WILLIAM CLARK SCHMIDT, LL.B., Washington University, 1935, submits an analysis of the *Constitutional Limitations Upon Legislative Power to Alter Incidents of the Shareholder's Status in Private Corporations.* For this article Mr. Schmidt was awarded the Mary Hitchcock Thesis Prize of 1935. He is now a member of the St. Louis, Missouri Bar.

Notes

"LEGAL INTEREST" FOR THE PURPOSE OF SUITS TO ANNUL ORDERS OF THE INTERSTATE COMMERCE COMMISSION

The federal district courts have been invested with jurisdiction over suits to enjoin, set aside, or annul orders of the Interstate Commerce Commission.[1] There is no provision, however, as to the proper parties to maintain the suit.[2] "The determination of the question . . . is left by the Interstate Commerce Act

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[1] Sec. 16 of the Hepburn Act (34 Stat. 584, 592, 1906) provided for review of orders of the Interstate Commerce Commission. That section provided in part, "The venue of suits brought in any of the Circut Courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated." See B. & O. R. R. v. I. C. C. (1909) 215 U. S. 216, 219. In 1910 Congress created the Commerce Court with exclusive jurisdiction to hear "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." (1910) 36 Stat. 539, (1911) 36 Stat. 1148, (1916) U. S. Comp. Stat. sec. 993. In 1913 Congress abolished the Commerce Court and transferred its jurisdiction to the District Courts. (1913) 38 Stat. 219, 28 U. S. C. A. sec. 41 (28). But the District Courts are specially constituted if an interlocutory injunction is sought. (1913) 38 Stat. 220, 28 U. S. C. A. sec. 47. State courts are without jurisdiction to entertain suits seeking to enjoin, set aside or annul an order of the Commission. Lambert Run Coal Co. v. B. & O. R. R. Co. (1922) 258 U. S. 377; St. Louis Connecting R. Co. v. Blumberg (1927) 325 Ill. 387, 156 N. E. 298.

[2] Supra, note 1. Congress has provided, however, for the party defendant, providing that the suits "shall be brought against the United States." (1910) 36 Stat. 542, (1911) 36 Stat. 1149, 28 U. S. C. A. sec. 46. See also (1911) 36 Stat. 1150, (1913) 38 Stat. 219, 28 U. S. C. A. sec. 48. See Lambert Run Coal Co. v. B. & O. R. R. Co., supra, note 1; State of North Dakota ex rel. Lemke v. Chicago N. W. Ry. Co. (1922) 257 U. S. 485; Venner v. Michigan Cent'l R. R. Co. (1926) 271 U. S. 127, 130.

to the general rules and practice of equity . . ."[3] It is clear that under those rules neither a mere stranger to the order nor a person unaffected by it is entitled to an injunction. Some sort of "legal interest" is necessary but the concept of such an interest for this purpose is not crystallized. This article will attempt to point out the apparent tendencies of the courts in determining "legal interest" as an essential to the maintenance of a suit to annul, set aside or enjoin an order of the Interstate Commerce Commission.

The decisions in regard to the interest which entitles a petitioner to institute suit to annul an order of the Commission involves the following propositions: 1. Whether a petitioner acquires "legal interest" because he was an intervener before the Commission in the proceeding leading to the order sought to be annulled or enjoined. 2. Whether detrimental alteration of his competitive position by an order invests a petitioner with "legal interest" when as to him the order is neither unreasonable or discriminatory in other respects. 3. Whether a state or department thereof or cities have "legal interest." 4. Whether stockholders of a corporation affected by the order have standing in court.

I

As to the first problem the cases are in apparent conflict. Following a provision that the Attorney-General shall act for the government in certain cases, a statutory proviso reads, "That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission in which an order or requirement is made, may appear as parties thereto of their own motion and as of right . . . in any suit wherein is involved the validity of such order or requirement or any part thereof and the interest of such party."[4] The proviso was first interpreted as allowing any party who intervened before the commission to maintain suit, Mr. Justice Brandeis saying, "The section does not in terms provide that such party may institute a suit to challenge the order, but this is implied."[5] The same Justice, however, six years later, said that "the mere fact that

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[3] I. C. C. v. Diffenbaugh et al. (1911) 222 U. S. 42, modifying and affirming (1910) 176 Fed. 409. The quotation is from the decision of the lower court l. c. 416. Such suits are plenary suits in equity. Ibid. See also Alabama et al. v. U. S. et al. (1929) 279 U. S. 229, 230.

[4] 28 U. S. C. A. sec. 45a. A further proviso in the same sec. confers on "communities, associations, corporations, firms and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone . . . . relating to the action of the Interstate Commerce Commission," the right to "intervene in said suit or proceedings at any time after the institution thereof."

[5] The Chicago Junction Case (1924) 264 U. S. 258.

the appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of actual or threatened legal injury to it."[6] This second view as to the right of an intervener before the Commission to maintain suit is the one now generally followed.[7] The latest consideration of the statutory proviso involved points out that the right to intervene and to be heard in a suit brought by another is all that the statute confers and that right "is to be distinguished from an authorization to bring suit."[8] This seems to be the proper result. It is not necessary to have a "legal interest" to intervene before the Commission[9] and unless the effect of the order is to deprive the intervener of a right and in consequence give him a "legal interest" to maintain suit, it is apparent that mere intervention before the Commission does not of itself mean that a petitioner has "legal interest." While the proper result seems to have been reached here, a recent case harks back to the old doctrine, but there were clearly other bases for the decision.[10] The reference certainly is not to be taken as an about face by the court.

II

The cases dealing with situations wherein the petitioners have sought to annul orders because they adversely altered their competitive position have fallen into two groups: 1. Those wherein carriers have sought to set aside certificates of public convenience and necessity granted to other carriers; and 2. Those wherein other parties than carriers have sought to annul orders of the Commission.

The first group of cases have arisen under the Transportation Act of 1920, which provided in part that before a carrier could extend its lines in any manner "there shall first have been obtained from the Commission a certificate that the present or

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[6] Pittsburgh & W. Va. Ry. v. U. S. et al. (1930) 281 U. S. 479, 486. It should be noted that the Court found that the petitioners had the necessary "legal interest" aside from the fact that they were parties to the order.

[7] For other cases see: Pa. R. Co. v. U. S. et al. (D. C. W. D. Pa. 1930) 40 Fed. (2nd) 921. Indian Valley R. R. v. U. S. et al. (D. C. N. D. Cal. 1931) 52 Fed. (2nd) 485, aff. without an opinion (1933) 292 U. S. 608; that the petitioner was an intervener before the Commission in this case see 166 I. C. C. 3. Alexander Sprunt & Son, Inc. et al. v. U. S. (1930) 281 U. S. 249.

[8] Moffat Tunnel League et al. v. U. S. et al. (1933) 289 U. S. 113, affirming (1932) 59 Fed. (2nd) 760.

[9] Alexander Sprunt & Son, Inc. et al. v. U. S. et al., supra, note 7; Moffat Tunnel League et al. v. U. S. et al., supra, note 8.

[10] Youngstown Sheet & Tube Co. et al. v. U. S. et al. (1935) 55 Sup. Ct. 822, 823. "The appellants were entitled to bring and maintain this suit to set aside the order. They were parties to the proceeding before the Commission. . . ."

future public convenience and necessity require the extension."[11] Under the terms of the Act there was nothing to prevent the Commission from authorizing an extension of a carrier's lines into districts previously served by other carriers and thus depriving the latter of a business advantage.[12] In several instances, however, railroads have sought unsuccessfully to set aside a certificate upon the ground that the added competition affects a legal right.

To operate a railroad in any area without competition is a mere privilege.[13] When that privilege is abrogated as a result of certificate issued by the Commission there is no legal injury resulting; a mere privilege is retracted. Although a large, profitable business may have been grounded upon the privilege and its denial may seem to work a manifest economic loss, no legal injury obtains from added competition resulting from a certificate of the Commission so as to confer upon the affected railroad "legal interest" entitling it to sue to annul a certificate.[14]

One case, however, has reached the opposite result.[15] The Commission had granted a certificate allowing a railroad to establish a ferry within twenty miles of the petitioner's ferry. In holding that the petitioner could maintain an injunction suit, the Court relied on Section 20 of the Transportation Act,[16] which provides that "any party in interest" may sue to enjoin an extension unless a certificate was obtained from the commission. Previous suits under this section were brought before a certificate had been issued and in those cases "any party in interest" was broadly construed so as to include a carrier which would suffer by competition.[17] Such cases were clearly within the purview of the statute. In the *Claiborne-Anapolis Ferry Case,* however, the suit was brought after a certificate had been issued and it would seem that in that situation neither section 20 nor the previous cases would be controlling. After the certificate was issued it

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[11] 41 Stat. 477; 49 U. S. C. A. sec. 1 (18).

[12] Pa. R. Co. v. U. S. et al., supra, note 7.

[13] Indian Valley R. R. v. U. S. et al., supra, note 7; Pa. R. Co. v. U. S. et al., supra, note 7.

[14] Compare this statement in Indian Valley R. R. v. U. S., supra, note 7, l. c. 487: "Such loss as may occur due to the certificate and the order would result as a consequence of the operation of a competing railroad line and would be solely due to the loss of traffic revenue due to the presence of a competing line. The operating by a carrier without competition in any particular area is a privilege to be enjoyed as long as existing—but it is not a legal right. . . ."

[15] Claiborne-Annapolis Ferry Co. v. U. S. (1932) 285 U. S. 382.

[16] Supra, note 11.

[17] Detroit & M. Ry. Co. v. Boyne City, G. & A. R. Co. (D. C. Mich. 1923) 286 Fed. 540: Bremmer v. Mason City & C. L. R. Co. (D. C. Del. 1931) 48 Fed. (2nd) 615. See also Western Pac. Cal. R. Co. v. Southern Pac. Co. (1931) 284 U. S. 360.

was like any other order of the Commission and a suit to enjoin it should have been considered like any other suit to enjoin an order of the Commission.

Not only may a carrier's competitive position be affected by an order of the Commission, but so may other businesses.[18] It is difficult to tell however, whether the sole basis of the injunction suit is loss of competitive position. According to the two cases which the writer believes to be the only pertinent ones, when a petitioner seeks to enjoin an order of the Commission on the aforementioned ground he has no standing in court.[19] Mr. Justice Brandeis' statement in *Alexander Sprunt & Son, Inc.* v. *U. S.* is well worth quoting. "In the case at bar the appellants have no independent right which is violated by the order to cease and desist. They are entitled as shippers only to reasonable service at reasonable rates and without unjust discrimination. If such service and rates are accorded them, they cannot complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled. The advantage which the appellant enjoyed under the former tariff was merely an incident of, and hence was dependent upon, the right, if any, of the carriers to maintain that tariff in force and their continuing desire to do so."[20]

III

Whether a state or department thereof or a city may sue to set aside an order of the Interstate Commerce Commission is a problem frequently raised. It should first be noted that since Congress has provided that suits to enjoin, set aside, or annul an order shall be brought in the district courts,[21] a state should bring its action in those courts.[22] Moreover, a state may not successfully maintain its suit unless the carriers affected by the order are also before the court.[23] Assuming these conditions to be satisfied there still remains the problem of "legal interest."

It is well established that a state may maintain suit when it seeks to set aside an order on the ground that it is an invasion of state rights.[24] Not only may a state maintain a suit on such

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[18] Edward Hines Yellow Pine Trustees et al. v. U. S. et al. (1923) 263 U. S. 143; Alexander Sprunt & Son, Inc. et al. v. U. S. et al., supra, note 7.

[19] Supra, note 7, l. c. 255.

[20] Supra, note 7.

[21] State of Texas v. I. C. C. (1922) 258 U. S. 158; State of North Dakota ex rel. Lemke v. Chicago & N. W. Ry. Co., supra, note 2.

[22] State of Texas v. I. C. C., supra, note 21.

[23] Texas v. Eastern Tex. R. R. Co., Texas v. U. S. et al. (1922) 258 U. S. 204; Colorado v. U. S. (1926) 271 U. S. 153; Transit Commission v. U. S. (1932) 284 U. S. 360.

[24] Dep't of Public Works of Washington v. U. S. (D. C. W. D. Wash. 1932) 55 Fed. (2nd) 392.

ground, but so may a department of a state. An interesting case in point involved a department of the State of Washington.[25] The Interstate Commerce Commission prescribed interstate rates "which would in other than exceptional cases be subject to the jurisdiction of the Department of Public Works" of Washington. It was held that the department had the requisite interest to maintain suit since the order acted as a bar to the exercise of its statutory powers. That the proper result has been reached in these cases is clear since a state should be entitled to prevent an encroachment on state rights.

A state or city may maintain a suit when it is directly affected by an order. Thus, if a city has an interest in a franchise contract affected by an order, it may sue;[26] similarly, with a state which seeks to enjoin an order on the ground that it is inconsistent with a statutory preference allegedly granted.[27] However, whether a state or city may sue as representing the interest of those within its territory who are affected by the order, has not been expressly decided. There are *dicta* to the effect that such a suit may be maintained by a city or state.[28] In one case the lower court upheld the right of a city to sue in a representative capacity,[29] but the case was reversed on appeal on other grounds.[30]

The problem just discussed raises another, namely, whether a representative organization may sue for its members in seeking to annual an order of the Commission. The answer seems to be that it can, so long as the members of the organization have a

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[25] City of N. Y. v. U. S. et al. (D. C. E. D. N. Y. 1921) 272 Fed. 768; Village of Hubbard, Ohio v. U. S. et al. (D. C. N. D. Ohio 1922) 278 Fed. 754, rev. on other points (1925) 266 U. S. 474.

[26] State of Tenn. et al. v. U. S. et al., (D. C. M. D. Tenn. 1922) 284 Fed. 371, rev. on other points (1923) 262 U. S. 318. The order of the Interstate Commerce Commission made rates on stone and gravel when used for building public highways and consigned to federal, state, county, or municipal authorities equal to other rates. Tenn. claimed that this violated 49 U. S. C. A. sec. 22 which provides, "Nothing in this chapter shall prevent the carriage, storage or handling of property free or at reduced rates for the United States, State, or municipal governments. . . ."

[27] Compare: "The right of the state, either in its own interest as a contingent shipper or in the right of its citizens, to attack an order of the Interstate Commerce Commission affecting rates within the state, seems not to be doubted." State of Tenn. et al. v. U. S. et al., supra, note 27. "The city, by reason of its interest in its duty to the residents and taxpayers of the locality, together with its interest as shipper and receiver of milk and cream for its institutions, has, as such, a right to legally commence and maintain this suit." City of N. Y. et al. v. U. S. et al., supra, note 25.

[28] U. S. et al. v. Merchants' & Manufacturers' Traffic Ass'n of Sacramento et al. (1916) 242 U. S. 178, rev. (1915) 231 Fed. 292.

[29] I. C. C. v. Diffenbaugh et al., supra, note 3.

[30] Moffat Tunnel League et al. v. U. S. et al., supra, 8.

legal interest affected.[30] Where the members do not possess the requisite interest, the representative may not maintain suit.[31]

IV

In two instances a shareholder of a carrier affected by an order of the Commission has sought to set aside the order, although the carrier was not desirous of doing so. In the earlier case it was claimed that the order threatened the financial stability of the corporation and consequently the petitioners' financial interest.[32] The court held that the interest of the petitioners was not independent of the corporation, but was derived through it, and hence, the petitioners had no independent interest on which to maintain suit. The case noted that there may be situations in which an order may deal directly with stockholders' interests as investors, as distinguished from their interests merely as stockholders in their corporation. The second case did involve just such interest as noted.[33] The Commission granted an order allowing one railroad to gain control of another through leases. The order provided that the lease was to contain specific provisions for rental payments to minority stockholders of the lessor corporations, or, as an alternative, a provision granting the minority stockholders the right to sell their stock to the lessee. The court held, "The minority stockholders are, in effect, third party beneficiaries of the authorized lease agreements and, as such, have an independent interest, even though, because of dissatisfaction with the provisions, they may be unwilling to assert the rights accorded to them thereunder."[34] Thus where stockholders' interests in an order of the Commission are merely derivative through their interests in the corporation they have no "legal interest" to institute an injunction suit; but when their interests are independent of the corporation they have the requisite interest.

In conclusion it may be reiterated that the concept of "legal interest" for the purpose with which this article is concerned is not clear. Certainly clarification is needed.

ABE J. GARLAND '36.

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[31] Pittsburgh & W. Va. Ry. v. U. S., supra, note 6.
[32] N. Y. Cent'l Securities Corp. v. U. S. et al. (1932) 287 U. S. 12, affirming (1931) 54 Fed. (2nd) 122.
[33] Ibid., 54 Fed. (2nd) l. c. 126.