd.* v. *Midland Ry. and Others*, 11 Ry. and Canal Traffic Cases, 259.

[4] *Cowan & Sons* v. *North British Ry.*, 11 Ry. and Canal Traffic Cases, 271.

[5] *Pidcock* v. *Manchester Sheffield & Lincolnshire Ry.*, 9 Ry. and Canal Traffic Cases, 45.

tionment of the rate, may be proposed by a railway, a canal company, or a trader. In case of dispute regarding the rate or its apportionment the matter is brought before the Commission. In apportioning the through rate, the commissioners are to consider the special circumstances of the cases, and are not to compel any company to accept lower mileage rates than it may for the time legally be charging for like traffic, carried by a like mode of transit on any other line of communication, between the same points, being the points of departure and arrival of the through route.

Reasonable facilities in general must be such as can reasonably be required of the railway company, due allowance having been made for the way in which the service is already performed.[1] Similarly, in a reduced through rate there must always be considered whether there is a commensurate advantage to the railway company.[2] *Prima facie*, it is against public interest to interfere with vested legal rights, unless some compensation or equivalent is given. There must, therefore, be evidence both of public interest and reasonableness in favor of the rate and route sufficient to outweigh the former considerations.[3] The fact that two competing routes will tend to make either company treat the traders more reasonably is a consideration bearing on the question of public interest.[4] At the same time the Commission will not grant a through rate which creates unhealthy competition.[5] If there are

[1] *Newry Navigation Co.* v. *Great Northern Ry.* (Ireland), 7 Ry. and Canal Traffic Cases, 176.

[2] *Plymouth Incorporated Chamber of Commerce* v. *Great Western Ry. & L. & S. W. Ry.*, 9 Ry. and Canal Traffic Cases, 72; 10 ibid. 17.

[3] *Didcot, Newbury & Southampton Ry.* v. *Great Western Ry. & L. & S. W. Ry.*, 9 Ry. and Canal Traffic Cases, 210.

[4] *Plymouth, Devonport & S. W. Ry.* v. *Great Western Ry. & L. & S. W. Ry.*, 10 Ry. and Canal Traffic Cases, 68.

[5] *Didcot, Newbury & Southampton Ry.* v. *L. & S. W. Ry. and Others*, 10 Ry. and Canal Traffic Cases, 17.

grounds for the Commission granting something claimed as a proper facility for using railways, an objection grounded on its inconvenient consequences to railway companies by reason of arrangements made by themselves will not be sufficient reason for not granting it.[1] The particular circumstances of the proposed route and rate must be considered. The reasonableness of a rate over a proposed route is not to be measured by an existing rate over an alternative route, even if the rate over the latter route may be reasonable.[2]

Incident to granting a through rate, a through booking (ticketing) arrangement may also be made.[3] While the Commission has not attempted to lay down any general principle on which through rates are to be apportioned, it will consider any special expenses in construction or special charges a company may have been empowered to make.[4] It is not clear that the Commission has power to rescind a through rate once established under the Act of 1888.[5] So far no such action has been taken.

In the claims made by canal and by dock companies to obtain through rates, considerable emphasis has been laid upon the technical interpretation of the word "railway." Thus it was decided in 1897 that the powers the Manchester Ship Canal possessed to construct railways on its quays, although these railways were simply for its own service, constituted it a railway company. In 1901 the action of the Commission in approving a through rate arrangement for a dock company was overruled on the

[1] *Corporation of Birmingham & Sheffield Coal Co., Ltd.* v. *Manchester, Sheffield & Lincolnshire Ry., Mid'and Ry., & L. & N. W. Ry.*, 10 Ry. and Canal Traffic Cases, 62.

[2] *Didcot, Newbury & Southampton Ry., etc.* v. *Great Western Ry., etc., ut supra.*

[3] *Didcot, Newbury & Southampton Ry.* v. *Great Western Ry. & L. & S. W. Ry.*, 10 Ry. and Canal Traffic Cases, 1.

[4] *Forth Bridge & North British Ry. Co.* v. *Great North of Scotland Ry. & Caledonian Ry.*, 11 Ry. and Canal Traffic Cases, 1. This would cover, for example, "bonus mileage," or an arbitrary, in the case of an expensive bridge.

[5] *Great Northern Central Ry.* (Ireland) v. *Donegal Ry.*, 11 Ry. and Canal Traffic Cases, 47.

ground that the railways possessed by the dock company did not constitute a railway within the meaning of the act.[1] In 1903 a further application of the same company, subsequent to its acquisition of a short railway with which it had made connections, was refused on the ground that the difficulties of exchange of traffic did not justify the granting of such an application.

The Commission has looked at each through-rate case by itself. It has refrained from proposing a through rate. It has limited its action to the acceptance or rejection of the proposed through rate as brought before it. The power to propose through rates has been of little value to the traders. Normally, they have not been possessed of the exact knowledge necessary to the making of a through rate, with the result that they have been successful only in one out of five applications. The following summary gives details with reference to the through-rate applications formally acted upon by the Commission:—

Year.	By canal company.		By dock company.		By railway company.		By traders.		By municipal corporation and traders.	
	Granted.	Refused.	Granted.	Refused.	Granted.	Refused.	Granted.	Refused.	Granted.	Refused.
			No action prior to 1895.							
1895	2	–	–	–	–	–	1	1	–	–
1896	1	–	–	–	1	–	–	–	–	–
1897	1	–	–	–	3	–	–	–	–	1
1898	–	–	–	–	–	–	–	–	–	–
1899	–	–	–	–	2	1	–	–	–	–
1900	–	–	–	–	–	–	–	–	–	–
1901	–	–	–	–	–	–	–	–	–	–
1902	–	–	1	–	–	–	–	–	–	–
1903	–	–	–	2	–	–	–	2	–	–

[1] *London and East India Docks Co.* v. *Great Eastern Ry. & Midland Ry.*, 11 Ry. and Canal Traffic Cases, 57. This was a majority decision, Peel dissenting. The decision of the Court of Appeal was given by Mr. Justice Wright, who was a member of the Commission when the Manchester Canal case was decided. He distinguished the cases.

III.

Undue Preference.

The question of "undue preference" has long engaged attention in England. Complaints were made during the investigation of 1882 that many anomalies existed in domestic rates. Thus London sugar refiners complained that, while Greenock was double the distance from given points, sugar was being carried to these points at the same rates as were given to London.[1] But it was against low import or *preferential* rates, which intensified the competition to which different industries were subjected, that especial attention was directed.[2] The Act of 1873 had left much to the discretion of the Railway Commission in dealing with the question of undue preference. In the parliamentary discussions of 1887 and 1888 there were constant complaints of preferential rates. It was stated that no general measure dealing with railway traffic could be considered satisfactory which did not prevent preferential rates in favor of foreign products.[3] The government held, however, that no difference should be made between English merchandise and foreign merchandise because of origin.[4]

The undue preference section of the Act of 1888 provides that where, for the same or similar services, lower rates are charged to one shipper than are charged to another, or any difference in treatment is made, the burden of proof that such actions do not constitute an undue preference shall be on the railway. In considering

[1] See evidence of J. H. Balfour Browne before the Select Committee of 1882, explanatory of the factors involved, answers to questions 1297 and 1298.

[2] In addition to the evidence bearing on this point contained in the *Select Committee Report of* 1882, see also detail in the *Report of the Royal Commission on Depression of Trade and Industry*, 1886.

[3] Motion of Earl of Jersey, Hansard, 1888, third series, vol. 322, p. 1796. This was defeated by a vote of 72 to 45.

[4] Lord Salisbury, Hansard, 1888, third series, vol. 323, p. 1052.

whether the action complained of constitutes an undue preference, the commissioners are to consider "whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made. *Provided that no railway company shall make, nor shall the commissioners sanction any difference in the tolls, rates, or charges made for or any difference in the treatment of home and foreign merchandise in respect of the same or similar services.*"[1] The final clause of the section prohibits a higher charge for similar services, for the carriage of a like description and quantity of merchandise, for a less than is charged for a greater distance on the same line of railway. The concluding clause of the section is not only wider than the "long and short haul" clauses of the American statutes, it is also much wider than the prohibition hitherto existing in English legislation. An attempt was made by the railway interest to have a "long and short haul" clause placed in the legislation. It was argued that where a question of preferential rates came up, the comparison should in fairness to the railway, be made with traffic carried over the same portion of the line.[2] It was held, however, that the consideration of this matter could safely be left to the discretion of the Commission.

Complaints concerning undue preferences have occupied a prominent place before the Commission. Broadly

[1] I have italicized this so as to bring out the distinction of treatment between home and foreign traffic. In the Bill, introduced in 1887, clause 25 provided that the commissioners were to consider whether the difference in charges or treatment was necessary "for the purpose of securing the traffic in respect of which it was made." The vague phrase, "in the interests of the public," contained in the legislation of 1888, was placed in the Bill of 1887 by amendment.

[2] The proposal was voted down, both in Grand Committee of the House of Commons and in the House itself. The motion will be found in Hansard, 1888, third series, vol. 329, p. 452. The statement of Mr. Acworth, *Hearings before the Committee on Interstate Commerce of the United States Senate, etc.*, 1905, vol. iii. p. 1851, that there is in the Act of 1888 a "long and short haul" clause—"the short distance included in the long distance"—is evidently attributable to the fact that he had not a copy of the act before him.

speaking, the subject-matter of these fall under the headings of: (*a*) *differential rates*, concerned with disparities in domestic rates and including as sub-heads export rates, group rates, and rebates in respect of quantity; (*b*) *preferential rates*, concerned with disparities between home and import traffic. Before 1888 inequalities of charges for like services were only *prima facie* evidence, and the burden of proof was on the complainant: now it is on the railway. In the earlier decisions no rule is apparent. Each case was considered by itself. A decreased rate to develop a particular traffic in a particular district was an undue preference. The mere fact preference existed was not sufficient: it must be shown to be "undue" and "unreasonable." Differences in rate might be allowed where there were differences in the cost of conveyance.[1]

Additional points have been made under the present Commission. A contract to give exclusive use of a given station to a particular colliery is an undue preference, as are also lower tolls given by a navigation company to prevent a large dealer moving his business.[2] Normally, similar charges should be made for similar services.[3] An unreasonable preference is a question of fact, and no general principle will be laid down.[4] Competition is a circumstance to be taken into consideration, and the extent to which it is to be considered is a question of fact, not law.[5]

[1] For a summary of the law on this point, prior to 1888, see Woodfall, *op. cit.*, pp. 77–82. See also Darlington, *Railway Rates*, chap. iv.

[2] *Rishton Local Board* v. *Lancashire & Yorkshire Ry.*, 8 Ry. and Canal Traffic Cases, 74; *Fairweather and Others* v. *Corporation of York*, 11 Ry. and Canal Traffic Cases, 201.

[3] *Timm & Son* v. *Great Eastern Ry., Lancashire & Yorkshire Ry., and Others*, 11 Ry. and Canal Traffic Cases, 214.

[4] *Per* Lord Herschell in *Pickering Phipps and Others* v. *London & N. W. Ry. and Others*, on appeal, 8 Ry. and Canal Traffic Cases 100, 101; *Inverness Chamber of Commerce* v. *Highland Ry. Co.*, 11 Ry. and Canal Traffic Cases, 218.

[5] *Pickering Phipps*, case cited, p. 87. Group rates are authorized by Section 29 of the Act of 1888. See in this connection the important decision given in *Denaby Main Colliery Co., Ltd.* v. *M. S. & L. S. Ry.*, 11 App. Cas. 97.

There can be no mathematical equality in regard to the charges or advantages between places which are outside of a group and the different members of a group. Competition and convenience to the neighborhood are to be considered as affecting the justifiability of a group rate.[1]

On the question of differential rates the Commission has reversed itself. As has been indicated, the Commission is empowered to consider whether the rate complained of "is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made." In 1890[2] complaint was made that lower rates on grain and on flour were given from Cardiff to Birmingham than from Liverpool to Birmingham. The distances were respectively 173 and 98½ miles. The railway company contended that this was on account of competition, and that the lower rate was necessary (1) in its own interest, (2) in the interests of the public. Direct inland communication exists between Bristol and Birmingham by way of the Severn River and canal navigation. There is also a combined sea and rail route.

Justice Wills pertinently said Parliament had dealt with the matter of undue preferences with a "faltering hand." It had left to the Commission the responsibility of deciding many things which would more naturally have been laid down in legislation.[3] The somewhat inchoate nature of the undue preference clause is, however, more correctly attributed to its compromise origin. While it was intended, in a general way, that the phrase "in the interests of the public" should protect the interests of the consumers, Justice Wills was undoubtedly correct in saying that Parliament had no clear idea of what it meant. He considered that the "public interest" must

[1] *Pickering Phipps. etc.*, 87–88.

[2] *Liverpool Corn Traders' Association* v. *London & N. W. Ry.*, 7 Ry. and Canal Traffic Cases, 125.

[3] Page 137.

be something wider than that of one of the two localities concerned, and stated that he could not see that any important "public interest" would be affected if the traffic in grain and flour should have to seek some other route from Cardiff to Birmingham.[1] The action of the railway in engaging in such competition created artificial conditions which interfered with the natural course of trade. Sir Frederick Peel put this point still more strongly: "A traffic which differs only from other traffic in being competitive can have no such a distinction made in its favor, however necessary a lower charge may be to meet the competition, or however much it may be to the benefit of the company to secure the traffic." The attempt of the railway to compete with the "natural advantages" of the traffic which went from the Severn ports[2] by sea and rail, or by inland water navigation, to Birmingham was unjustifiable. His general reasoning rested on the assumption that the low rail rate from Cardiff gave "little or no profit," and that therefore a penalty was being placed on Liverpool in the "highly remunerative rate" it paid.[3]

The unsatisfactory position taken by this decision in regard to the effect of competition, and the extent to which this was to be taken into consideration, was, however, apparently justified by the decisions on the matter. While the law was confused and contradictory, the leading decision—Budd's case—ruled water competition out of consideration.[4] The effect of water competition on the undue preference clause was brought up

[1] Pages 136–138.

[2] These are Cardiff, Portishead, Avonmouth, Bristol, and Sharpness.

[3] Pages 140, 141.

[4] *Budd (P. O.) v. L. & N. W. Ry.*, 4 Ry. and Canal Traffic Cases, 394. The cases bearing on this subject are dealt with by Justice Wills in his decision. See also Lord Herschell in *Pickering Phipps*, *infra*, 104, 105. See also Butterworth and Ellis, *A Treatise on the Law relating to Rates and Traffic on Railways and Canals*, etc., pp. 168–170.

again in 1892.[1] Complaint was made of an undue preference in flour and grain between the Severn ports and Birmingham, on the one hand, and Birkenhead and Birmingham, on the other. While the rate from Birkenhead to Birmingham, a distance of 98 miles, was 11*s.* 6*d.*, the rate from Bristol to Birmingham, a distance of 141 miles, was 8*s.* 6*d.* The railway contended that the apparent anomaly was attributable to water competition. Both a majority and a minority decision were given In the dissenting opinion, delivered by Sir Frederick Peel, it was held that, while the evidence justified low rates from the Severn ports, at the same time the Birkenhead rate should be reduced so as to give a lower mileage rate. The majority opinion upheld the railway position. The rates complained of were attributable to effective competition, maintained by a competing railway and by water competition. The existing inequality in rates was necessary to give the section of country around Birmingham the advantage of the supplies both from the Severn ports and from Birkenhead. Justice Wills stated that in the former decision he had construed "public interest" too narrowly. The public intended was the public of the locality or district. Any considerable portion of the population in general as opposed to an individual or an association was sufficient.[2]

While it is contended that one principle was applied in the first Corn Traders' case, because the amount of traffic affected was small, and that a different principle was applied in the second case because the amount of traffic affected was large,[3] it would appear that the change of

[1] *Liverpool Corn Traders' Association* v. *Great Western Ry.*, 7 Ry. and Canal Traffic Cases, 114.

[2] *Liverpool Corn Traders' Association* v. *Great Western Ry.*, 7 Ry and Canal Traffic Cases, 127.

[3] See Boyle and Waghorn, *The Law relating to Railway and Canal Traffic*, vol. i. p. 4; also evidence of Mr. W. M. Acworth, *Committee on Interstate Commerce, etc.*, 1905, vol. iii. p. 1843.

position was, in reality, attributable to a decision in a case appealed from the Commission in 1891.[1] In this the construction of "public interest" had been involved. It was contended that a difference in rate complained of was not necessary for the purpose of securing the traffic in the public interest, and that the railway in making such a rate was seeking its own interest, not that of the public. This attempt to exclude the railway interest from "public interest" was denied by Lord Herschell. The point which should be considered, he stated, was not only the legitimate desire of the railway to obtain traffic, but also whether it was in the interest of the railway to secure this traffic rather than abandon it. The legislature, he continued, had recognized that there were cases where the traffic could not be obtained if the lower rate was raised, and where at the same time it would be unfair to demand as a condition of obtaining the traffic a reduction of the higher rate.[2] By judicial construction "public interest" has thus come to mean the controlling power of effective competition on particular rates. Undoubtedly there was a desire, when the legislation was under consideration in Parliament, to give the phrase a narrower construction. In 1887 it was stated that the railway, in carrying traffic on a rate competitive with sea-borne traffic, must show that there was a distinct public interest involved. The fact that some additional profit was obtained by engaging in such traffic was not sufficient.[3]

The "long and short haul" question comes before the Commission but seldom. When it does, it is not treated, as in the United States, as a form of preference demanding exceptional treatment. The Commission has recog-

[1] *Pickering Phipps and Others* v. *L. & N. W. Ry. and Others*, 8 Ry. and Canal Traffic Cases, 83.

[2] *Pickering Phipps, etc.*, 102 and 103.

[3] See statement of Lord Salisbury, Hansard, 1887, third series, vol. 314, 332.

nized effective competition as a justification of a lower rate for the longer distance. Where a higher rate is charged for the shorter than for the greater distance, the less being included in the greater, the Commission has held that, in the absence of effective competition at the longer distance point, such an arrangement is not justifiable, and that the shorter distance point should share on a mileage basis in the low rate given to the longer distance point.[1] The effect of competition has also been recognized in the case of export traffic. In 1903, in the Spillers & Bakers case, a low "shipment" rate was held necessary to obtain traffic. It was considered impossible to raise this rate, and the dissimilarity of circumstances did not warrant a comparison of the higher domestic rate with the lower export rate.[2] In 1904 a briquette manufacturing firm claimed that it was unduly prejudiced, since it paid the domestic rate on its raw material, while the manufactured product came into competition abroad with coal carried on a low export rate. The Commission upheld the principle of export rates, and further found that the railway was under no obligation to regulate its charges with reference to the ultimate competition complained of.[3]

From an early date English railway law has held that wholesale rates for large shipments do not constitute an undue preference. So early as 1858 in Nicholson's case, a leading case, it was decided that carrying at a lower rate in consideration of large quantities and full train loads at regular periods was justifiable, provided the real object was to obtain a greater profit by reduced cost of carriage. In taking this point of view, it was recog-

[1] *Timm & Sons* v. *N. E. Ry., Lanc. & York Ry., and Others*, 11 Ry. and Canal Traffic Cases, 214.

[2] *Spillers & Bakers, Ltd.* v. *Taff Vale Ry.*, 20 The Times L. R. 101.

[3] *Lancashire Patent Fuel Co., Ltd.* v. *L. & N. W. Ry., Great Central Ry., and Others.* A summary will be found in the *Railway Times*, August 13, 1904.

nized that various shippers would necessarily be excluded from the advantage of the low rate granted on such conditions.[1] In the decisions of the Commission of 1873 it was recognized that lower rates might be given because of trainload shipments or of ability to load a greater weight into trucks.[2] The general justification of such arrangements has been recognized by the present Commission.

An example from a case decided in 1900 will indicate the nature of the arrangement.[3] A rebate of 3*d*. per ton from the established rate was to be made on condition that a minimum shipment of 25,000 tons of coal a year was guaranteed, and that the arrangement should last for five years. The Commission has, in various cases, held such rebates excessive.[4] The ground taken has been that the rebate is justified by a reduction in cost to the company, and that the rebate should not be in excess of the saving to the company. It is obvious that such a practice as this has dangers connected with it. A considerable number of complaints have been directed against the excessive advantages obtained by Messrs. Rickett, Smith & Co. under their rebate arrangement with the Midland Railway. In one case, though the evidence is contradictory, there are the earmarks of a secret rebate.[5] While the decisions of the old Commission recognized bulk of traffic as a justification for reduction of rates, the policy

[1] *Nicholson* v. *Great Western Ry.*, 5 C. B. (N. S.) 366. The text of the agreement complained of will be found in the foot-notes to pp. 382–408. See also *Evershed* v. *L. & N. W. Ry.* (1877), 2 Q. B. Div. 267.

[2] *E.g.*, *Ransome* v. *Eastern Counties Ry.* (No. 2), 1 Ry. and Canal Traffic Cases, 109; *Girardot, Flinn & Co.* v. *Midland Ry.*, 4 Ry. and Canal Traffic Cases, 291; *Greenop* v. *S. E. Ry.*, 2 Ry. and Canal Traffic Cases, 319.

[3] *Daldy and Others* v. *Midland Ry. and Others*, 10 Ry. and Canal Traffic Cases, 305.

[4] *E.g.*, *Charrington, Sells, Dale & Co.* v. *Midland Ry. Co.*, 11 Ry. and Canal Traffic Cases, 222; *Walsall Wood Colliery Co.* v. *Midland Ry.*, *Railway Times*, July 25, 1903.

[5] *Charrington, Sells, Dale & Co.*, *ut supra*, p. 229.

of the present Commission has not been clear-cut. In some cases it has recognized quantity as a justification for a rebate.[1] But it has in other cases attempted to confine cost to mere economies of book-keeping, attributable to more prompt settlements, etc.;[2] and it has expressed the dictum that rebates in respect of quantity would justify a differentiation of charges in so many cases that the rule against preference would be in danger of disappearing, "and the small trader would be in a more helpless position than the position in which he now is."[3]

While the traders recognize the value of export rates, and the effects of competition thereon, the conditions which affect the import rate are often neglected, and the low rail rates given on imported goods are often attributed to the stupidity, if not turpitude, of the railways in preferring home to foreign goods. When the Act of 1888 provided that the Commission should not "sanction any difference . . . in the treatment of home and foreign merchandise in respect of the same or similar services," it was claimed that this absolutely forbade preferential rates, and that the home traffic would therefore be carried at the same as that of foreigners.[4] Notwithstanding this enthusiastic prediction there is at present a reiterated demand for a select committee to investigate the question of preferential rates.

The discussion of preferential rates in England has proceeded along lines familiar to every student of the effects of water competition on railway rates. "Why,"

[1] *Daldy and Others, ut supra*, p. 310. See also *Hickelton Main Colliery Co. v. Hull & Barnsley Ry., Railway Times*, July 25, 1903. In this case the consideration of the lower rate was a minimum of 38,000 tons per annum.

[2] *E.g., Charrington, Sells, etc., ut supra*, 230. [3] Ibid. 231.

[4] Waghorn and Stevens, *Report upon the Proceedings of the Inquiry held by the Board of Trade*, 1889, 1890, pp. 12 and 106. This report to the Lancashire and Cheshire, Devon and Cornwall, and Irish Conferences (traders' organizations), was published at Manchester in 1890. It contains a searching but extremely acrid and biassed examination of the railway position.

asks one, "if they (the railways) can carry at a profit from foreign countries, can they not carry home produce at the same rate?"[1] If the London & North-western carried a trainload of meat from Liverpool to London at 25s because it was American, it should be able to do the same wherever the meat came from.[2] "*Ex hypothesi* they (the railways) already got a profit out of the produce they carried, . . . and what they would have to do was to put the English farmer and producer on the same footing as the foreigner."[3]

The question of preferential rates was brought before the Commission in 1895 in an exceedingly important case, which lasted eight days.[4] Complaint was made that the railway charged lower rates from Southampton docks to London on the following goods of foreign origin—wool, hay, butter, cheese, lard, hops, fresh meat, bacon, hams—than it charged on similar articles of home origin, which were normally carried a shorter distance, and that the services rendered in respect of the foreign traffic were not less than those rendered for the home traffic in the proportion that the rates were lower. A few examples will serve to show the nature of the disparity complained of:—

Station.	Distance travelled.	Rates on fresh meat, hay, and hops to London.		
		Rate for meat.	Rate for hay.	Rate for hops.
Southampton docks	76 miles	17*s.* 6*d*	5*s.*	6*s.*
Southampton town	76 "	26*s.* 3*d*	9*s.* 8*d.*	20*s.* 10*d.*
Alton	45 "	9*s.* 2*d.*	7*s.* 4*d.*	20*s.*
Botley	76 "	27*s.* 6*d.*	9*s.* 8*d.*	22*s.* 7*d.*

[1] Lord Henniker, Hansard, 1885, third series, vol. 315, p. 412.

[2] Mr. Mundella, Hansard, 1888, third series, vol. 329, p. 413.

[3] Mr. Chamberlain, Hansard, 1888, third series, vol. 339, p. 445.

[4] *Mansion House Association on Railway and Canal Traffic for the United Kingdom* v. *London & South-western Railway*, 9 Ry. and Canal Traffic Cases, 20.

Back of the complaint lay a competition of ports for foreign traffic. The London docks were in competition with the Southampton docks, which were owned by the London & South-western Railway.[1] Competition existed between the all-water route to London and the water and rail route via Southampton.

At first the railway endeavored to justify the apparent anomalies on the grounds that the rates complained of were made on the basis of water competition, and that, besides, they were balances of through rates. But the Commission ruled that such matters could not be considered in evidence under the provisions of the Act. Under these conditions the railway had to fall back on the unsatisfactory standard of cost of service. It was shown that the rate for the home traffic covered a variety of services —*e.g.*, receiving, weighing, loading, covering, superintendence, provision of station accommodation, switching— which were not included in the rate on the foreign goods. The foreign merchandise was less valuable, less liable to damage, more easily and expeditiously handled, could be dealt with at times more convenient to the railway, always in larger quantities, and generally in a much more economical manner. On account of better baling, to cite one example, three tons of foreign hops could be loaded into a truck that would hold only two and a half tons of English hops.

The traders contended that such conditions of traffic as regularity and quantity, while admitted, were not capable of being included in the "similar services" spoken of in the undue preference section. Their contention was in substance that, while there might be differences in the case of home traffic because of dissimilarity of circum-

[1] When these docks were acquired by the railway in 1892, it was anticipated they would be a formidable competitor of the London docks. For information descriptive of the highly developed facilities for handling traffic at the Southampton docks, see *Railway Age*, July 1, 1904; *Railway News*, January 7, 1905.

stances, in the case of the foreign traffic it was intended that there should not, on any account, be any difference in favor of foreign goods.

Had the contention of the traders been successful, it would have established a principle. But the decision of the Commission, which has been claimed as a victory by both parties, was of a compromise nature, and proceeded on the careful lines already laid down that undue preference is a matter of the facts of the particular case. The articles with which the decision concerned itself were hops, fresh meat, and hay. These were the only articles in which there was any considerable traffic from the stations intermediate between Southampton and London. The rates quoted on the other articles were simply "paper" rates. Sir Frederick Peel, who decided on the facts, held that the differences between the home and the import rates on meat, hops, and hay were not justified.[1] While his colleagues accepted this opinion, it was with hesitation. They both had doubts as to the alleged preference on meat,[2] and justly so. The average consignment of foreign meat from Southampton was 37 tons. In a period of seventeen months 10,638 tons of meat were shipped in 286 consignments. On the other hand, from Salisbury, the leading English meat centre concerned, 231 tons in 825 consignments were shipped in the same period. It is apparent that, where the whole series of costs would be so different, the Commission strained the idea of cost of service to the breaking point, and in doing so favored the home producer.

The decision was based on the idea, manifestly correct, that it was the intention of the statute to eliminate competition from the factors to be considered. At the same time the majority of the Commission are satisfied that the real factor controlling the rate situation in this case

[1] *Mansion House case*, 38, 39. [2] Ibid. 32 and 43.

is water competition. As was said by Justice Collins, there was "no reason or principle in leaving out of account the fact of a rival route by rail or water from the point of departure to the point of arrival in the case of goods from abroad and taking it into account, as it clearly may be taken into account, where the comparison is between home goods only."[1]

This unsatisfactory decision, which cost the traders £2,000 in law costs, obtained no general principle for the traders, and at the same time forced the railways to depend upon the artificial justification of cost of service. While the decision is of such a nature that in a case where there is real competition of home and foreign products a different verdict might be given, no further action in regard to preferential rates has been taken before the Commission. In 1899 the question of preferential rates was brought before the Board of Trade under the conciliation clause, but no satisfactory agreement could be obtained.[2]

It was Mr. Chamberlain who introduced into the legislation the clause under discussion. The agitation in regard to preferential rates has been given an added vigor by his preferential trade movement. Back of much of the outcry concerning preferential rates is a hazy protectionism. The support Mr. Chamberlain has obtained, for example, in the iron and steel industry is in considerable part due to preferential rates on iron and steel products, although the matter is complicated by the export rates given by the railways of competing countries.[3]

The control over docks by railway companies, which was

[1] *Mansion House case*, 32. See also the statement of Lord Cobham in *Didcot, Newbury & Southampton Ry. Co.* v. *Great Western Ry. & L. & S. W. Ry.*, 9 Ry. and Canal Traffic Cases, 210.

[2] Case 16, *Seventh Report of the Board of Trade, under Section* 31 *of the Act of* 1888.

[3] See *Report of the Tariff Commission* (Chamberlain), 1904, vol. i.: The Iron and Steel Industry, under heading "Preferential Rates." *Contra*, see "British Railways and Goods Traffic: Is Preference given to Foreign Products?" A. Dudley Evans, *Economic Journal*, March, 1905.

objected to at an earlier date as a source of discrimination,[1] has been increasing of recent years. The railways have found it necessary to obtain control not only of docks, but also of steamer lines connecting with the Continent, in order to obtain the through rates which are necessary, if the import and export traffic are to balance, and thus permit a more economical use of rolling stock.[2] Complaint is made that the railways are spending large sums in erecting docks and warehouses at ports in order to encourage foreign trade, thereby still further increasing the number of preferential rates. The provisions of the Act of 1888 with reference to the right of the traders to have through rates from foreign points distinguished into their domestic and foreign portions are somewhat ambiguous. In the Southampton case the traders were unable to ascertain the foreign portion of the rate. As a result of this condition, an attempt was made in 1904 to obtain a provision in a special railway act, requiring that the railway should distinguish on its rate books, in the case of imports on a through rate, the portions attributable to (1) land carriage abroad, (2) dock, harbor, and shipping charges abroad, (3) conveyance by sea, (4) dock, harbor, and shipping charges at the British port, (5) railway charges in the United Kingdom. This was voted down by 103 to 79 on the ground that it was unfair to pick out a particular company in connection with what was a general matter.[3]

The farmers of the United Kingdom are subject to com-

[1] Section 27 of the draft *Report of the Select Committee of* 1882, p. xxviii.

[2] The practice of consigning goods on through rates is increasing. At the same time Continental railways—*e.g.*, those of Belgium—refuse to make through rates, except with railway companies. As to the alleged evil effects of such arrangements, see remarks of Mr. Hanbury, president of the Board of Agriculture, Hansard, 1902, fourth series, vol. cviii. p. 1640. See also Boyle and Waghorn, *op. cit.*, vol. i. p. 304.

[3] Lancashire and Yorkshire Railway Bill. For text of the Instruction see Hansard, 1904, fourth series, vol. 131, p. 1473.

petition from many points. To cite but a few examples: Algerian fruit and vegetables, French hops, Danish butter and eggs, compete with the home products. The hop rates complained of when President Hadley wrote still exist. Not only do the English farmers complain of preferential rates, there is also complaint from Ireland that the existing rate basis discriminates against Irish eggs, butter, and bacon. It should be noted, although such a consideration is ruled out by the Railway Commission, that the low rates complained of are balances of through rates. It costs about £10 for freight charges to place one ton of Algerian fruit or vegetables in London. In fruit shipments the foreigners have had the advantage that a considerable number of the British growers are not giving sufficient attention to grading and packing and, in general, to the requirements of consumers. The following may be taken as examples of the complaints in regard to Danish competition:—

	Distance (mixed route).	Commodity.	Rate per ton.
Esbjerg (Denmark) to Birmingham	553 miles	butter	47*s.* 6*d.*
Esbjerg (Denmark) " "	553 "	eggs	58*s.* 8*d.*
Armagh (Ireland) " "	358 "	butter	42*s.* 6*d.*
Armagh (Ireland) " "	358 "	eggs	50*s.* 0*d.*

The apparent disparity of rates on a distance basis disappears when it is remembered that on the Danish products there is a long water haul, and that there is also the difference between a car lot and a less than car-lot basis. The Danish rates are quoted on minimum consignments of ten tons, while the Irish rates are based on three hundredweight.

The more enlightened English farmers recognize the effects of water competition. They know that it would not benefit them to have the through rate raised, as it would simply mean that the foreign produce would move more cheaply by an all-water route When the London

& South-eastern Railway in 1887 placed foreign hops on the same rate basis as domestic hops, the result was that the former moved by water to London. The English producer was injuriously affected by the increased competition which lowered the price. At present approximately 90 per cent. of the Continental produce imported by way of Boulogne and Calais goes by water to London. While the farmers recognize the superior facilities for handling foreign goods, they at the same time consider that the disparity between home and foreign rates is too great.[1]

Some part of the complaint in regard to preferential rates is attributable to misunderstandings in regard to rate conditions as well as to a lack of initiative on the part of the farmers. The Royal Commission on Agriculture stated in 1897 that, while co-operation among farmers was necessary in order to obtain lower rates, this matter could not be helped on by legislation.[2] But little has been done by the farmers to accomplish this.[3] While there is much unorganized complaint in regard to agricultural rates, the farmers are presenting very little evidence before the Departmental Committee, which is at present investigating the matter. The railways have been more willing than the farmers to co-operate. For forty years the London & North-western has been collecting small consignments of agricultural produce along its lines. These it forwards in bulk, delivers them to the London salesmen, pays market dues, collects the proceeds from the salesmen, and forwards the balance to the shippers. The London & South-western, which does a large business in

[1] *E.g.*, evidence of W. W. Berry, a prominent hop-grower of Kent, before the *Royal Commission on Agricultural Depression*, 1897, answers to questions 49,190, 49,226, 49,258. See also statement of Mr. Sinclair, Hansard, 1904, fourth series, vol. 136, p. 295.

[2] *Final Report*, p. 529.

[3] See statement of the president of the Board of Agriculture, Hansard, 1902, fourth series, vol. 108, p. 1639.

package freight, undertook recently to supply the farmers along its lines with copies of Pratt's *The Organization of Agriculture*. All of the railways have been active in giving special rates to encourage agricultural shipments.[1] But, while the Danes are shipping produce into England on relatively low rates, which are the result of co-operation, 70 per cent. of the domestic agricultural shipments on the North-eastern Railway are below three hundredweight, and 90 per cent. fall below one ton.

IV.

Control over Actual Rates.

In dealing with the rate policy of the Commission, a distinction must be made between the period prior to 1894 and that subsequent thereto. Though it had been stated in 1872 that legal maximum rates afforded but little real protection to the public,[2] the system was continued by the Act of 1888. While the work of the Board of Trade, as embodied in the Provisional Orders Acts, meant in all cases the systematization and in many cases the reduction of the maxima, the outcome was not satisfactory to the traders, some of whom wanted a general reduction of rates, regardless of the cost to the railways. The change of status in regard to *reasonable* rates introduced by the Act of 1888 was more apparent than real. The former Railway Commission had stated that, in addition to there being a necessity that rates charged should be within the maximum, there was also the added requirement that

[1] For full detail concerning the special arrangements made by British railways in this regard see *Railway Rates and Facilities*, copy of correspondence between the Board of Agriculture and Fisheries and the Railway Companies of Great Britain, etc., 1904. A large number of details bearing on the question of preferential rates will be found in Pratt's *Railways and their Rates*. This book has come to hand since the material contained in this section was set up.

[2] *Report of the Joint Select Committee on Railway Companies Amalgamation*, 1872, p. xxxiv.

they must be reasonable.[1] No legal action had been taken, however, in regard to this matter. Two judicial decisions given in 1883 and in 1887 seemed to uphold the position that a maximum rate sanctioned by Parliament was conclusively reasonable.[2] But the statements in these decisions are simply dicta, since the question of reasonableness of rates was not directly involved. The Act of 1888, however, settled that the maximum rate was conclusive of reasonableness.[3]

At the outset of its work the only way in which the Commission was brought in touch with rates was through the provisions concerned with undue preference and with through rates. The Commission will not state beforehand that a rate is preferential.[4] One of the commissioners, Sir Frederick Peel, has taken the position that certain powers over actual rates were given to the Commission. He has construed the statement in the "undue preference" clause which directs the commissioners to consider "whether the inequality cannot be remedied without unduly reducing the rate charged to the complainant" to give a power of reducing the higher rates.[5] Concerning this interpretation there is some doubt. Justice Wilis holds that the words in question do not confer any rate-making power, but simply indicate the circumstances to be considered.[6] In an Irish case in 1897, in which the question of distributive rates was involved, it was held

[1] *Fourth Report of the Railway Commissioners*, p. 6, Section 14.

[2] See *Manchester, Sheffield & Lincolnshire Co.* v. *Brown*, 8 App. Cas. 715, and *Great Western Railway Co.* v. *McCarthy*, 12 App. Cas. 218. In the latter case Lord Watson took the position, "*Prima facie*, I am prepared to hold that a rate sanctioned by the legislature must be taken to be a reasonable rate."

[3] See Act of 1888, Section 24, Sub-section 6, and Sub-section 10. *Report of Board of Trade*, 1890, *on Classification of Merchandise Traffic, etc.*, p. 17.

[4] *In re* Taff Vale Ry. Co. 11 Ry. and Canal Traffic Cases, 89.

[5] Note his dissenting opinion in the Liverpool Corn Traders' Association case in 1892.

[6] *Select Committee on Railway Rates and Charges*, 1893, answer to question 8268.

that the rate to the shorter distance point should be 3*d*. per ton less than the rate to the longer distance point; but no attempt was made to determine the longer distance rate.[1] In 1900 a temporary reduction of a canal toll was directed.[2] However, it cannot be said that these decisions have established the power of the Commission to reduce rates under the undue preference clause. Sir Frederick Peel also holds that the Commission may fix a through rate, no matter what the railways concerned may have agreed upon. While this matter has not been passed on, the weight of opinion is against such an interpretation.[3] It would appear, although this also has not been passed upon, that the Commission has no power to test the reasonableness of an established through rate. While the Commission has power to fix a through rate, if the parties do not agree, it would appear, although this is a moot point, that it has no power to apportion such a rate.[4] The Commission stated explicitly in 1895 that it had no power under the Act of 1888 to inquire into the reasonableness of a particular rate.[5] The various reductions of rate which have been ordered in connection with the workmen's trains applications are given under an entirely different jurisdiction.[6]

In the matter of group rates there has been some conflict between the English and the Irish decisions. The

[1] *Carrickfergus Harbor Commissioners and Others* v. *Belfast Northern Counties Ry.*, 10 Ry. and Canal Traffic Cases, 74.

[2] *Fairweather & Co. and Others* v. *Corporation of York*, 11 Ry. and Canal Traffic Cases, 201.

[3] Evidence before Select Committee of 1893, answers to questions 7963, 7964, 7966. See also the extremely guarded statement of Justice Wills before the same committee, answer to question 8264.

[4] This point was raised in the Forth Bridge case, 11 Ry. and Canal Traffic Cases, 5, but was not passed upon.

[5] *West Ham Corporation* v. *Great Eastern Ry.*, 9 Ry. and Canal Traffic Cases, 15.

[6] *E.g.*, *In re London Reform Union* v. *Great Eastern Ry.* 10 Ry. and Canal Traffic Cases, 280. See Ferguson, *Railway Rights and Duties*, pp. 206, 207.

former regard competition and convenience as the most important factors. The latter lay more stress on distance. The appeals from the Commission have settled that competition is as important a factor in connection with rates as geographical position.

The question of the reasonableness of particular rates was suddenly brought before the Commission in 1891. The adjustments necessary in putting into force the rates under the revised maxima were great. The fact that fully one-half of the traffic is carried on exceptional rates, which are below the class rates, still further complicated matters.[1] At the same time there was an apparent desire on the part of some of the railways to give the traders an object-lesson in regard to the disadvantages of the legislative intervention which had brought some maxima below the actual rates formerly charged. And so the maximum class rates were published as the actual rates effective January 1, 1893. The outcry which followed quickened the work of adjustment, and led to an undertaking on the part of the railways that the rate increase should not be more than 5 per cent. But this did not prevent the enactment of a piece of panic legislation, passed hurriedly and without due consideration.[2] By this act it was provided that, where rates were directly or indirectly increased after December 31, 1892, they were *prima facie* unreasonable. The fact that the rate complained of was within the maximum was not to be a justification of the increase. The Commission was given power to deal with complaints arising under this act, subject to the provision that an application was first to be

[1] For detail concerning these rates see "Report on the Question of Slow Freights (England)," by Henry Smart, *Bulletin of the International Railway Congress*, July, 1904.

[2] A mass of detail pro and con will be found in the evidence attached to the *Report of the Select Committee of* 1893. See also Mavor, "The English Railway Rate Question," *Quarterly Journal of Economics*, April, 1894; Acworth, *The Elements of Railway Economics*, pp. 147–154.

made to the Board of Trade. Over seventeen hundred complaints were brought before the Board of Trade between the date of the passage of the act and the end of February, 1895.

In the investigations leading up to the Provisional Orders legislation the traders had all along been desirous of having the actual rates serve as maxima.[1] The evident intention of the majority of the members of the Select Committee of 1893 was that the rates in force at the end of 1892 should be the maxima.

In taking up the new functions imposed by the revolutionary Act of 1894, the Commission had a full appreciation of the difficulties of the new jurisdiction. Justice Collins said, "I cannot suppose that Parliament intended to take the management of these great trading companies [the railways] out of the hands of the practical men who work them, and to place it in the hands of the Railway Commissioners." The Commission had no intention to exercise a rate-making power. It was its intention to construe the legislation strictly. In the interpretation of the statute there was, however, a difference of opinion between the commissioners. Lord Cobham held that the Commission was not competent, of its own knowledge, to say whether a rate was reasonable or not. "No tribunal, however expert, would undertake to say that a 6*s*. 6*d*. rate for the carriage of coal from Derbyshire to London is reasonable, but that 6*s*. 9½*d*. is unreasonable." The legislature had, however, given a standard of reasonableness in the rate of 1892, and the rate could not be increased above this unless good reasons were shown.[2] In endeavoring to obtain some definite standard of measurement of reasonableness, the Com-

[1] *E.g.*, speech of J. H. Balfour Browne, already cited, p. 171. Evidence of Marshall Stevens before the Select Committee of 1893, answers to questions 2448 and 2518.

[2] *Derby Silkstone Coal Co., Ltd.* v. *Midland Ry.*, 9 Ry. and Canal Traffic Cases, 107.

mission ruled out all reference to competition, or to that more inclusive system, charging what the traffic will bear.[1] The opinion of the traders, that the rates in force at the end of 1892 should be maximum rates, received a partial support from Lord Cobham, who held that the fact that a rate had not been increased prior to 1892 created a strong presumption against the railway because it had not increased the rate when it had the unchallenged right to do so;[2] but Justice Collins held that conditions prior to 1892 could be considered, and that the reasonableness of a rate was to be tested by conditions existing or apprehended before the legislation came into force.[3] Later decisions have taken into consideration conditions subsequent to 1894.[4] There still remained the question of the criterion of reasonableness. Justice Collins held that this should be cost of service. Reasonableness, he held, must be measured by reference to "the service rendered and the benefit received." This, in his opinion, pointed to cost of service as the base, because "the service rendered and the benefit received was unaffected by the prosperity or misfortune of the parties to the contract."[5] This squared with the views of the traders, who held that the true basis of a rate was cost of service.[6] The fact that the legislation provided, in the first instance, a rate of an antecedent period as a criterion of reasonableness would seem to show an intention of ruling out in the present rate

[1] *E.g.*, *Charlaw and Sacriston Collieries Co.* v. *North-eastern Ry.*, 9 Ry. and Canal Traffic Cases, 140. In *Black & Sons* v. *Caledonian Ry., etc.*, 11 Ry. and Canal Traffic Cases, 176, the Court of Sessions refused, on appeal, to grant the process which would enable the railway companies to investigate the books of the applicants to see what their profits had been during a given period.

[2] *Derby Silkstone Coal Co.* v. *case*, 130. [3] Ibid. p. 111.

[4] *E.g.*, *Black & Sons, ut supra.*

[5] *Derby Silkstone case*, 113. The decision in this regard is based on *Canada Southern Ry. Co.* v. *International Bridge Co.*, 8 App. Cas. 731, 732.

[6] *E.g.*, letter of Sir James Whitehead, president of the Mansion House Association, London *Times*, December 22, 1892; also speech of J. H. Balfour Browne *ut supra*, p. 257.

any consideration of what the traffic would bear; for, if charging what the traffic would bear in the present, were admitted as a present criterion of reasonableness, it is difficult to see how the past rate could serve as a standard of reasonableness, when, presumably, what the traffic would bear was something essentially different.

The increases in rates complained of, which have for the most part arisen in connection with coal traffic, have in a number of cases been indirect, attributable to decreases in the allowance made for wastage in the coal traffic, etc. The criterion the Commission has found it necessary to adhere to—cost of service—has tied it down to an arbitrary arrangement. To meet this condition, the railways have had recourse to technicalities savoring, in some instances, of subterfuge. In one case it was alleged that the increase complained of was attributable to an increase in the cost of cartage as distinguished from conveyance charges. The former fell under terminal services, over which the jurisdiction of the Commission was limited.[1]

No general principle has been established in the unreasonable rate cases. The railways had claimed the right in 1893 to increase the rates by 5 per cent. as compared with the rates in force in 1892. While the traders never recognized the validity of this claim, the Board of Trade by 1898 had accepted this arrangement as justifiable. The important Smith and Forrest case, which came up in 1899, was intended to test this arrangement.[2] Complaint was made by the oil refiners of Liverpool and Manchester that an increase of 5 per cent. was unreasonable. The increase was in part direct, in part indirect, attributable to decreases in cartage rebates. The matters involved

[1] *Mansion House Association, etc.* v. *L. & N. W. Ry.*, 9 Ry. and Canal Traffic Cases, 174. See especially the remarks of Lord Esher in the appeal proceedings, 199 and 200.

[2] *Smith & Forrest* v. *L. & N. W. Ry. and Others.* 11 Ry. and Canal Traffic Cases, 156.

were pertinent to the whole freight traffic of the United Kingdom, and affected future as well as past rates. The railways introduced statistical evidence showing that, because of various increases in cost, particularly in the case of labor, expenses were 5.1 per cent. higher in 1892 than in 1888 and 6.3 per cent. higher in 1898 than in 1892. The railways desired to carry the comparisons back to 1872, when many of the old rates had been fixed; but the Commission considered 1888 a sufficiently remote date, and comparisons were made with the conditions of 1891. It was found that an increase of 3 per cent. would be justified. The Commission has thus shown its intention to look at each case by itself. If a 5 per cent. increase should be found justifiable in a particular case, it would not necessarily have any bearing on a later decision.

The desire of the Commission not to engage in any rate-making experiments has kept it from making any statements as to general rates. It has concerned itself with the reasonableness of particular rates. The Commission has painstakingly endeavored to get at the cost involved. The decisions have been compromises. Where decisions have been against the railways, damages have been awarded on the basis of the difference between the increase and what was deemed a justifiable increase; and the railways have been ordered to desist charging the unreasonable rates. In a recent case an attempt was made to obtain an expansion of the unreasonable rate jurisdiction.[1] It was contended that it was unreasonable to increase a rate, although the increased rate was still below the point to which it had been decreased in 1894. The Commission did not, however, pass upon this question. It is apparent that, if such a contention were accepted, still more rigidity would be introduced

[1] *Millom & Askam Hematite Iron Co. v. Furness Ry. and Others*, reported in *Railway Times*, January 21, 1903.

into the system. The traders' anticipations as to the effect of the Act of 1894 have been nullified by the willingness of the Commission to consider conditions antecedent to the legislation. The whole position, it must be recognized, is an exceedingly artificial one. While the position taken by the Commission is strained and unsatisfactory, it is difficult to see, when it was specifically referred back to the conditions of 1892, what other method it could have adopted. By acting as it has, a degree of elasticity has been retained for the process under the legislation which it otherwise would not have possessed.[1]

V.

It was objected at the outset that the judicial member would dominate the Commission, owing to the difficulty of distinguishing between law and fact. It has happened, however, that in the performance of their duties the lay members determine on questions of [illegible]. At the same time, while the opinion of the *ex-* [illegible]ommissioner is final on a point of law, the lay mem[illegible] also form and express their opinions.

The government has throughout considered the requirement that one member of the Commission shall "be experienced in railway business" to mean that he shall have been a railway director or a railway manager.[2] Exception has been taken to this by the traders. To the attempt to obtain a business representative on the Commission, in addition to a railway representative, the

[1] The criticism directed against the Commission by Grinling, in *British Railways as Business Enterprises*, pp. 161–163, contained in Ashley's *British Industries*, is not wholly justified.

[2] Mr. Price, before his appointment to the Commission of 1873, had been chairman of the Midland Railway. Viscount Cobham, who succeeded Mr. Price in 1891, had been deputy chairman of the Great Western. On Viscount Cobham's resignation, early in the present year, he was succeeded by Mr. Gathorne-Hardy, who had been deputy chairman of the South-eastern.

railways are not opposed. It is from the government that the objection has come. Mr. Mundella, when president of the Board of Trade, said he would be glad to appoint a "really" business man who should be an impartial authority, fairly representative of the trading class. Mr. Mundella had stated that the Commission as then constituted was generally unsatisfactory.[1] An attempt was made by the traders in 1894 to so amend the legislation that one of the commissioners should be "experienced in trade or commerce." This was not pressed beyond the first reading.[2] Mr. Bryce, who succeeded Mr. Mundella, held, however, that no such restriction as his predecessor had favored should be placed on the choice of the government. The desire to have a commercial representative is still active. Believing that the commissioners should be assessors, possessed of expert knowledge, rather than judges, the traders have urged that the terms of the commissioners should not exceed ten years, so that there might be an opportunity to keep constantly in touch with actual conditions.

Looking at conditions as they are, it is apparent that the presence of a railway representative on the Commission has meant that those appearing before it have been more careful to give essential details. There is no real cause for complaint, from the traders' standpoint, concerning the services which the lay members have performed. The railway representative, for example, in the enforcement of the legislation of 1894 has followed very closely the ideas favored by the traders. Sir Frederick Peel has been willing to give a broad construction to the legislative provisions concerned with control of rates.

The average English trader asks for a process which

[1] Hansard, 1894, fourth series, vol. 28, pp. 792, 793.

[2] The text of this bill will be found in the *Railway Times*, June 16, 1894, p. 782. See also *Report of the Select Committee of* 1893, p. xiii.

shall be "short, sharp, and decisive." And to him the process of the Commission has undoubtedly been unsatisfactory. As a minimum, six weeks elapse between the filing of the application and the decision of the case.[1] In a number of cases more than a year has elapsed between the initial hearing and the decision. In some cases the delays are attributable to adjournments in order to permit the obtaining of more evidence.[2] In other cases, delays have been caused by an endeavor to get the parties to settle the questions in dispute. When cases are appealed, there are further delays. While one case has been decided on appeal within two months after the decision of the Commission, the usual period is from six months to one year.

Notwithstanding the assumption in 1887, that giving a *locus standi* to governing bodies and to traders' associations would cause much litigation, the number of complaints is not great. In the period 1889–1903 there have been, on the average, fifty applications a year; but many of these have been of minor importance. In the same period there have been on the average twenty-three decisions a year. But here there are many cases where one decision covers a group of identical cases.[3] Complaint has been made of the small number of days on which the Commission sits. In the nine years, 1896–1904, the average period the Commission has sat annually as a court is thirty-two days. This, it is true, is exclusive of the days when the Commission has sat to consider applications for sanctioning working agreements between railways, the time taken up in connection with the administrative duties of the Commission, and the days on which

[1] The Rules of Procedure of the Commission allow twenty-one days after the filing of the application for the filing of replies.

[2] *E.g.*, the important case of Spillers & Bakers, etc., was heard first December 9 and 10, 1903. It was then adjourned for further evidence, and was decided in July, 1904.

[3] See Table I.

the registrar of the Commission has inquired into damages and interlocutory proceedings which would otherwise come before the commissioners acting as a court. Of these no record is kept; but, after making all allowance, it is apparent that the Commission is not overworked. It is apparent, however, as has been recognized by the traders themselves, that the mere enumeration of the number of days on which the Commission has sat is no criterion of its usefulness.[1]

The Commission is criticised on account of its expense. This criticism is, however, directed only to a slight extent against its cost of maintenance.[2] It is the expense of obtaining a decision that the critics have in mind. In recommending a limitation of the right of appeal, the committee of 1882 intended to limit expense. By providing for the intervention of the Board of Trade in various matters, the legislation of 1888 hoped that the expense of proceedings might be kept down. The attempt of the legislation of 1894 to lessen expense, by providing that costs should not be granted by the Commission, except in cases where the claim or the defence is frivolous or vexatious, was intended to obviate the burden of the fees of the railway lawyers falling on the trader, when defeated in a case. The admittedly high expenses are not attributable to the fees of the Commission, which are moderate,[3] but to the development of a technically equipped Railway Commission Bar. It was early seen that the necessary prominence of the lawyers employed would make the process relatively expensive. The same conditions existed in connection with the Commission

[1] In this connection see the statement of Sir B. Samuelson, who was very active, on the traders' side, in the steps leading up to the legislation of 1888. Hansard, 1883, third series, vol. 278, p. 1887.

[2] In 1903 the cost of maintenance of the Commission amounted to £6,497.

[3] See Railway and Canal Commission Procedure, Schedule III., Woodfall, *op. cit.* See also *Senate Committee on Interstate Commerce*, *ut supra*, vol. v., Appendix B, p. 220. The Commission fees in rate cases, as a maximum, do not exceed £5.

of 1873. In the body of lawyers found practising before the Commission are many whose names are prominent in the Parliamentary bar,—a practice whose fees are high. The legal work before the Commission has tended to fall into the hands of a relatively small number of practitioners.[1] Prior to 1894 it was the practice to allow costs for two lawyers, unless when some especially technical matter was involved.[2] Since 1894 there have been, on the average, two lawyers on each side in the traders' cases. Under these conditions the expense, in a case contested before the Commission, runs from £150 to £200 a day. The individual trader is able to lessen his expense where, as in the sidings' rent cases, a group of traders bring action on a common set of facts. Only in one case has a rate matter been presented before the Commission by the complainant himself; and he was unsuccessful. The judicial members of the Commission are opposed to the complainants appearing in person. While it is true that in one case, which was settled before trial, the total court costs to the complainant were £1; and these, with his other expenses, were reimbursed to him by the railway, it is apparent that those who are aggrieved in small matters cannot afford to come before the Commission.[3] There have not been the migratory sessions of the Commission which the traders favor. The sessions are held in the capital cities of the countries concerned. It is cheaper to have the cases taken to the tech-

[1] In the 58 traders' cases covered by the reported decisions down to 1902, 68 lawyers took part. Mr. J. H. Balfour Browne, K.C., who is the dean of the traders' legal forces, appeared in 41 cases; Mr. C. A. Cripps, in 36; Mr. E. Moon, in 31. In all there were 32 lawyers who appeared in more than three cases. Eight of these appeared in more than ten cases each. The leaders have not practised exclusively on one side. For example, Mr. C. A. Cripps, who has appeared in 30 cases for the railways, has appeared in 6 cases on the traders' side.

[2] The registrar is the taxing officer of the Commission. See appeal from his decision in this connection in *Glamorganshire County Council* v. *Great Western Ry.*, 9 Ry. and Canal Traffic Cases, 1.

[3] See evidence of T. Middleton before the Royal Commission on Agricultural Depression, 1897, answer to question 2361.

nically equipped lawyers in the capital cities than to have these come to the cases in local centres. If the case involves any matter of considerable moment, the contest has to be carried on against the Railway Association. This being so, the complaints have to be fought out by firms, groups of traders, trade associations, Chambers of Commerce, local governing bodies.[1] The cost of a suit before the Commission is, under these conditions, about the same as before any other high court.[2]

In view of the expense attaching to suits before the Commission, it has been urged that the power possessed by the Board of Trade under the Act of 1873 to institute proceedings before the Railway Commission should be utilized. While the railways would not object to the Board of Trade presenting before the Commission matters arising under the conciliation procedure of the Board, where its decisions have not been accepted by the railways, it has been held that this would interfere with the efficiency of the conciliation clause. The government has held that to make a government department public prosecutor in cases before the Railway Commission would savor rather of persecution than of prosecution.[3] One exception has been made to this general rule. In 1899 the Irish Department of Agriculture was empowered in its act of organization to present rate grievances before the Commission at the public expense. So far there has been only one such case, in 1902. In this the Board of Agriculture was successful.

The Associated Chambers of Commerce urged in March,

[1] One of the most interesting trade associations is the Mansion House Association, founded in 1889. It represented, before the Board of Trade in 1889–90, 209 public and local authorities, 174 commercial and agricultural organizations, besides a large number of individuals.

[2] While the limitation of appeal reduces the expense, the powers of the Court of Appeal to grant costs in Commission cases is not affected by the legislation of 1894.

[3] Hansard, 1883, third series, vol. 278, p. 1901, statement of Hon. Joseph Chamberlain.

1904, that, with a view to cheapness and expedition, the local county courts should be used in cases between the railways and the traders. This suggestion is especially intended to cover the case of the small trader. In one form or another it has been under discussion since the early nineties. Cases affecting railways already come before the county courts from time to time.[1] While the county court method of procedure might work fairly well in local matters, it is apparent that this procedure is unfitted for matters of more general interest. There would also be a defect in that the way is open for a lack of expedition. Appeals may be taken on points of law or equity from the decisions of the county court. In the consideration of these appeals the high courts are empowered to draw inferences of facts. Exceedingly small matters are appealed at present. In 1904 one appeal was concerned with an alleged overcharge of 1½*d.* on a railway journey.[2] It has been suggested, however, that the cost of appeals under the proposed jurisdiction should, where the appeal is by a railway, be borne by the railway.[3]

When the Act of 1894 was under discussion, it was claimed that the legislation was defective, in that it had not restored the right possessed prior to 1888 to challenge the reasonableness of all rates. To the proposition to confer rate-making power on the Commission the government was strongly opposed. It considered that "to ask the Railway Commission, or any tribunal, to consider what is a reasonable rate would be to give them no firm ground on which they could stand."[4] Back of all the criticism

[1] *E.g.*, cases arising under Section 5 of the Railway Rates and Charges Act of 1891. This section is concerned with special charges that may be made by railways for special services.

[2] *Ashton v. Lanc. & Yorkshire Ry.*, 2 K. B. 1904, 313.

[3] Waghorn and Stevens, *op. cit.*, p. 65.

[4] Statement of Hon. James Bryce, president of the Board of Trade, in an interview with the deputation on railway rates and charges, June 15, 1894, *Railway Times*, June 23, 1894.

directed by the trader against the Commission there is in reality a desire that the rate-making power should be exercised. But, while the desire exists, there is a lack of unanimity as to the means to use to accomplish this. In this uncertainty some are looking to the Board of Trade.

The Board of Trade was given jurisdiction, under the Act of 1888, to deal with rate grievances through a conciliation process modelled on that contained in the Act to regulate Commerce. It is also empowered to attempt to settle complaints about unreasonable rates. The operation of the Board of Trade under its conciliation jurisdiction is recognized as having met with a considerable degree of success.[1] Agreements have been obtained in about one-third of the cases brought before it. By the explanations it obtains from the railways the board is also able to settle incipient rate grievances. The process is simple and inexpensive. When a complaint is made, the railway is communicated with, so that a statement of its position may be obtained. If the matter cannot be settled by correspondence, an attempt is made to arrange a meeting at the Board of Trade between the complainant and a railway representative. Here the matter is taken up in an informal manner. Isolated cases have dragged on a year without a decision, but normally some settlement is obtained much more promptly. Complaints varying from an overcharge of 2*d.* on a lawn-mower to questions concerned with preferential rates come before the board. In 1900 it was able to obtain a reduction in distributive rates affecting five hundred towns in England and in Ireland. Since 1888 over eleven hundred cases have been brought before the board.[2] Approxi-

[1] This is admitted by so strong an advocate of the rate-making power as Mr. W. A. Hunter. See an article of his, "Railway Rates and the Common Weal," *New Review*, vol. viii. p. 341.

[2] This is exclusive of over 1,900 unreasonable rate complaints dealt with by a special official prior to 1899.

mately one-half of these were presented in the period 1899–1903. The following summary shows the result of the more important applications:—

Principal Applications, 1899–1903.	Seventh Report.		Eighth Report.	
	Settled.	Unsuccessful.	Settled.	Unsuccessful.
Classification	4	9	2	12
Delays in conveyances, facilities, etc.	15	15	4	5
Facilities and tolls on canals	2	4		
Rates, differential	9	18		10
Rates, preferential		2		
Rates, through rates obtained	2	7	2	4
Rates, through rates, reduction of	2	2		1
Rates, unreasonable, reduction of	37	82	18	29
Rebate, cartage	6	3	3	2
Rebate, station terminals	1			

There were, then, under these headings satisfactory agreements in about one-fifth of the applications made.

While the conciliation work of the Board of Trade has met with a fair degree of success in smaller matters, it has failed when larger matters have had to be dealt with. In Pidcock's case, which later came to the Railway Commission, there was involved the right of the complainant to receive rebates in respect of terminal services not performed at his sidings. The matter dragged on for seventeen months, and finally the railways stated they would take the matter to the Commission, although in the opinion of the Board of Trade the "matter was of no such intricacy or difficulty as to make the arbitrament of a more elaborate tribunal essential to a just decision."[1] The railways will not recognize the conciliation procedure in any matter which involves legal right. With a view to simplifying procedure the Act of 1888 provides that, when a trader desires to obtain a through rate, a prelim-

[1] *Fourth Report of the Board of Trade of Proceedings under Section 31 of the Railway and Canal Traffic Act*, 1888 p. 6.

inary hearing before the Board of Trade is necessary. However, since the determination of the Board on such a matter has no legal effect, the preliminary hearing has become simply a perfunctory matter. The Board of Trade is unwilling to express an opinion; while the railways are unwilling to take any position that may be used against them before the Commission.

When the rate increases of 1893 were under discussion, the Mansion House Association proposed, on behalf of the traders, to accept the decision of the Board of Trade on these rates if the railways would also pledge themselves to accept the decision. But to this the railways would not agree. To the attempt to give the Board of Trade power over rates the railways are strongly opposed. This position is also supported by the Board of Trade itself. It has constantly claimed that the strength of the conciliation procedure of the board is wholly attributable to lack of compelling power. It is averse to any increased jurisdiction over rates being conferred upon it. It also believes that, if a new rate tribunal is organized, it should, while equipped with a commanding *personnel*, be of the "advisory" type.

VI.

Table I. indicates that, from the traders' standpoint, the most important matters brought before the Commission are sidings' rent charges, preference, unreasonable rates, charges for services at sidings, and reasonable facilities. Attention has already been directed to the importance of sidings' traffic in British railway working. For many years the small traders engaged in retailing coal had been using the trucks as storage warehouses. The railways objected to their sidings being crowded with loaded trucks. The colliery owners, to whom the rolling stock belonged,

also objected. Formerly the railways had charged demurrage charges based on the average time a truck was detained on a siding. In 1895 the railways decided to charge demurrage based on the actual time a truck was detained on a siding over and above the time necessary to unload it. Since 1895 many applications dealing with this arrangement have been brought before the Commission. Some have come up under the heading of legality of rates, others under the heading of unreasonable rates. The complaints in regard to charges for services at sidings are attributable to the fact, already sufficiently explained, that in the English railway system there are various special charges over and above the conveyance rate. As is indicated in Table I., 779 applications have been made to the Commission.

The preventive effect of the Commission is in part measured by the details given in Table II. A special example will make the preventive effect clearer. In 1902 some forty-seven cases, which were brought before the Commission alleging that the Midland Railway was unduly preferring a prominent colliery, such favor being to the detriment of the complainants, were settled before trial. In all, 219 cases have been settled or withdrawn. Formal action has been taken in 346 applications,[1] leaving approximately one-third of the applications concerning which there is no further record.

There have been only three cases in the history of the Commission in which anything savoring of a secret rebate has been brought before it. The work of the Commission, in so far as rates are concerned, has been almost entirely concerned with freight traffic. The Act of 1888 makes no direct provision for action in regard to passenger rates.

[1]This includes a large number of group decisions; i.e., where one decision covers identical facts in a set of cases, consent decisions, cases where a settlement arrived at by the parties is embodied in an order of the Commission, dismissal of applications, etc.

It has, however, been settled in decisions arising out of the Commission's action that it has, as an incident of a through rate arrangement, power to order through booking (ticketing) of passengers. It has also power to deal with passenger facilities under the question of "reasonable facilities." Of the rate cases formally argued before the Commission the traders have won not far from three-fifths. The tendency of the Commission has been to give compromise decisions. Not only have there been compromises as between the contending parties, there have been compromises as between the opinions of the commissioners themselves. In the Rickett, Smith case, in which the point involved was an increase in rates, Justice Collins thought all the increase was justifiable, Lord Cobham thought none of the increase was justifiable, Sir Frederick Peel occupied an intermediate position, and his opinion prevailed. Both in the traders' cases and in the cases between railways the Commission has been attempting to have the parties arrive at satisfactory settlements, without final action on its part. In some cases, when the parties have agreed, the Commission, in accepting the agreement, has incorporated it in its final order.

The presence of a judge on the Commission has meant a strict constructionist point of view in regard to the law. In general, powers have not been implied. Early in the history of the Commission Justice Wills said nothing could be more mischievous than to strain legislation to cover facts that had been left out of it. In 1892 the same judge, in speaking of a statute, said, "The legislature had reasons of its own, good, bad, or indifferent, which have nothing to do with me." In one case, however, where a railway had closed a branch railway, and pulled down the railway station, the Commission required, with much hesitation on the part of the judicial member, that the railway should give the reasonable facilities asked for;

and this of necessity involved the rebuilding of the railway station. This implication from the law of 1854 was promptly overruled.[1]

Undoubtedly the presence of a judge on the Commission has made the relations with the higher courts more harmonious than was the case with the Commission of 1873. There has not been that tendency, so conspicuous in the relations of the federal courts to the Interstate Commerce Commission, to regard the Commission as an amorphous interloper. In one case, it is true, the Scotch Court of Sessions claimed that, if a decision as to fact depended upon a conclusion in law, then there could be an appeal. This line of argument, which, if followed, would soon undermine the finality of the Commission's decisions on questions of fact, has not been adopted; and there has been a ready recognition by the courts of the finality of the Commission's decisions on questions of fact. The result of this is seen in the attitude of the courts to the decisions of the Commission. Down to 1904 there have been, as is indicated in Table III., thirty-eight appeals. The Commission has been overruled in four cases, while in two others it has been sustained in part and reversed in part. The decisions of the Commission in the traders' cases have more finality than in the cases between railways. While nine-tenths of the applications before the Commission have been concerned with traders' rights, there have been only eighteen appeals in the traders' cases; while there have been fifteen appeals in cases where railways alone or railways and dock companies have been concerned.

From the standpoint of the trader a question of importance is the willingness of the railway to obey the orders of the Commission without fighting the matter to the last ditch. While, on the whole, the railways have been loyal

[1] *Darlaston Local Board* v. *L. & N. W. Ry.*, 8 Ry. and Canal Traffic Cases, 216.

to the decisions of the Commission, examples may be found on both sides. In 1902 the railway reconsidered its first intention to appeal the Charrington, Sells case. The result was that a large number of cases, in which the same set of facts was involved, were settled out of court. The London & North-western, as a result of the decision in the first Corn Traders' case, gave up the attempt to compete for the traffic with which the case was concerned, and readjusted its rates accordingly. On the other hand, it was necessary, in the case which the Mansion House Association won from the same railway in 1896, to have supplementary proceedings before the Commission in 1897 before the cessation of some of the rates complained of was obtained. The involved uncertainties of English railway law have also played their part. The railways have been able, acting within the law, but depending upon legal, not commercial, conditions, to modify the redress given by the Commission. In 1889 a decision, under the undue preference clause, found that existing rates were interfering with the distributive business of the Irish town of Newry. Two years later complaint was made because one of the rates complained of had been raised. The railway successfully justified this, on the ground that the section of road, on which there was an increase of rate, was expensive to work on account of cost of gradients, etc. In 1900 the firm of Cowan & Sons, paper manufacturers, failed in an application to the Commission for a rebate on sidings' charges. In retaliation for this application the railway company, which for twenty-eight years had delivered coal at the private siding of the firm in question, refused any longer to deliver coal at the siding. While the railway was at the same time delivering coal at the sidings of adjacent competing firms, it delivered the coal for the Cowans at a near-by station, and they had to haul it *back* to their siding. The decision of the Commission

in favor of the Cowans was overruled. It was held that the arrangement between the railway and the trader in this case was a purely voluntary arrangement, creating no prescriptive rights against the railway. It was not till 1904 that legislation, bringing such sidings within the facilities clause of the Act of 1854, and thus supporting the Commission's decision, was passed.

The Commission, whenever there is an [illegible]ty of facts,—*e.g.*, in many of the sidings' rent cases, [illegible]alt with cases in groups giving a decision which [illegible] a set of cases. The unwillingness of the courts to give the decisions of the Commission a more general effect has assisted in tying the decisions down to the facts of a particular case. In October, 1901, the Commission decided that certain coal rates charged by a number of Scotch railways were unreasonable. The rates were discontinued, as regards the complainants, in December of that year. Three other traders, who were subjected to the same rates, but who had not been parties to the suit, later brought action in the courts for damages because the railways had continued to charge them the rates complained of. The court held, however, that the decision of the Commission had no general effect. Although the rates had been found unreasonable, the court would take no cognizance of this unless they were also illegal.[1]

The functions committed to the Commission are extremely diverse. While it has, with evident innuendo, been called the Traders' Court, it has, in addition to dealing with rate matters, an extensive jurisdiction in regard to arbitration of matters referred to it by the Board of Trade; *e.g.*, differences between railways involving such matters as running rights, number of trains under a running arrangement, arrangements in regard to connec-

[1] *Lanarkshire Steel Co., Ltd.* v. *Caledonian Ry.*, 11 Scots Law Times Reports, 407, 408. A preliminary decision of the court had held that the Commission's decision was of general effect. Ibid. 225.

tion in a through train service over a connecting line, division of expenses between the owning and the controlling company, differences between the Postmaster-General and railways in regard to postal payments, questions arising in connection with the introduction of improved brakes, complaints in regard to the water supply of London. In addition it serves as a court of appeal from the Board of Trade in cases arising out of the rules made by the Board of Trade under the railway labor acts, and has alternative jurisdiction in the workmen's trains applications. In addition to jurisdiction under special acts the Commission exercises functions finding their legal sanction in some nineteen general acts.

Not only are there complaints at present in regard to preferences on imported products, there are also complaints concerning the rates and facilities given home products. Complaint is especially active in the case of Irish agricultural products. Comparisons, unfavorable to domestic rates, are constantly being made with foreign rates. The question of shipments on "owner's risk" rates gives rise to many complaints. The criticism of the Commission on Agriculture of 1897, that the rate regulative legislation has not given clear effect "to the intentions of Parliament,"[1] is general among the traders. That the Commission has not accomplished much that was expected of it is a patent fact. Its procedure has not met the case of the small trader. At the same time the rate regulative procedure that accomplishes all that is expected of it is not absent from England alone. The Commission, it must be remembered, was organized, not to reduce rates or to intervene actively in matters of rate regulation, but as a court to settle differences. As a court, it has performed its functions. While there was, at the outset, some tendency on the part of the judi-

[1] *Final Report*, paragraph 526.

cial members to look at matters from a legal standpoint rather than from the standpoint of facts, the tendency has been, in more recent years, to meet the conditions rather than to bend the conditions to meet preconceived theories. On questions of railway law the Commission has been, on the whole, more in touch with the facts than the ordinary law courts. While the expense attaching to litigation before the Commission is readily apparent, it may be queried in how far there is a justification for expecting either a cheap settlement or a settlement, at the public expense, of important business matters. So far as England is concerned, the attempts to obtain cheap settlements, in the face of the existing involved body of railway law, would mean, if successful, results of little worth.

VII.

In the United States the Federal courts have recognized the debt of the Act to regulate Commerce to the English regulative legislation. But, when comparison is made of the constitution and functions of the English Commission with those of the Interstate Commission, differences at once appear.

The English Commission is a court. The American Commission has the functions of a referee or special commissioner. The former has final decision in regard to fact and a limitation on the right of appeal, with the result that appealed cases are normally settled within a year. The latter has no finality of decision in regard to fact, and appeals from its decisions have taken from two to nine years to decide. While the English Commission has been overruled in the period ending 1904, wholly or partly, in six out of thirty-eight appeals, the American Commission has, in approximately the same period, been overruled in twenty-nine out of thirty-eight

appeals.[1] While the Interstate Commerce Commission has, practically from the outset, claimed, as a necessary implication from the language of its enabling statute, an amendatory rate-making power, the English Commission, organized as a court, has, almost without exception, kept aloof from making implications extending its jurisdiction, and has denied any intention to exercise a rate-making power. While the members of the American Commission hold on a limited tenure and the Commission is a bi-partisan organization, the tenure of the lay commissioners in the English Commission is for good conduct, there is a pension on retirement, no question of bi-partisan organization enters in, and the provision is made that one of the commissioners shall have technical knowledge of railway affairs. The judicial members of the English Commission are assigned to it for five years; but during the period they are not engaged in the Commission work they perform their regular duties as judges of the high court.

In the details of the regulative policy which has developed under the Commissions, resemblances and differences appear.[2] The English regulative policy is not in harmony with that of the United States in regard to the extent to which competition is to be considered as a justification of rate anomalies. While the English legislation eliminates competition in the case of import rates, the American position, as established in the Import Rate Case, states that competition is to be considered as affecting both import rates and domestic rates. In the case of domestic rates the English Commission at first would not recognize competition as the justification of any anomalously low rate-basis unless a well-defined "public interest" was thereby

[1] See Table III. See also Appendix D, p. 331, vol. v., *Hearings of Committee on Interstate Commerce, etc.*, 1905.

[2] There is no recognition, in the working of the English Commission, of results arrived at in the regulative policy of the United States.

served. Later it accepted the same view as was set forth in the United States in the Alabama Midland case; namely, that competition is one of the matters which may lawfully be considered in making rates. The grievance of secret rebates, one of the central evils in the United States, is practically non-existent in England. There is no provision other than that of the undue preference clause to cover such a grievance. In both countries the principle that undue preference is a question of fact has been accepted. While the United States has singled out a particular form of preference for special treatment under the "long and short haul" clause, England has allowed more elasticity by placing the matter under a general clause. On the question of the justifiability of granting wholesale rates in respect of quantities larger than carload lots, the American decisions have been contradictory. The lower courts have shown a tendency to accept the decision in Nicholson's case, but in the Party Rate case the Supreme Court established as the law that a discrimination in respect of quantity, even if allowed to all doing the same amount of business, is to be considered from the standpoint of public policy and the effect of such an arrangement upon trade competition.[1] In so deciding there has been accepted as a principle what is, so far, only a tendency in the English regulative policy.

The dissimilarities of the matters dealt with by the two Commissions will be seen by referring to Table I. The items common to the two Commissions are legality of rates, unreasonable rates, reasonable facilities, and undue preference.[2] In all, about one-half of the applications made

[1] *I. C. C.* v. *Baltimore & Ohio Rd. Co.*, 145 U. S. 263. This upholds the general position taken at an earlier time by the Interstate Commerce Commission in *Providence Coal Co.* v. *Providence & Worcester R. Co.*, 1 I. C. C. Decisions, 363. See also Judson, *The Law of Interstate Commerce and its Federal Regulation*, p. 194.

[2] I omit sidings' rent (demurrage) charges, because the conditions under which these arise in England differ entirely from those existing in the United States.

to the English Commission are concerned with matters of a kind coming before the American Commission.

The English Commission has used two sets of rate principles: competition as an important factor in differential rates, export rates, and in general in the home side of undue preference; cost of service in regard to preferential rates, and unreasonable rates. This has been in great degree attributable to the legislation. The traders have desired free trade in exports, not in imports. Admitting that there has been a certain *judicial* bias in favor of the cost of service principle, it is at the same time apparent that legislation, like that of 1894, which makes a past rate the *prima facie* criterion of reasonableness rules out the possibility of considering present competition. The defects of the legislation of 1894 are its own. The Commission has made the legislation less unworkable than could have been expected.

A considerable part of the desire to control and lower actual rates in England pertains to that hysterical belief in England's industrial decadence which has found some favor in recent years. A considerable part of the criticism arises from the endeavor to prove, on the basis of foreign statistics not properly comparable with English statistics, that English rates are unduly high. Some rearrangements in the Commission's machinery would, however, effect improvements. An arrangement whereby, when a question of principle is established in a decision of the Commission as distinct from a mere finding on facts, the enforcement should be placed in the hands of the Board of Trade instead of leaving it as a question of possible dispute to be fought out in individual cases, would effect an improvement. A closer articulation of the conciliation procedure of the Board of Trade with the process of the Commission, whereby the findings of the former would have a status before the latter, would also be expedient.

The Commission is becoming more and more a technical court, whose decisions are modified by an attempt to obtain settlements rather than legal decisions. Notwithstanding the criticism directed against it, it is difficult to see how, considering the peculiar geographical, industrial, and railway conditions it has faced, the Commission could have accomplished more than it has done.

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TABLE I.

SUBJECT-MATTER OF APPLICATIONS

DEALT WITH BY THE COMMISSION, 1889–1903.[1]

	1889	1890	1891	1892	1893	1894	1895	1896	1897	1898	1899	1900	1901	1902	1903
Board of Trade (Prevention of Accidents Act, 1900)	–	–	–	–	–	–	–	–	–	–	–	–	–	6	26
Classification	–	–	–	–	–	–	–	–	–	–	1	–	–	–	1
Facilities, Reasonable	3	8	3	3	1	6	–	1	4	2	2	5	4	4	3
Postmaster-General, Applications concerning	–	–	–	–	–	–	–	–	–	2	2	2	–	1	–
Preference, Undue	3	4	5	4	5	5	4	6	–	1	6	3	97	10	8
Rates, Distinction of	2	3	–	–	–	–	–	1	–	–	–	–	–	–	–
Rates, Legality of	–	2	–	1	–	–	–	2	–	–	–	2	–	–	–
Rates, Through	–	–	–	–	–	2	13	4	3	3	6	2	1	–	–
Rates, Unreasonable	–	–	–	–	–	1	63	10	2	24	–	–	3	–	1
Sidings, rent (demurrage)	–	–	–	–	–	–	–	6	–	–	25	3	–	108	91
Sidings, rebate from sidings' charge	–	–	–	–	–	1	6	3	–	4	9	8	6	–	3
Sidings, services on, charges for	–	–	–	–	–	–	1	4	5	1	–	2	–	23	24
Terminal charges	–	1	–	–	–	1	–	1	–	–	–	–	–	–	–
Trucks, rebates because not supplied	–	–	–	–	2	–	–	–	1	–	–	–	–	–	–
Railways, differences under special acts, etc.	3	10	1	2	4	5	3	7	6	3	3	4	2	1	2
Railways, working agreements approved	3	2	5	5	2	–	2	2	2	–	1	2	3	1	–
Workmen's trains applications	–	–	–	1	–	–	–	–	–	23	1	3	–	1	–
Water Act, Metropolitan(1897), applications	–	–	–	–	–	–	–	–	–	2	–	2	–	–	–
Miscellaneous	–	–	1	2	1	2	3	3	1	2	–	1	1	1	1

[1] In various cases a number of points are dealt with. In constructing the table, I have selected the most important point in each case.

TABLE II.

CASES WITHDRAWN OR SETTLED EITHER

IN COURT OR OUTSIDE, 1889-1903.[1]

	1889	1890	1891	1892	1893	1894	1895	1896	1897	1898	1899	1900	1901	1902	1903
Facilities, Reasonable	1	–	–	2	–	1	1	–	2	2	–	4	1	3	2
Postmaster-General, Applications concerning	–	–	–	–	–	–	–	–	–	1	–	–	–	–	–
Preference, Undue	–	–	1	–	2	2	2	–	2	2	2	–	–	2	15
Rates, Legality of	–	1	–	–	–	–	–	2	3	–	–	–	–	–	–
Rates, Through	–	–	–	–	–	–	–	1	2	–	1	1	–	1	–
Rates, Unreasonable	–	–	–	–	–	–	2	16	20	19	8	1	4	30	–
Sidings, rent (demurrage)	–	–	–	–	–	–	–	2	2	–	–	–	–	1	1
Sidings, rebate from sidings' charge	–	–	–	–	–	–	1	2	1	3	2	2	1	–	–
Sidings, services on, charges for	–	–	–	–	–	–	–	1	2	–	–	1	–	–	–
Railways, differences under special acts, etc.	–	–	1	–	1	1	–	2	–	2	–	1	–	–	–
Workmen's trains applications	–	–	–	–	–	–	–	–	–	12	1	3	1	–	–
Water Act, Metropolitan (1897), applications	–	–	–	–	–	–	–	–	–	–	1	–	–	–	–
Miscellaneous	–	–	–	–	–	2	–	2	1	–	–	1	1	–	–

[1] See foot-note to Table I.

TABLE III.

CASES APPEALED FROM THE RAILWAY AND CANAL COMMISSION, 1889–1904.[1]

YEAR.	Name of Case.	Appealed by	Point involved in Appeal.	Result.
1890	*Taff Vale Ry. Co.* v. *Barry Docks & Ry. Co.*	defendant.	Differences under special act.	Com. sustained.
1891	*Sowerby & Co.* v. *Great Western Ry. Co.*	plaintiff.	Terminal charges.	" "
1891	*Rhymney Ry. Co.* v. *Bute Docks Co.*	"	Facilities between parties.	" "
1892	*Pickering Phipps et al.* v. *L. & N. W. Ry. et al.*	"	Undue preference.	" "
1892	*Liverpool Corn Traders' Ass'n.* v. *Gt. W'n. Ry.*	"	Undue preference.	" "
1894	*North-eastern Ry* v. *Scarborough & Whitby Ry.*	"	Construction of working agreement.	" "
1894	*Darlaston Local Board* v. *L. & N. W. Ry.*	defendant.	Reasonable facilities.	" overruled.
1895	*Mansion House Ass'n* v. *Gt. W'n Ry.*	"	Unreasonable rates.	" sustained.
1896	*Greenwood & Sons* v. *Lanc. & Yorkshire Ry.*	"	Rebate on sidings' charges.	" "
1896	*Watson, Todd & Co.* v. *Midland Ry. & L. & N. W. Ry.*	plaintiff.	Terminal rebates.	" "
1896	*Mansion House Ass'n* v. *L. & N. W. Ry.*	defendant.	Unreasonable rates.	" "
1896	*Dicot. N. & S. Ry.* v. *Gt. W'n Ry. & L. & S. W. Ry*	"	Through booking of passengers.	" "
1897	*North-eastern Ry.* v. *North British Ry.*	both parties.	Running rights.	" "
1898	*Salt Union* v. *North Staffordshire Ry.*	defendant.	Rebate on sidings' charges.	" "
1898	*Gt. Northern Ry.* v. *N. E. Ry. & N. B. Ry.*	"	Differences under special act.	" "
1899	*Huntingdonshire County Council* v. *Simpson*	"	Reasonable facilities.	" "
1900	*Postmaster-General* v. *Corp'n of London*	"	Telegraph connections.	" "
1900	*Postmaster-General* v. *Corp'n of Glasgow*	"	Telegraph connections.	" "
1900	*Forth Bridge* v. *N. B. Ry., Gt. N. Ry., et al.*	plaintiff.	Through rates.	" "
1900	*L. T. & S. Ry.* v. *Gt. Eastern Ry.*	"	Differences between railways.	" overruled.
1901	*Cowan & Sons* v. *North British Ry.* (No. 2)	"	Rebates on sidings' charges.	" sustained.
1901	*Black & Sons* v. *Cal. Ry., N. B. Ry., & G. & S. W. Ry.*	defendants.	Application for details of plaintiffs profits to use in suit.	" "
1901	*Cowan & Sons* v. *North British Ry.* (No. 3)	defendant.	Reasonable facilities.	" { sustained. / overruled.[2]
1901	*Huntington et al.* v. *Lanc. & Yorkshire Ry.*	plaintiff.	Ownership of siding.	" sustained.
1901	*Rhymney Ry.* v. *Great Western Ry.*	"	Differences [illegible]	" "
1901	*Gt. Western Ry.* v. *Metropolitan Ry.*	defendant.	[illegible]	" "
1902	*Crompton & Co.* v. *Lanc. & Yorkshire Ry.*	"	Rebate on [illegible] g	" { overruled.
1902		"	Rebate on [illegible]	" sustained.
1902	*Vickers, Sons & Maxim* v. *Midland Ry. et al.*			
1902	*London & India Dock Co.* v. *Gt. Eastern Ry. & Midland Ry.*	defendants.	Power to [illegible]	" "
1902	*Lanc. Brick & Terra Cotta Co.* v. *Lanc. & Yorkshire Ry.*	"	Con[illegible]	" "
1902	*Gt. Western Ry.* v. *Metropolitan Ry.*	"	Di[illegible]	" sustained.[2]
1902	*Mold & Denbigh Jn. Ry.* v. *L. & N. W. Ry.*	plaintiff.	Di[illegible] parties.	" "
1902	*Abram Coal Co.* v. *Gt. Central Ry.*	defendant.	La[illegible]	" "
1903	*London & India Docks* v. *Midland Ry. & Gt. Eastern Ry.*	plaintiff.	Re[illegible] through rate.	" "
1903	*Great Western Ry.* v. *Postmaster-General*	"	C[illegible] eusatio[illegible] al.	" "
1903	*Ackers, Whitley & Co.* v. *Gt. Central Ry.*	defendant	Undue prefere[illegible]	" "
1904	*North British Ry.* v. *Caledonian Ry.*	"	Running rights.	" "
1904	*Lancashire & Yorkshire Ry.* v. *Wright*	plaintiff.	Point of law.	" overruled.

[1] The official report of cases for 1904 is not yet available. [2] In part.

[The official report of cases for 1904 is not yet available. — In part.]