Review of the Public Service Commission and the Transit Commission in the New York Courts

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REVIEW OF THE PUBLIC SERVICE COMMISSION AND THE TRANSIT COMMISSION IN THE NEW YORK COURTS

I.

GENERAL JURISDICTION AND POWERS.

The Public Service Commissions were first created in New York in 1907, and succeeded to the powers and duties of several utility regulating bodies—the board of railroad commissioners, the commission of gas and electricity, the inspector of gas meters, and the board of rapid transit railroad commissioners. There was one commission for each district, the first district comprising greater New York City, and the second district including the rest of the state. The statute creating these commissions was held constitutional.

This geographical arrangement was changed in 1921. The transportation situation in New York City was placed under the control of the newly-created Transit Commission.

1 This paper was written as a thesis for the course in Administrative Law conducted at the Harvard Law School by Professor Felix Frankfurter. Its purpose was to examine the judicial review, in the New York courts, of the orders and acts of the Public Service Commission and the Transit Commission. For this reason, no decisions are considered except such as involve an adjudication, direct or collateral, upon some determination of the Commission. This eliminates the cases which raise the question as to whether matters which were not submitted to the Commission should have been so submitted, e.g., the many recent decisions in regard to bus lines operating without the required certificate of convenience and necessity. And because this is a study of review in the state courts, all federal cases are omitted. With these exceptions, I have tried to consider all the pertinent authorities (excluding memorandum opinions) found in the reports up to 249 N. Y. 178 and 230 N. Y. Supp. 792.

2 All references to statute, unless otherwise noted, are to the Public Service Commissions Law (Laws of 1907, c. 429, amended and revised as Laws of 1910, c. 48; Consol. Laws, c. 48).


4 Sec. 121.

5 Sec. 122. See People ex rel. Rehm v. Willcox, 60 Misc. 329, 112 N. Y. Supp. 341 (Queens County, 1908).

6 Sec. 123.

All other matters previously regulated by the Commissions of each district were now placed under the control of a single Public Service Commission, which had jurisdiction over both districts.\(^8\) This statute has also been held constitutional.\(^9\)

In 1926, the state departments were reorganized, the Transit Commission becoming the Metropolitan Division, and the Public Service Commission becoming the State Division of the Department of Public Service.\(^10\)

In examining the activities of the Commission, we find first that it has been given some powers of a \textit{legislative} nature. Its exercise of these powers is not subject to review by the courts, except as to constitutionality. Thus the Rapid Transit Act\(^11\) gave to the Commission the power to determine when and where it is necessary to construct rapid transit railroads in New York City. Before undertaking such construction, the Commission must secure the consent of the owners of half of the adjoining property, or in lieu thereof, have the necessity for the railroad assented to by three commissioners appointed by the court. The object of this requirement is to prevent the Public Service Commission (which acts here as an agent of the Legislature rather than as an administrative board) from thrusting a railroad among property owners against their consent. Such an impairment of property rights requires a judicial determination, which is effected by this special commission as an agent of the court (like the appraisal commissioners in eminent domain proceedings, discussed below), whose decision must be confirmed by the court.\(^12\)

Once the necessity for the railroad has been thus established, the Public Service Commission is authorized to acquire by eminent domain whatever land is needed for that purpose.\(^13\) Its fiat as to what land shall be taken cannot be

\(^8\) Laws of 1921, c. 134. It was provided that there should be a transit commission for cities containing a population of more than 1,000,000; New York City was, of course, the only one to which this description was applicable.


\(^10\) Laws of 1926, c. 350, Secs. 431-3.

\(^11\) Originally Laws of 1891, c. 4, amended several times.

\(^12\) Sec. 4 of the Rapid Transit Act. For a decision on such a determination of commissioners appointed in lieu of consent, see \textit{in re} Pub. Serv. Comm., 154 App. Div. 587, 139 N. Y. Supp. 982 (1st Dept. 1913).

\(^13\) Rapid Transit Act, Sec. 39.
interfered with by the courts, even though bad faith on the Commission's part is charged,—as long as its petition shows that the land is desired for a public purpose.\textsuperscript{14}

The compensation to be paid to owners, whose land is thus taken by order of the Public Service Commission, is fixed by appraisal commissioners appointed by the court. The decree of these commissioners, like the decisions of the special commissioners for consent hereinbefore described, are in all cases subject to review by the courts.\textsuperscript{15} Miscellaneous cases as to the procedure before these appraisal commissioners and the principles of damages by which they are to be guided are collected in the footnote.\textsuperscript{16}

Another legislative function which is delegated to the Commission by the Rapid Transit Act is the power, with the approval and consent of the Board of Estimate and Apportionment, to contract on behalf of the City of New York for the construction of rapid transit routes.\textsuperscript{17} The city will be liable for work done under these contracts,\textsuperscript{18} provided that they have a legitimate connection with such construction,\textsuperscript{19} and provided, further, that all the details which involve the expenditure of money have been approved by the Board of Estimate;\textsuperscript{20} but the city is not liable for any negligence on the part of the Commission by which the other contracting party is prejudiced.\textsuperscript{21} The courts, regardless of how they may feel about these contracts, cannot set them aside, for the

\textsuperscript{15} In re Willcox, in re Manhattan Loop No. 1, 135 N. Y. Supp. 153 (Sup. Ct., New York County, 1912).
\textsuperscript{17} Rapid Transit Act, Secs. 4, 5, and 27. See Amendment in Laws of 1912, c. 226.
\textsuperscript{18} Degnon Contracting Co. v. City of New York, 235 N. Y. 481, 139 N. E. 580 (1923).
acts of the Commission and of the Board of Estimate in this connection are not reviewable, unless they violate the state or federal Constitution.\textsuperscript{22}

The Conservation Law\textsuperscript{23} also invests the Commission with a quasi-legislative function. Under the terms of that statute,\textsuperscript{24} a corporation producing light, heat, or power may bring an action to condemn real property on the basis of a determination by the Commission\textsuperscript{25} that such property is an integral component of a single undeveloped water power site,\textsuperscript{26} of which the petitioning corporation owns the major part. If the Commission determines that the acquisition of such real property by some such corporation is necessary for the production of heat, light, or power which is required for public use, that is a judgment on a legislative question which will not be reviewed by the courts; the judiciary will inquire only as to whether the use by this particular petitioner will constitute a public use.\textsuperscript{27}

There is one feature of the Commission's work which cannot properly be called legislative, but in which it acts as an investigating committee for the Legislature. This is the duty imposed upon the Transit Commission, after making the necessary studies and investigation of the situation, to prepare a plan of readjustment for the relief of the emergency conditions which existed in New York City, and for the improvement of local transit.\textsuperscript{28}

The bulk of the Commission's work, however, is in the regulation of public utilities. In this administrative field, its orders and acts are subject to review by the courts. The


\textsuperscript{23}Sec. 624 (3) added by Laws of 1921, c. 579, and amended by Laws of 1922, c. 242. This statute was held constitutional in People ex rel. Horton v. Prendergast, 248 N. Y. 215, 162 N. E. 10 (1928).

\textsuperscript{24}Matter of Niagara, Lockport and Ontario Power Co., 125 Misc. 269, 210 N. Y. Supp. 748 (Oswego County, 1925).

\textsuperscript{25}If the site were not a single one, Section 624 (2) of the Conservation Law would apply, so that the Water Power Commission would have authority to act and the Public Service Commission would have no jurisdiction. See People ex rel. Horton v. Prendergast, \textit{supra}, Note 24, at 220-222.


Commission was given powers of regulation over railroads, street railroads, and common carriers, including (since 1909) bus lines; over gas and electric corporations; over steam corporations (since 1913); and over telephone lines and corporations (since 1910). This affords a wide ambit of activities, and it has not been difficult to decide what utilities are subject to the Commission's supervision. The court has had occasion in three instances to rule that certain businesses somewhat "affected with a public interest" do not fall within this sphere of regulation. They were: (a) a leased parcel room in a railroad passenger terminal; (b) an elevator operated on private property for the residents on that property; and (c) subways which carry the electrical conductors and wires of electric light companies.

Of course the Commission has jurisdiction only over a utility operating in New York state. But it is not precluded by the commerce clause of the federal Constitution from regulating the rates charged to retail consumers in New York by a gas company which produces its gas in another state and then brings it into New York. As to matters within the state, but subject to the concurrent jurisdiction of Congress under the commerce clause, the Commission has power to act in the absence of regulation by Congress. Thus, under the Transportation Act of 1920, the Commission was at liberty to regulate interstate railroad rates after September 1, 1920, until the Interstate Commerce Commission

29 Arts. II and III, Secs. 25-59.
30 Transportation Corporations Law, Laws of 1909, c. 219 (Consol. Laws, c. 63), Secs. 24-26, changed by Laws of 1926, c. 762, Sec. 1, to be Secs. 64-66.
31 Art. IV, Secs. 64-67.
32 Art IV-a., Secs. 78-89 added by Laws of 1913, c. 505.
33 Art V, Secs. 90-103 added by Laws of 1910, c. 673.
should take action. But as soon as the Interstate Commerce Commission does or is authorized to "enter the field," the Public Service Commission is ousted of jurisdiction.

Not only must the Commission keep from interfering in subjects which the national government has taken in hand, but it must not infringe too closely on local municipal control. Where the municipality has the power to regulate certain matters, and has exercised that power, the Commission is precluded from taking any action. But where these matters are within the orbit of regulation by the Commission, and it has ruled adversely on the municipality's petition for some action, the municipality cannot then try to effect the desired result by ordinance—such an edict is altogether void.

II.

PROCEDURE.

A. Administrative Technique.

The Commission is given great leeway in the conduct of proceedings before it. Most of the hearings provided for by the various sections may be instituted by the Commission on


62 Therefore the company has a complete defense at law, and is not entitled to an injunction. Erie R. R. Co. v. Village of Elmira Heights, 125 Misc. 441, 211 N. Y. Supp. 688 (Chemung County, 1925).
its own motion as well as upon complaint, and the Commission can issue orders based thereon. But Sec. 48 of the statute, which applies to common carriers, makes a distinction between investigations in response to complaints and investigations initiated by the Commission itself. Under this section, the Commission has power to investigate as to any acts done or omitted to be done by a common carrier in violation of law or of the Commission's order.

If this inquiry is made upon complaint, the Commission may issue an order directing the utility to remedy the matter. This section allows the Commission only to issue orders; if it wishes to enforce the orders, it must bring summary proceedings under Sec. 57, as described below,—the object of the investigation under Sec. 48 being merely to discover the facts on the basis of which to proceed under Sec. 57. Such an order can be enforced only by the Commission and in the manner described, it cannot be enforced by the complainant. On the other hand, if the Commission starts the investigation under Sec. 48 on its own motion, then it hasn't even power to issue an order, but must simply ascertain the facts and then proceed under Sec. 57,—any order which is made is absolutely void.

In hearings before it, the Commission is not bound by the ordinary rules of evidence, except that it must give the

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1 Secs. 49-51a in regard to common carriers, and Secs. 97 and 98, in regard to telegraph and telephone lines are typical. Until 1921, the Commission could not proceed on its own motion under Sec. 72 or under Sec. 85 (these sections are discussed in the chapter on rate regulation, the former applying to gas or electric corporations and the latter to steam corporations). But the Commission could still start investigations on its own motion in regard to rates by virtue of the provisions of Sec. 66 (3) and Sec. 80 (4), respectively. The Commission was given this power to proceed on its own motion, as to Sec. 72 by Laws of 1921, c. 134, Sec. 49; as to Sec. 85 by ibid. Sec. 62.

2 Sec. 96 is the corresponding provision in regard to telephone companies. There are no similar sections in the case of the other utilities, investigations as to then can be had only in connection with the Commission's regulation of specific phases of their activity.


parties an opportunity to rebut all the important evidence.\(^7\) Nor is the Commission required to join as a party anyone other than the complainant and the person complained of,\(^8\) though it may in its discretion allow other interested parties to intervene.\(^9\) The statute in some cases allows persons who could not be parties in an equity action to be parties before the Commission.\(^10\) The granting or refusal of an application for re-hearing rests entirely within the discretion of the Commission,\(^11\) though in some cases the courts will remit the matter for a re-hearing before review, if that is found advisable.\(^12\) And the Commission may re-open a case on its own motion.\(^13\)

The Commission is given power to subpoena witnesses and papers, and any witnesses who refuses to answer or to produce the papers may be committed for contempt.\(^14\)

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B. Judicial Review.

In a few cases the Commission was in the courts in a private capacity or as agent of the city of New York. Thus, unsuccessful attempts were made to interfere with the Commission's disposition of certain contracts (these involved matters of private law). The Commission as an employer is subject to the Workmen's Compensation Law. And if the terms of a contract made by the Commission for the city of New York require the Commission's voucher as a condition precedent for payment, one who performs under such a contract may by mandamus compel the Commission to issue the voucher.

The most numerous and most important cases, however, are those which review some administrative act of the Commission.

The Commission may bring summary proceedings, mandamus, or injunction to compel obedience to law or to its mandates. And an individual for whose benefit an order is made may bring mandamus or injunction to enforce the order. Obviously his claim is limited to the right given to him by the order. These summary remedies are not granted if the failure to obey is not serious; nor if the utility puts forward a claim of impossibility or confiscation, for it is entitled to a hearing on such an issue. But in a mandamus

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19 Sec. 57, Sec. 74, Sec. 87, Sec. 103.
20 Burke v. Iroquois Natural Gas Co., 189 App. Div. 545, 179 N. Y. Supp. 230 (4th Dept. 1919), aff'd without opinion, 229 N. Y. 593, 129 N. E. 921 (1920); City of New York v. Brooklyn Edison Co., 189 N. Y. Supp. 312 (Sup. Ct. Kings County, 1921). This of course applies only to orders made by the Commission as a result of investigation of a particular subject, and not as a result of a general investigation under Secs. 48 or 96 (discussed above).
suit, the utility cannot re-open the question of the merits. The court will look only to see whether a compliance of reasonable promptness is indicated; if conditions have changed, the utility should go before the Commission and ask for a re-hearing.\textsuperscript{23}

The Commission may also bring an action for penalties for violation of its orders against the utility and any of its officers or agents.\textsuperscript{24} This procedure was held constitutional, in view of Sec. 24 which provides that the penalties shall be remitted if during the period of violation the utility is in good faith pursuing an action to set aside the Commission's order.\textsuperscript{25} This penalty provision is construed like all penal statutes, therefore an officer will not be liable if he can show that he did not know of, or reasonably misunderstood the order; or that he has made every effort to comply, but is prevented from doing so by circumstances beyond his control.\textsuperscript{27} Similarly, if the Commission has a bus line enjoined from operating, a driver of the bus will not be committed for contempt.\textsuperscript{28}

Now we come to consider actions brought against the Commission. Prohibition or injunction will lie to restrain the Commission from acting beyond the limits of its jurisdiction.\textsuperscript{29} But if the Commission has jurisdiction over the general subject-matter, and the contention is made that it lacks "power to grant the particular relief prayed for," then a writ of prohibition will not be granted; the petitioner must bring


\textsuperscript{24} Sec. 56, Sec. 73, Sec. 86, Sec. 102.


\textsuperscript{26} People v. Dempsey, 224 N. Y. 140, 120 N. E. 145 (1918).

\textsuperscript{27} People v. Whitridge (No. 1), 144 App. Div. 486, 129 N. Y. Supp. 295 (1st Dept. 1911), aff'd without opinion, 204 N. Y. 646, 97 N. E. 1112 (1912).


certiorari. If the Commission erroneously asserts lack of power to act, certiorari is the remedy by which the aggrieved party can compel action.

If the Commission has exceeded its jurisdiction in making an order, that order is void, and may therefore be attacked collaterally. But if the order was within the jurisdiction of the Commission, and the objection is to the manner in which the power was exercised, the order may be attacked only directly, not collaterally.

The method of direct attack provided in the Civil Practice Act is by application to the Supreme Court for an order or writ of certiorari to the Commission, requiring it to submit the controversy to the Appellate Division for review. This writ may be brought by the utility affected by the order, or by the unsuccessful complainant, or by a third party whose interests have been prejudiced by the determination. Certiorari lies only from a final order of the Commission.
The order is not final until the Commission has refused an application for a re-hearing thereon, but the application for a re-hearing must be made within the time limit during which certiorari may be brought,—which is four months.

Since certiorari is a discretionary writ, the court is not obliged to grant it if the complainant simply presents questions of law,—he must adduce facts which tend to prove the existence of one of the reasons given in the Practice Act for vacating the order. Certiorari will not be granted if the objections existed at the time of hearing before the Commission and were not made there. So if the utility against whom an order is made fails to appeal from the order and then engages in a practice similar to the one prohibited, the court will be quick to sense an attempt to reach the forbidden end by a roundabout means, and will hold the company to be barred from doing this because of its acquiescence in the previous order. Furthermore, if any new evidence has arisen, the utility should go before the Commission and have

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42 These are found in C. P. A. Sec. 1304, discussed in People ex rel. New York & Queens Gas Co. v. McCall, infra, note 52.
44 People ex rel. Western Union Telegraph Co. v. Pub. Serv. Comm., 160 App. Div. 144, 145 N. Y. Supp. 545 (3rd Dept. 1914). In this case, the Western had been transmitting telegrams for the Postal to points where the latter had no offices. The Western made an additional charge for the words indicating the point of origin on the Postal system. The Commission ordered this practice stopped, and the Western did not appeal, but then began to charge the Postal for the words indicating the point of transfer from the Postal to the Western systems, the use of these words being necessary for the Western's accounting system. The court held that this was an attempt by the Western to do indirectly what it had been prohibited from doing by the order.
it reconsider the determination in the light of this new evidence, before coming to the courts.\(^4\)

After the Appellate Division has remitted the matter to the Commission for a new or modified determination, the parties must await such determination before they can carry the case to the Court of Appeals.\(^4\) But if the Appellate Division directs what determination shall be entered, then the matter may be immediately appealed to the higher court.\(^4\) In any case, timely objections not taken before the Appellate Division cannot be raised in the Court of Appeals.\(^4\)

The Supreme Court which grants the writ of certiorari may, in its discretion, stay the execution of the Commission's order pending the decision in the Appellate Division,\(^4\) but if the order is one fixing a rate, it may not be stayed except upon notice and after hearing.\(^4\)

When the case comes up before the Appellate Division for review, the Commission must submit all the evidence which it had considered, even though taken in \textit{ex parte} proceedings, so that the court can have before it all the facts which induced the Commission to reach its result.\(^4\) The scope of review allowed to the court has been best described by Judge Cuddeback.\(^5\)

\begin{quote}
"It was assumed perhaps by the legislature that the members of the public service commissions would acquire special knowledge of the matters intrusted to
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\(^4\) \textit{In re} Iroquois Natural Gas Co., 176 N. Y. Supp. 474 (Sup. Ct., Albany County, 1919) ; C. P. A., Sec. 1295.
them by experience and study, and that when the plan of their creation was fully developed they would prove efficient instrumentalities for dealing with the complex problems presented by the activities of these great corporations. It was not intended that the courts should interfere with the commissions or review their determinations further than is necessary to keep them within the law and protect the constitutional rights of the corporations over which they were given control.**

"It is urged that * * * the court may set aside the determination of the commission as against the weight of the evidence regarding it the same as the verdict of a jury.

"* * * The review authorized does not substitute the judgment of the * * * court for that of the [administrative body] upon the evidence or the merits, but inquires into jurisdiction of the subject-matter, the exercise of authority in relation to the subject-matter according to law, the violating of any rule of law to the prejudice of the relator and the like. * * *

"The court at the Appellate Division substituted its own judgment for that of the public service commission in determining that the latter's order was unreasonable. This decision, if allowed to stand, will seriously hamper the commissions in the discharge of their duties, and go far towards defeating the efforts of the legislature to establish agencies to regulate the great public service corporations."

Certain points of procedure are peculiarly associated with rate regulation, and are therefore discussed in the next section.

III.

RATE REGULATION.

A. Rates Fixed by Statute.

As the law stood before 1921, the Commission's jurisdiction over rates charged by common carriers, railroad and
street railway corporations, was given by Sec. 49 (1) in the following language:

“Whenever [the] commission shall be of opinion * * * that the rates, etc., are unreasonable * * * or that the maximum rates, etc. * * * are insufficient to yield reasonable compensation for the services rendered, * * * the commission shall * * * determine the just and reasonable rates, etc., to be thereafter observed and in force as the maximum, notwithstanding that a higher rate, etc., has been heretofore authorized by statute.”

The jurisdiction over the rates charged by gas and electric corporations was given in somewhat different language, and as the courts have interpreted the statute, this has led to an important difference in result. The provisions in regard to these utilities are found in Sec. 66 (5) and Sec. 72. Before 1921, the former read:

“Whenever the commission shall be of opinion * * * that the rates, etc., are * * * unreasonable * * *, the commission shall determine and prescribe the just and reasonable rates, etc., thereafter to be in force * * * notwithstanding that a higher rate, etc., has heretofore been authorized by statute.”

And Sec. 72 read:

“The commission within lawful limits may, by order, fix the maximum price of gas or electricity not exceeding that fixed by statute. * * * The price fixed by the commission under this section or under Sec. 66 (5) shall be the maximum price to be charged.”

An examination of the cases which defined the Commission’s powers under the above sections offers an interesting laboratory study of “the nature of the judicial process.”

It was easy to decide that the Commission had power to reduce rates fixed by a special legislative act of incorpora-
There was no provision in the above sections against the reduction of statutory rates, and these grants were held not to come within the constitutional protection against impairment of contract obligations.

It was a little harder to decide that the Commission could increase the rates on mileage books when the books were required and the rates were fixed by the Railroad Law. The Ulster & Delaware case reached this conclusion upon the ground that the Commission's power over this form of reduced rate was derived from parts of the statute other than Sec. 49 (1), and that these parts did not contain the words "notwithstanding that a higher rate, etc., has been heretofore authorized by statute." This seems a tortuous construction of the Public Service Commissions Law. The history of the legislation tends to confirm the contention of the minority, that these other parts of the statute gave to the Commission power only to require new forms of reduced rate tickets,—as commutation, excursion, school, family, and children's half-fare tickets, but did not affect the Commission's jurisdiction to fix rates in regard to tickets which were already in existence. Therefore, they argued, the rates in this case came under the provisions of Sec. 49 (1), which allows the Commission only to reduce but not to increase a statutory rate. The majority opinion refused to undertake any interpretation of Sec. 49 (1), because they said it had no application to this situation.

The Quinby case was the first case to state categorically that the Commission had power to increase rates of fare.

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4 Laws of 1890, c. 565, as amended by Laws of 1910, c. 481 (Consol. Laws, c. 49). Sec. 60 deals with these mileage books.
6 Sec. 33 (4) and the second paragraph of Sec. 49 (1), both as amended by Laws of 1911, c. 546. In speaking of Sec. 49 (1), I include only the first paragraph of that section.
7 See 156 N. Y. Supp. at 1069.
on railroads and street railroads, even though these rates had been fixed by statute.6

The court repeated that this point had not been passed upon in the Ulster & Delaware case, and went on to say: 9

"The words 'notwithstanding that a higher rate, etc., has heretofore been authorized by statute' are not entirely apt, but the section, read as a whole, is susceptible of no other natural interpretation than that the legislature has, for greater certainty, expressly included in its general delegation of powers, the power of the commission to reduce a maximum rate fixed by the legislature. The purpose of the legislation was to provide for the regulation of statutory fares by a board which may be expected to pass equitably upon conflicting claims with its single purpose the common good even where a maximum rate had been fixed by the legislature."

This may be a desirable result to reach as a question of policy. But it is submitted, with all due respect to the court which seemed to be unanimous on this point,10 that this is doing violence to the language of the statute. Mr. Presiding Justice Kellogg, in his dissent in the Ulster & Delaware case, also found this clause "notwithstanding that a higher rate, etc., has heretofore been authorized by statute" to be inconsistent with the words in the earlier part of the section, "whenever the commission * * * shall be of opinion * * * that the maximum rates, etc. * * * are insufficient." But he pointed out that when the bill was introduced, this last clause had read "notwithstanding that another or different rate, etc.," and that the Legislature had substituted the word "higher" for the words "another or different" for the very purpose, as the debates showed, of preventing the Commission from increasing any statutory rate.11

The talk of the Quinby case did not apply, however, to Sec. 72, where we find no language regarding the insufficiency

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6 The statute in this case was the amendment to the charter of the city of Rochester, Laws of 1915, c. 359.
7 See 223 N. Y. at 258.
8 See note 42, infra.
9 See 156 N. Y. Supp. at 1072.
of the maximum rates, and where it is specifically provided
that the rate may not exceed that fixed by statute. In the
Municipal Gas case,12 the court decided that because of this
proviso in Sec. 72, the Commission did not have power to
increase a statutory gas rate. The court intimated that this
power might exist if only Sec. 66 (5) were involved, since
that was like Sec. 49 (1), considered in the Quinby case,
but said that the two sections relating to gas rates must be
considered as interdependent, and that the restrictive clause
of Sec. 72 could not be nullified by grounding the proceeding
on Sec. 66 (5).

B. Rates Fixed by Franchise or Contract.

A different problem arises when the rate which the
utility is allowed to charge has been fixed as a part of the
consent given by a municipality to the use of its streets.
Street railway companies are required to obtain these con-
sents by Art. 3, Sec. 18 of the New York Constitution. It is
settled that stipulations as to rates of fare, etc., which are
imposed by the municipalities as a condition of granting
these consents or franchises, are binding on the street car
companies by ordinary principles of contract law.13 But the
questions that have been the source of much controversy in
the New York courts are:

(1) May the Legislature, in the exercise of its
police power, abrogate these conditions?

(2) Assuming that the Legislature has this
power, had it delegated that power to the Public
Service Commission?

This problem arose for the first time in 1916, in the
North Shore Traction case.14 Without a full or satisfactory
discussion, the Appellate Division held that the Public Serv-

12 People ex rel. Municipal Gas Co. v. Pub. Serv. Comm., 224 N. Y. 156,
120 N. E. 132 (1918). In this case the gas rates for the city of Albany had
been established by Laws of 1907, c. 227.
N. E. 536 (1912).
ice Commission had power to increase the rates fixed by these franchises. The court relied largely on the case discussed above which had allowed the Commission to reduce the fares established by a municipal license. But this is to overlook the very significant difference between the terms of a permit which is revocable at will by the municipality, as contrasted with a condition which is part of the consideration given to the municipality for binding itself by a franchise contract.

This case was overruled in 1918 by the Quinby case, which involved the street railway fares in the city of Rochester. These fares had been fixed both by franchise agreement and by statute. We have already examined the court's remarks to the effect that the statute would not prevent the Commission from increasing the fares. But the majority, speaking through Judge Pound, held that the Commission had no power to increase the rates above those fixed in the franchise. The court expressly refused to consider, and left open for future determination, the first question above, as to whether the Legislature had the power to abrogate these consents; the decision went emphatically on the ground that whatever the powers of the Legislature might be in this connection, it was not clearly shown that the Legislature had delegated any of these powers to the Commission. This construction was adopted on the ground that Sec. 49 (1) and the other relevant sections make mention only of rates of fare established by statute, and did not purport in terms to give the Commission power over fares established by franchises.

Next in order came the South Glens Falls case which
decided that the Commission had the power to increase gas rates which had been fixed by the franchise agreements. In the case of gas and electric corporations the municipal consents to using the streets is not required by the Constitution, but by statute.\(^2\)

Judge Crane, writing the prevailing opinion, first develops the argument that this franchise contract is one which may be abrogated by the Legislature in the exercise of the reserve police power which had remained with it after the parcelling out of some rights and privileges to its political subdivisions, the municipal corporations. He then finds that the Legislature has delegated this power to the Public Service Commission. This conclusion is a little hard to understand, in view of the Quinby case decided only nine months before. In that case, it will be remembered, the court said that since the Legislature had empowered the Commission to change a rate notwithstanding that it had been fixed by statute, but had not made such an express extension of the Commission's power to rates fixed by franchise, power to change the latter rates would not be implied. Judge Crane concurred in the following memorandum: \(^2\)

"I am of the opinion that the reserve police power of the legislature has not been contracted away. I concur in the above opinion insofar as it states that the legislature has not in this instance given to the public service commission the power of regulation."

Now Sec. 66 (5) has exactly the same language in this connection as Sec. 49 (1),—both of them say only that rates established by statute shall not be exempt from the Commission's power. If the power to alter franchise rates was not given by Sec. 49 (1), as Judge Crane admitted, certainly it could not have been given by Sec. 66 (5). The majority opinion is not very clear in its discussion, but the argument

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\(^2\) Transportation Corporations Law. This was originally Laws of 1909, c. 219, but was completely revised by Laws of 1926, c. 762, Sec. 1. The sections requiring this consent were Sec. 61 (1) and (2) of the old law, and Sec. 11 (1) and (3) of the new law.


\(^2\) See 223 N. Y. at 264.
seems to be that the power can be found in Sec. 72, which gives the Commission power to establish a rate "not exceeding that fixed by statute." The learned justice concludes that this restriction is the only one upon a power which is otherwise plenary, and since franchise rates do not fall within this exception they are subject to the Commission's general power of regulation.

This interpretation seems strained. As the court pointed out in the Municipal Gas case, Sec. 66 (5) and Sec. 72 are interdependent, and the language of either, which is designed to impose an additional restriction, should not be construed to expand the limits of the other. True, the Quinby case does not hold that Sec. 66 (5) expressly denies to the Commission any power over franchise rates, but simply says that the power is not clearly granted. But it is no easier to find such a grant implied by the language of Sec. 72. The Commission was given power "within lawful limits" to fix the price of gas; these lawful limits include the municipal franchises, until the Legislature has made clear its intention to abrogate those franchises. It seems fairly obvious that the words "not exceeding that fixed by statute" were added, not to mark out the sole exception to an otherwise unlimited power, but rather to make it absolutely clear that in addition to other limitations, including those of the municipal franchises, the statutory maximum should not be exceeded. This additional precaution was necessary because Sec. 66 (5) might be interpreted, as Sec. 49 (1) was interpreted in the Quinby case, to mean that the Commission could increase the statutory rate. This argument was stressed by the dissenting judges, who contended that the instant case and the Quinby case were indistinguishable on the question of the Commission's power over franchise rates.

Neither can any distinction be drawn from the fact that the requirement of consent in the Quinby case was part of the Constitution, while it was only a statutory matter in the present case. As the dissenting judges point out, this difference is important only as bearing on the first question, whether the Legislature has power to abrogate the conditions, but doesn't help to show whether any power that exists in the Legislature has been delegated.
The only ground on which the *South Glens Falls* case can be supported is that taken by Judge McLaughlin in his separate concurring opinion. This is, that the state has never delegated to the municipalities its sovereign power to regulate the rates of public service corporations. The statute requiring the municipal consents to allow gas and electric corporations to use the streets provides that those consents may be given "under such reasonable regulations as they [the municipal authorities] may prescribe." Judge McLaughlin says that reasonable regulation does not include the power to fix rates. Therefore the franchise rate was a private contract between the municipality and the utility, and like any other private contract (as we shall see below) was subject to abrogation by the Legislature in its general supervision. In other words, the Legislature had never delegated its rate-making power to the municipalities, but had delegated all its power on this subject to the Commission with the single exception in regard to the statutory maximum. Therefore, the argument runs, it is unnecessary to find an express grant of power over these franchise rates, for the Legislature didn't consider this subject important enough expressly to place it, *ex majore cautella*, within the jurisdiction of the Commission.

From this point of view, the *Quinby* case is distinguishable in that the consent provision there was in the Constitution, and had been interpreted as giving the municipality power to fix rates, so that the Legislature should have taken some positive action with reference to that power.

Even so, the distinction seems rather strained, and Judge McLaughlin himself did not seem to think much of it, as is shown by his opinion in the *Niagara Falls* case, discussed below. I think the result can be explained as being purely an accident of the calendar. The Court of Appeals at this time consisted of ten members, of whom only seven sat at any one time. The *South Glens Falls* case was decided by a four to three vote, and the three members who did not participate in this case had voted with the majority in the *Quinby* case, and showed clearly by their subsequent opinions that they

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*Judges Cardozo, Pound, and Andrews.*
agreed with the result of that case;\textsuperscript{24} so that a different composition of the court in the second case would have made it more harmonious with the first. On the other hand, I think it is equally true to say that six of the ten members at this time did not like the doctrine of the \textit{Quinby} case,\textsuperscript{25}—some of those who had voted for it having changed their minds. Indeed, several of the judges tried in later cases to confine the \textit{Quinby} decision to street railways in the city of Rochester on the ground that the decision was based on the special statute involved,\textsuperscript{26} in spite of the fact that Judge Pound had said very distinctly in that case: \textsuperscript{27} "Rates so fixed by special statute are still subject to regulation by the public service commission." This method of distinguishing away an undesirable case moved Judge Cardozo to remark \textsuperscript{28} "Such a reading of the opinion [in the \textit{Quinby} case] underrates the capacity of the members of the court to give expression to their meaning."

Nevertheless, when the \textit{Quinby} case was re-argued before the court, eighteen months after the first decision, and the contention was made that it had been overruled by the \textit{Glens Falls} case, the court unanimously reiterated its earlier decision, and again emphasized the distinction in regard to street railways between franchise rates, which could not be increased, and statutory rates, which \textit{could} be increased.\textsuperscript{29}

And the principle was again affirmed and applied in the \textit{Niagara Falls} case,\textsuperscript{30} the court laying special emphasis on

\textsuperscript{24} See infra, note 42.

\textsuperscript{25} This point is developed infra, note 42.

\textsuperscript{26} This suggestion was first advanced by Judge McLaughlin in his special concurring opinion in the \textit{South Glens Falls} case. See 225 N. Y. at 228. Judge McLaughlin also suggested that the \textit{Quinby} decision may be explained as being required by the language of Secs. 173 and 181 of the Railroad Law. But he himself shows in a later opinion that Sec. 181 could not possibly be in the way of any such exercise of power by the Commission. See 229 N. Y. at 350. And Sec. 173 merely deals with certain details of administration in connection with the granting of such consents in the future, and provides that this provision shall not in any way affect the terms of certain existing franchises, including the Rochester agreement among them. This section said nothing about the rate of fare, but merely provided that there should be only one fare. See Judge Cardozo's remarks on this subject, 229 N. Y. at 339.

\textsuperscript{27} See 223 N. Y. at 259.

\textsuperscript{28} In the \textit{Niagara Falls} case. See 229 N. Y. at 340.

\textsuperscript{29} 227 N. Y. 601, 125 N. E. 922 (1919).

the fact that three successive legislatures since the Quinby case had been asked to change the effect of that decision by expressly giving to the Commission jurisdiction over franchise rates, but had refused to do so. Three judges dissented, again trying to whittle down the Quinby case, in spite of its recent re-affirmance. Judge McLaughlin, speaking for the minority, tried to extend even to constitutional consents his conception in the South Glens Falls case,—that the municipalities had never been given power, other than as private individuals, to stipulate for rates of fare. He quotes the South Shore Traction case for the proposition that the conditions imposed in these consents cannot interfere with the regulatory power of the Public Service Commission; but the consents in that case were given after the passage of the Public Service Commission Law, and so come under the rule of the City of New York case, discussed below. I think it safe to reiterate that if a different group of seven had sat in the Niagara Falls case, the Quinby case would have been completely overruled.

In 1920, then, the situation stood as follows:

1. In regard to gas and electric rates, the Commission did not have power to increase those fixed by statute (Municipal Gas case), but did have power to increase those fixed by franchise (South Glens Falls case).

2. In regard to street railway fares, the Commission did have power to increase those fixed by statute, but did not have power to increase those fixed by franchise. (Quinby case.

There were certain situations, however, in which the Quinby case did not apply, and the Commission did have power to increase franchise rates.

First, the case of franchises which expressly reserved to the Legislature the right to regulate the fares. That the Commission did have jurisdiction to increase these rates was

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32 See infra, note 42.
decided by a unanimous court in the *International Ry.* case. This case goes on the ground suggested in Judge McLaughlin's opinion in the *South Glens Falls* case. Since it was so clear that the Legislature had the power to fix the rates in a situation like this, this power passed to the Commission by virtue of its general grant of power to regulate rates. It wasn't necessary to make an express statement of intention here because there was no possibility of a constitutional difficulty, as there was in the *Quinby* case. Judge Cardozo thus explained the *Quinby* decision: "In default of 'clear and definite language,' we followed the settled rule that 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that is unconstitutional, but also grave doubts upon that score.'"

Secondly, the *City of New York* case decided that the Commission had jurisdiction over the rates in franchises granted after the passage of the Amendment of 1911 to the Public Service Commission Law. The court said that these consents were understood to be granted subject to the regulatory powers of the Commission which were then known to

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33 *Matter of International Ry. Co. v. Pub. Serv. Comm., 226 N. Y. 474, 124 N. E. 123 (1919); motion for re-argument denied, 227 N. Y. 669, 126 N. E. 910 (1919).* This case involved the Milburn agreement between the city and the street railways of Buffalo. That part of the agreement which abolished transfer charges did not reserve to the Legislature any power of modification, and this part was specifically excepted from the jurisdiction of the Commission by Sec. 49 (6).


The principle applies likewise to franchises which incorporated the provisions of Laws of 1884, c. 252, Sec. 13, or of Sec. 181 of the Railroad Law, since the latter section expressly provides that all rates of fare fixed therein or by the aforementioned statute of 1884 remain subject to regulation by the Legislature. *Evens v. Pub. Serv. Comm., 246 N. Y. 224, 158 N. E. 310 (1927), (West Side, Court Street & East End, and Binghamton Central franchises); Fagal v. Pub. Serv. Comm., 131 Misc. 398, 227 N. Y. Supp. 18 (Albany County, 1928).*

34 *People ex rel. Cohoes Ry. Co. v. Pub. Serv. Comm., 143 App. Div. 769, 128 N. Y. Supp. 384 (3rd Dept. 1911), aff'd without opinion, 202 N. Y. 547, 95 N. E. 1137 (1911).* This case upheld a special act reducing a rate fixed in a franchise which reserved to the Legislature the power of regulation.

35 *People ex rel. City of New York v. Nixon, 229 N. Y. 356, 128 N. E. 245 (1920).*

36 *Laws of 1911, c. 546.*
exist. The constitutional provision about consents meant only that a municipality should not have a railway constructed upon its streets against its will. The Legislature could validly prescribe and limit the conditions which municipalities might attach to franchises to be granted in the future. A municipality could not be required to consent, but if it did consent the franchise thus given incorporated by reference all the regulations which the Legislature had prescribed in advance. One such regulation was the passage of the Public Service Commission Law, which declared that the Commission should have jurisdiction over all matters embraced in the consents. The difficulty in the Quinby case was that the franchise had been granted prior to the passage of the statute, and the Legislature had not clearly indicated its intention to give the Commission power over such franchises, as it did express its intention with regard to future consents like those involved in this case. The court intimated that this principle would extend to any consents granted after the passage of the original law in 1907, but it was not called upon to decide that point, since the franchise in question had been granted in 1912.

This question was settled by the Garrison case, a per curiam opinion. This case also decided that the Quinby doctrine did not apply to consents granted before January 1, 1875, the date when Art. 3, Sec. 18 was incorporated into the Constitution. Prior to that time this consent provision had been only in the statute, and the per curiam opinion gives no inkling of what difference that should make, unless this is to be understood as a line of demarcation adopted by the South Glens Falls case.

Finally, the Garrison case decided that the Quinby doctrine did not apply to franchises granted directly by the Legislature, or to franchises which had reserved to the

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38 Laws of 1907, c. 429.
40 This is the explanation given in Evens v. Pub. Serv. Comm., 246 N.Y. 224, 158 N.E. 310 (1927) [Washington Street & State Asylum and City Railway franchises].
41 This was followed in Evens v. Pub. Serv. Comm., supra, note 40 (Binghamton & Fort Dickinson franchise).
Legislature the power to fix the fares. As to all franchises not coming within the above exceptions, the doctrine of the Quinby case was re-affirmed, three judges dissenting. 42

42 This is a convenient place to study the votes and opinions of the several judges with a view to supporting the propositions advanced in the text, namely (1) that a majority of the judges did not like the Quinby doctrine; (2) that if another group of seven had sat in the South Glens Falls case, that would have followed the Quinby case, at least on the doctrine of stare decisis; (3) that if a different group of seven had sat in the Niagara Falls case, that would have overruled the Quinby case, both because the judges didn't like it, and because they thought it had been practically put in the corner by the South Glens Falls case.

The ten members of the court at the time the Quinby case was decided were Chief Judge Hiscock and Judges Chase, Collin, Cuddeback, Hogan, Cardozo, Pound, 'McLaughlin, Crane, and Andrews. Chief Judge Hiscock dissented in the Quinby case and concurred in the South Glens Falls case. It is thus clear that he did not approve of the Quinby case. He did not sit in the Niagara Falls case, and concurred in the Garrison case. I suggest it as a possibility,-and only as that,—that Chief Judge Hiscock, if he had sat in the Niagara Falls case, would have voted to overrule the Quinby case; but not having had an opportunity to do this, he felt obliged to concur in the Garrison case since the principle of the Quinby case had been repeated in the Niagara Falls case. I venture this suggestion because of Chief Judge Hiscock's vote in the two previous cases, and because of his dissent in the subsequent Mamaroneck case. Of course the attitude of the dissenting judges in the Mamaroneck case is only mildly persuasive, since there is no opinion, and the judges may have gone on the ground that there was an interurban railway involved, but if that was the sole ground of the dissent, it seems to me it would have been stated (see discussion of the case, infra).

Judge Chase did not sit in the Quinby case, and wrote the dissenting opinion in the South Glens Falls case, but proceeded entirely upon the argument that the two cases were indistinguishable and therefore the Quinby case ought to be followed as a matter of stare decisis. He then wrote a dissenting memorandum in the Niagara Falls case, contending that since the Quinby case could not be distinguished from the South Glens Falls case, it should be considered as having been confined to the particular situation there involved. From this, and from the fact that Judge Chase joined in the dissent to the Garrison decision, I think it clear that he was opposed to the Quinby doctrine, and that his dissent in the South Glens Falls case is to be explained purely on the basis of stare decisis, which is the ground he gives in his decision. This is absolutely clear in the case of Judge Collin, who dissented in the Quinby case. He joined Judge Chase's "stare decisis" dissent in the South Glens Falls case, but then concurred in Judge McLaughlin's dissent in the Niagara Falls case—a dissent which also asserted that the Quinby doctrine was to be narrowly confined to the street railways in Rochester.

Judge McLaughlin was obviously opposed to the Quinby doctrine. He did not sit in that case, but his attitude appears clearly from his special concurring opinion in the South Glens Falls case, his dissenting opinion in the Niagara Falls case, his concurrence in result only in the City of New York case, and his dissent in the Garrison and Mamaroneck cases.

I think this is equally obvious in regard to Judge Crane, although he voted with the majority in the Quinby case. The opinion he wrote for the majority in the South Glens Falls case has already been discussed in the text. In every subsequent opinion he showed that he disapproved of the Quinby case. Thus he wrote the dissenting opinion in the Garrison case and joined in the dissent to the Niagara Falls case, on the ground that the Quinby case had been very
To return to the application of the Quinby doctrine. It must be remembered that this principle extended only to street railways, the consent to the construction of which was required by Art. 3, Sec. 18 of the Constitution. So it did not apply to a railroad company that had been organized under the Railroad Law; nor to a street railway whose business narrowly limited by the South Glens Falls case. He also concurred in the result only in the City of New York case, and dissented in the Mamaroneck case.

Judge Cuddeback, like Judge Crane, concurred in the Quinby decision, but also concurred in the South Glens Falls case. He was not on the bench in the subsequent cases (his place being taken by Judge Elkus) so we cannot be so sure of his attitude as we can of Judge Crane's. But I think it is fair to say, from the study we have made of the other judges who concurred in the South Glens Falls case, that one who concurred in that decision certainly didn't favor the Quinby doctrine.

Judges Pound, Cardozo, Andrews, and Hogan were obviously in favor of the Quinby doctrine and opposed to the South Glens Falls case. Judge Pound did not sit again until the Mamaroneck case, he concurred there. Though a dissent in the Mamaroneck case does not necessarily indicate a disapproval of the Quinby doctrine, as pointed out above, a concurrence in that case clearly shows an approval of the Quinby doctrine, because it is an even more extreme case.

Judge Cardozo wrote a special concurring opinion in the Niagara Falls case, and concurred in the Garrison case (with a modification) and in the Mamaroneck case. Judge Andrews concurred in the Niagara Falls and Mamaroneck cases, but did not sit in the Garrison case.

Judge Hogan did not sit in the Quinby case, but showed himself to be one of its strongest supporters by dissenting generally in the South Glens Falls case, by his opinion for the majority in the Niagara Falls case, and by his special concurrence in the Garrison case.

To sum up: 1. We list, as having definitely expressed themselves against the Quinby doctrine, five judges: The Chief Judge, and Judges Chase, Collin, McLaughlin, and Crane (the latter in spite of the fact that he concurred in the Quinby case). We add Judge Cuddeback as most probably also opposed to the doctrine, in spite of his affirmative vote in the case itself. Only four judges (Judges Hogan, Cardozo, Pound, and Andrews) can be said with certainty to have favored the doctrine.

2. Only four judges favored the decision in the South Glens Falls case, but those four happened to sit in that case, and so it was decided that way. These four judges were Chief Judge Hiscock and Judges Cuddeback, McLaughlin, and Crane. Two of the three dissenters (Judges Chase and Collin) disagreed with the Quinby doctrine, but felt bound to follow it. The three who did not sit (Judges Cardozo, Pound, and Andrews) would clearly have voted against the decision.

3. In the Niagara Falls case, we list five judges as surely in favor of the decision: Judges Hogan, Cardozo, Andrews, Elkus, and Pound (the latter not sitting in that case). Judges Chase, Collin, and McLaughlin dissented. As to Chief Judge Hiscock and Judge Crane who did not sit, the former would probably have voted against that decision and the latter would certainly have done so.  

was almost entirely interurban, the local business being merely incidental.\textsuperscript{44} That is because these utilities do not require such an extensive use of the streets, and the consents are demanded by statute\textsuperscript{45} rather than by the Constitution, so that the \textit{South Glens Falls} case applies.\textsuperscript{46}

Even allowing for these exceptions and those which were applied in the \textit{Garrison} case, the \textit{Quinby} doctrine prevented the Commission from increasing the street railway fares on many of the important urban lines. These companies must have made a strong fight before the Legislature, for in 1921 that body amended Sec. 49 (1) so as to read: \textsuperscript{47}

\begin{quote}
"The commission shall determine the just and reasonable rates, etc., to be thereafter observed and in force as the maximum \textsuperscript{* * * notwithstanding that a higher or lower rate, etc., has been heretofore prescribed by general or special statute, contract, grant, franchise condition, consent or other agreement."
\end{quote}

The Legislature had now delegated whatever power it had. This made it necessary to answer our first question which had been expressly left open by the \textit{Quinby} case and all the subsequent cases on this point, namely, whether the Legislature could constitutionally abrogate these consents. \textit{In re McAneny,\textsuperscript{48}} a case in the Appellate Division, answered this question in the affirmative in a dictum which went into the question very fully. The court held that the judges of the Court of Appeals had indicated that this would be their answer to the question. An examination of the previous cases shows this interpretation to be entirely justified,\textsuperscript{49} and this feeling is reinforced by the fact that when \textit{In re McAneny} came before the Court of Appeals\textsuperscript{50} it was unanimously affirmed. Three judges concurred specially in holding that

\begin{footnotes}
\textsuperscript{45} Secs. 21 and 171 of the Railroad Law.
\textsuperscript{46} In Koehn v. Pub. Serv. Comm., supra, note 51, the consents had been obtained in 1914, and the court gave this as one of its grounds of decision, following the \textit{City of New York} case. But the court laid great stress on the other basis for their decision, in which they followed the \textit{South Glens Falls} case.
\textsuperscript{47} Laws of 1921, c. 134, Sec. 29.
\textsuperscript{48} 198 App. Div. 205, 190 N. Y. Supp. 92 (1st Dept. 1921).
\textsuperscript{49} See \textit{infra}, note 51.
\end{footnotes}
the particular part of the 1921 Amendment which was then before the court (and which did not include Sec. 49 (1)), was constitutional. But while they reserved judgment as to other sections of the Amendment, they said nothing about Sec. 49 (1). It would seem, therefore, that this dictum of In re McAneny was accepted by the Court of Appeals. This dictum resulted in a square holding in In re Fleming to the effect that this change of Sec. 49 (1) was constitutional. This amendment thus gave to the Commission a jurisdiction that it had not had previously,—the power to increase franchise rates on street railways.

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A reference to note 42, supra, shows clearly that Chief Judge Hiscock and Judges Chase, Collin, McLaughlin and Crane were of opinion that the Legislature had this power, and that probably Judge Cuddeback was of the same opinion. The entire court (except Judge Hogan, who dissented) practically admitted this in the City of New York case. For that case decided that the Legislature could prevent the municipalities from writing these fare stipulations into future consents, despite the fact that these consents were required by the Constitution. And as to past consents, Judge Andrews concurred in that part of the dissent in the Niagara Falls case which stated that the Legislature had power to abrogate these past consents. Judge Cardozo in his special concurring opinion (in which Judge Elkus concurred) intimated that he too would be of that opinion, if the question were before the court for decision. Judge Pound did not express himself at that time. Judge Hogan's dissent in the City of New York case and his special concurrence in the Garrison case would seem to indicate that he did not believe the Legislature had this power. This computation of a total of eleven judges who sat during the period of these important cases shows six (and probably Judge Cuddeback) as certainly believing the Legislature to have the power; two judges indicating very strongly that they subscribed to that view, though not called upon to express a positive opinion; one who did not believe it; and one who had never said anything on the subject. However Judge Hogan seems to have departed from that position, if he had ever held it very strongly, by concurring specially in Matter of McAneny (as did Judge Cardozo), and Judge Pound concurred generally in that affirmance.

117 Misc. 373, 191 N. Y. Supp. 586 (Albany County, 1921), appeal dismissed, no record having been filed, 192 N. Y. Supp. 925 (App. Div. 3rd Dept. 1922). The reasoning of this case, which attaches some weight to the fact that the franchises were granted subsequent to 1890, is not very satisfactory, for this line of distinction does not square with the previous cases. But its result is clearly to hold constitutional the 1921 Amendment to Sec. 49 (1).

The village of Brownville had granted a franchise in 1890 to the Black River Traction Co., conditioned upon certain maximum fares being observed. The company applied to the Commission in 1919 for permission to increase its fare and it was held that the Commission had no jurisdiction, in view of the decision in the Quinby case. People ex rel. Village of Brownville v. Pub. Serv. Comm., 198 App. Div. 391, 191 N. Y. Supp. 293 (3rd Dept. 1921).

Things now having been nicely settled from the point of view of the lawyer and the street railway companies, the Legislature turned around again in 1923 and restored Sec. 49 (1) almost but not quite to its original form. The last clause now read: 64

"Notwithstanding that a higher rate, etc., has been heretofore authorized by general or special statute."

This shows an obvious legislative intention to reinstate the Quinby doctrine, and so the Mamaroneck case 65 decided that the Commission had no power, after the 1923 Amendment, 66 to increase rates fixed by franchise. But if the Commission had acted under the 1921 Amendment (and before the 1923 Amendment) so as to increase franchise fares, such action effectively disposed of this condition in the franchise. Therefore the rate fixed by the Commission during its lease of power to alter these rates could at any later time be increased or decreased by the Commission without regard to what the franchise rate had been before the change. This was decided by the United Traction case 67 and this interpre-

64 Laws of 1923, c. 891.
65 Village of Mamaroneck v. Pub. Serv. Comm., 208 App. Div. 330, 203 N. Y. Supp. 678 (3rd Dept. 1924), aff'd without opinion, 238 N. Y. 588, 144 N. E. 903 (1924). The railway in this case was an interurban, but it did a large local business. The court distinguished the case from the Koehn case, supra, note 44 on the ground that the utility in the Koehn case was a railroad, and was built on private property.

In the principal case, the company had complied with the consent rate in the village itself, yet the court enforced that part of the consent which prescribed the rates between the village and outside points, though these outside points had agreed to the increase. Both courts were divided in opinion.

66 The application by the company to the Commission in the Mamaroneck case was made before the enactment of the 1923 Amendment, but before the Commission could act on the matter the statute had become effective and the Supreme Court stayed further proceedings. Sec. 94 of the General Construction Law (Consol. Laws, c. 22) provides that the repeal of a statute shall not affect any proceedings commenced before the repeal and pending at that time. The court held this inapplicable to the present case on the ground that the Commission's power was analogous to a revocable power of attorney, and therefore that the Commission could not act after its power had been withdrawn.

67 United Traction Co. v. Pub. Serv. Comm., 219 N. Y. Supp. 421 (App. Div. 3rd Dept. 1927). The case might go on the ground that all the old consents in this case were consolidated in, and therefore abrogated by new franchises; and the new franchises, being granted in 1912 and 1913, came under the decision of the City of New York and Garrison cases. On this factual interpretation of a new franchise as superseding the old ones, compare People
tation seems correct in view of the fact that the Legislature had expressly refused to repeal any of the orders issued by the Commission pursuant to its power under the 1921 Amendment.

Considering the phraseology of the 1923 Amendment, I should be willing to argue the point that the Commission does not have power to increase statutory street railway fares, in spite of the statement to the contrary in the Quinby case. Several members of the court contended that the statute was the basis of the decision in the Quinby case, and therefore regard that as a square holding to the effect that the Commission has no power to increase these statutory rates. I am unwilling to rest my position on that ground because that does not seem to be a legitimate interpretation of the case. I prefer to argue from the intention of the Legislature as I think it fairly appears from the successive changes in the law.

It will be remembered that the Commission was originally given power to alter rates “notwithstanding that a higher rate, etc., has been heretofore authorized by statute.” Judge Pound said in the Quinby case that this was to be interpreted as if the statute had read “notwithstanding that a higher or lower rate, etc.” The Legislature put that form of wording into the Law by the 1921 Amendment. By the 1923 Amendment, however, the section was again changed so as to give the Commission power “notwithstanding that a higher rate has been heretofore authorized by general or special statute.” In 1920 it might have been excusable to argue that when the Legislature said “higher,” they meant “higher or lower,” although, as pointed out above, the legislative history of the bill shows this to have been a mistaken

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There is serious question in my mind as to whether this statement is more than a dictum, since the case was disposed of on the ground that the franchises prevented the Commission from increasing the rates. But the language of the court in denying the motion for re-argument (227 N. Y. 601) would seem to indicate that the talk about the statute did affect some rates. I don’t think the case can be called a positive authority for the proposition.
interpretation. But surely when the Legislature had expressly adopted the meaning which had been attributed to them, and had then intentionally gone back to the original form of the statute, it would be doing violence to their language to construe their words as meaning something which had been so explicitly negatived. And it cannot be said that the Legislature simply restored the old section in *haec verba*, without thinking of all the effects of repealing the 1921 Amendment, because the section still spoke of "rates fixed by general or special statute" (the words "general or special" having been added for the first time in 1921 and being retained in the 1923 Amendment). It thus appears that the Legislature adopted one of the changes made in 1921, but refused to continue the one we are now considering.

If this analysis is correct, the courts should now hold that the Commission has no power to increase street railway fares established by statute, even though they had previously decided otherwise, for this is purely a matter of statutory construction, and the Legislature has now changed the statute. But the court would not even have to contend with any square holdings against this point of view. The *United Traction* case allowed the Commission to increase a statutory rate,⁵⁰ but that order of the Commission, like the increase in the franchise rate discussed above, was made while the 1921 Amendment was still in force. The remarks in the *Quinby* case have already been considered. The *Garrison* case and the recent *Evens* case ⁶⁰ hold that rates fixed by legislative franchises may be changed by the Commission. But legislative franchises fall in a different category from statutes.

However this may be, it is clear that the Commission has absolutely no power to alter franchise rates in the case of street railways.⁶¹

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⁵⁰ The statute in question was Laws of 1905, c. 358, which was involved in the decision of People *ex rel.* Cohoes Ry. Co. v. Pub. Serv. Comm., 143 App. Div. 769, 128 N. Y. Supp. 384 (1911); aff'd without opinion, 202 N. Y. 547, 95 N. E. 1137 (1911). See note 34, supra.


⁶¹ The case of Interborough Rapid Transit Co. v. Gilchrist, 16 F. (2nd) 912 (S. D. N. Y. 1928) is not discussed here, because there would be no point in entering into that controversy. I disagree most completely with the conclusions and the reasoning of the statutory court; my reasons for this are apparent from the foregoing analysis of the state cases.
The situation is altogether different with regard to gas and electric rates. The 1921 Amendment covered these rates also. Sec. 66 (5) was changed to read: *62*

"The commission shall determine and prescribe in the manner provided by and subject to the provisions of Sec. 72 * * * the just and reasonable rates, etc., thereafter to be in force * * * notwithstanding that a higher or lower rate, etc., has heretofore been prescribed by general or special statute, contract, grant, franchise condition, consent or other agreement."

And Sec. 72 now read *63*: 

"The commission may, by order, fix just and reasonable prices, etc. * * * notwithstanding that a higher or lower price has been heretofore prescribed by general or special statute, contract, grant, franchise condition, consent or other agreement."

The intent of the Legislature was thus manifested to make Sec. 66 (5) and Sec. 72 interdependent, to approve the doctrine of the South Glens Falls case and to change the doctrine of the Municipal Gas case. This part of the Public Service Commission Law has not been changed, so that to-day the Commission has power to reduce or increase all gas or electric rates, whether previously fixed by franchise or statute. The same applies to steam rates and telephone and telegraph rates, which were amended in 1921 in conformity with the general scheme, and which were not changed by the 1923 Amendment. *64*

It is clear that all contracts made between a utility and its customers since the passage of the Public Service Commission Law are deemed to be subject to the provisions of that Law, and therefore that rates set by the Commission

*62* Laws of 1921, c. 134, Sec. 40.

*63* Ibid., Sec. 49.

*64* The provisions as to prices of steam are found in Sec. 80 (4) and Sec. 85, as amended by Laws of 1921, c. 134, Sec. 56 and Sec. 62, respectively. Telephone and telegraph rates are treated of in Sec. 97, as amended by Laws of 1921, c. 134, Sec. 66.
abrogate any that have been fixed by such contract. This is an obviously necessary power, in order to prevent discrimination. It was further held, on the authority of the South Glens Falls case, that even contracts made prior to the passage of that Law were nevertheless subject to change by the state, in its process of regulation under the general police power.

But the Commission has no power over such contract rates if these rates were made in consideration of the grant of an easement or a license. These two cases are pertinent in a consideration of the pending Interborough litigation.

C. Procedural Matters.

Every public service corporation is required to keep on file with the Commission a schedule of its charges. Since the purpose of this requirement is to prevent discrimination, it applies even where the Commission cannot fix the rate,—as when it has been enjoined from enforcing the statutory rate. These scheduled charges must be paid by the public until the Commission has taken some action in the premises; one who claims to be injured by the rates charged must complain to the Commission before he can come into the courts.

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68 Pavilion Natural Gas Co. v. Hurst, 123 Misc. 477, 205 N. Y. Supp. 847 (Wyoming County, 1924), (agreement made before 1907).

69 This is required of railroads and other carriers by Sec. 28, of gas and electric corporations by Sec. 66 (12), of steam corporations by Sec. 80 (10), of telephone and telegraph lines and corporations by Sec. 92 (1).


The utility may increase rates on its own initiative by filing a new schedule with the Commission and giving it publication for thirty days in advance. In the case of railroads and other carriers the Commission could (since 1914) suspend these new rates until after a hearing was held. But until 1921, the Commission did not have such power of suspension in regard to increases proposed by gas or electric corporations, steam corporations, or telephone and telegraph lines. This restriction of the Commission's power over the utilities other than common carriers applied also if the old rate which it was now proposed to supersede had been fixed by a franchise given after the passage of the Public Service Commission Law—this follows easily from the reasoning in the City of New York case. But the courts have gone further. They have held that even if the existing rate had been established by a franchise granted before 1907, the logical extension of the South Glens Falls doctrine prevented the Commission from interfering with the company if the latter sought to increase such a rate in the aforementioned statutory manner. This result, though reached by a unanimous court, seems questionable, but it is of little purpose to argue the point since the 1921 Amendment gave the Commission the power to suspend the charges proposed by these

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73 For the provisions in regard to gas or electric corporations and steam corporations, see the sections cited supra, note 69. Sec. 29 is the provision in regard to carriers, and Sec. 92 (2) covers the case of telephone and telegraph lines.

74 Laws of 1914, c. 240, Sec. 1.


76 Sec. 80 (10) and Sec. 92, respectively, were the same in this respect as Sec. 66 (12).


utilities, so that they have since been treated in the same manner as the carriers.

The Commission has always been authorized by the statute to allow these increases to be made by any utility without requiring the 30 days' notice. And the courts held that the Commission might, in its discretion, allow the increase to go into effect temporarily, while the hearing was pending (upon taking proper security for a refund in the event that the new rates were found unreasonable). This decision was enacted into the statute by the 1921 Amendment.

On complaint or on its own motion, the Commission may institute a hearing to decide on the reasonableness of an existing rate, if it is sought to reduce that; or of a new rate, if the utility has filed a proposed increase, as discussed above. At any such hearing, the courts held that it was error to put on the utility the burden of proving reasonable the existing or proposed rate,—the burden was rather on the complainant or the Commission to show the company's rate to be unreasonable. This was changed to some extent by the Legislature in 1914. A provision was added that if a carrier sought to increase the existing rate, it must sustain the burden of showing that the new rate asked for is a reasonable one. The 1921 Amendment completed the change, by adding the requirement that the carrier bear the burden of establishing the reasonableness of the existing rate when that is attacked, and extended this procedure (and that introduced

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79 Sec. 66 (12) was amended to this effect by Laws of 1921, c. 134, Sec. 42; Sec. 80 (10) by ibid., Sec. 56; Sec. 92 by Laws of 1920, c. 957.

80 See sections cited supra, note 73.


82 Sec. 29, as amended by Laws of 1921, c. 134, Sec. 24; Sec. 66 (12) and Sec. 72, as amended by ibid., Secs. 42 and 49, respectively; Sec. 80 (10) and Sec. 85 as amended by ibid., Secs. 56 and 62, respectively; Sec. 92 and Sec. 97 as amended by ibid., Secs. 65 and 66, respectively.


84 Sec. 29, as amended by Laws of 1914, c. 240, Sec. 1.

85 Sec. 29, as amended by Laws of 1921, c. 134, Sec. 24.
by the 1914 Amendment) to the other utilities. At first the courts held that any determination by the Commission in regard to rates was "judicial" in character, and therefore subject to review in the courts by certiorari. Subsequently the courts said that such a determination was "legislative" in nature, and so on certiorari, the court would undertake only a limited review. The court said it would not substitute its own judgment on the facts, but would only examine those facts to see whether there was "substantial evidence to sustain the order" and no error of law,—if the company alleges confiscation and desires a complete review of facts as well as law, it should bring a bill for injunction. It does not appear that this theoretical difference in approach has made any substantial difference in the results of the cases. One important point, however, is that in the court proceedings to review a rate determination by the Commission, the burden of proof is on the company to show that the Commission's rates are unfair and inadequate,—at least since the 1921 Amendment.

The Commission has no jurisdiction to declare a rate-fixing statute unconstitutional as confiscatory. It is true that in the Whish case the Commission had refused to enforce Sec. 77 of the Railroad Law on the ground that it was unconstitutional under the commerce clause of the federal Constitution, since Congress had "occupied the field" by one of the amendments to the Interstate Commerce Act. That determination of the Commission was upheld by the courts. The distinction between the two cases is reasonable enough. In the Whish case, the Commission was asked to enforce a

65 Sec. 66 (12) and Sec. 72 as amended by Laws of 1921, c. 134, Sec. 42 and Sec. 49, respectively; Sec. 80 (10) and Sec. 85 as amended by ibid., Secs. 56 and 62, respectively; Sec. 92 and Sec. 97 as amended by ibid., Secs. 65 and 66, respectively. Sec. 92 had previously been amended by Laws of 1920, c. 957, to the same effect as Sec. 29 in note 89, supra.
68 But see ibid., 207 N. Y. Supp. at 612.
statute that it considered unconstitutional; in the *Municipal Gas* case, the Commission was asked to *abrogate* an allegedly unconstitutional statute. When an administrative body is confronted with such a choice, probably non-action is the safest conduct, until a court shall pass on the matter. It would be interesting to see what the courts would decide in a proceeding brought to compel the Commission to enforce a statutory rate which the utility was not following, and which the Commission believed confiscatory.

If the utility contends that the statutory rate is confiscatory, its remedy is to go to the courts, which will grant an injunction on the principle of *Ex parte Young*, if the enforcement of the rate threatens great injury. In such an action, the Public Service Commission is a proper party defendant in addition to the state and local officials, and the county where the Commission is located is a proper venue for the action.

If the Commission is enjoined from enforcing the statutory rate, it cannot thereafter intervene in any legislation in which an individual seeks to enjoin the utility from charging a higher rate. After the courts have declared the statute unconstitutional, the Commission is free to regulate

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93 209 U. S. 123 (1908).
95 *Brooklyn Borough Gas Co. v. Pub. Serv. Comm.*, 175 App. Div. 684, 161 N. Y. Supp. 169 (1st Dept. 1916), aff'd without opinion, 220 N. Y. 576 (1917). In this case the bill for injunction was brought against the Attorney General of the State who is located in Albany County; the District Attorney of Kings County, and the Public Service Commission for the first district, which is located in New York County. It was held that New York County was a proper venue for the suit.
the rates since there is no statute to stand in the way, and the utility itself may raise its rate in the manner provided by the Public Service Commission Law.

D. Valuation.

First we may consider a few special cases, which do not raise general problems of valuation.

The Commission was upheld in allowing a gas company to charge a flat service rate to each customer, regardless of the quantity of gas used. The court held that this was not a rental charge for gas meters, which was prohibited by statute. The court reasoned that far from being discriminatory, this kind of charge was the most equitable way of apportioning the costs of distribution.

The Commission was reversed in its attempt, acting under Sec. 33 (4), to reduce the commutation rates from New York City, on the New York, New Haven & Hartford Railroad. The court said first that the Commission was not to substitute its judgment for that of the directors as to what rate would yield the largest net return. The court held further that in fixing these commutation rates the Commission must consider, in addition to the actual out-of-pocket expense of running each train, a fair allocation of interest, maintenance, and general expenses, and cost of upkeep of the tracks and equipment. Finally the court decided that the New Haven’s rates should not be made to conform to those of other

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101 Transportation Corporations Law, Sec. 66 of the old law, Sec. 16 of the new law.
102 People ex rel. New York, New Haven & Hartford R. R. Co. v. Pub. Serv. Comm., 159 App. Div. 531, 145 N. Y. Supp. 503 (3rd Dept. 1914), aff’d on opinion below, 215 N. Y. 689, 109 N. E. 1089 (1915). This case held Sec. 33 (4) constitutional. The power of the Commission in these cases is derived from Sec. 49 (1) of the Public Service Commission Law and Sec. 181 of the Railroad Law.
railroads for the same distance. Since the New Haven had to pay a unit charge per passenger to the New York Central for the use of the latter's tracks and terminal facilities the passengers transported should pay at least a large share of this charge—it is not like a gross expense, which may properly be distributed over the entire system. The minority pointed out that the use of the Grand Central Terminal gave to the New Haven a position of prestige and power, and that therefore the expenses incident thereto, even though figured on a per capita basis, should be borne by the total traffic. They argued that the road admitted the force of this reasoning by itself fixing the commutation rates at less than the aggregate of the propulsion, trackage, and terminal charges.

Finally, we have a few transfer cases, which depend upon their particular facts. A list of these is appended in the footnote.\textsuperscript{104}

Now as to general principles of valuation. First, if a utility is engaged in more than one public calling, the rates for each must show a fair return on the property invested in that particular part of the business. If the rates on one branch yield more than a fair profit, they must be reduced, so as not to carry the burden of the non-remunerative portion.\textsuperscript{105}

If the utility operates in another state as well, the method of allocating the property devoted to New York con-

\textsuperscript{104} People \textit{ex rel.} Joline v. Willcox, 194 N. Y. 383, 87 N. E. 517 (1909) \textit{supra}, note 92, was a case involving transfers, but the court passed only on the procedural point, not on the merits.


\textsuperscript{105} Municipal Gas Co. v. Pub. Serv. Comm., 225 N. Y. 89, 99, 121 N. E. 772 (1919). It is true that this case was discussing a statutory rate, but the same principle would apply to a rate fixed by the Commission. For the method of making the allocation, see People \textit{ex rel.} People's Gas Co. v. Pub. Serv. Comm. (1925), 214 App. Div. 108, 211 N. Y. Supp. 662 (3rd Dept. 1925).
sumers is set forth in the *Pennsylvania Gas* case, where the company did business in New York and in Pennsylvania. The rate base is to be composed of the following:

1. Property used exclusively in the New York service (including real property and fixtures situated in Pennsylvania, and materials, supplies, and capital requirements needed in Pennsylvania in order to conduct the New York business);

2. Of all the producing and distributing facilities for both the New York and Pennsylvania business (but excluding that used solely in the Pennsylvania business), allocate to New York the proportion that the New York consumption bears to the total consumption.

As to the method of ascertaining the value of the property, Sec. 49 and Sec. 97 (applying to carriers and telegraph and telephone companies respectively) directed the Commission to pay "due regard among other things to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for supplies and contingencies," while Sec. 72 and Sec. 85 (applying to gas or electric, and to steam corporations respectively) used the words "capital actually expended" instead of "property actually used." A subsequent amendment applicable only to Sec. 49 (1) directs the Commission to give due regard, in addition to these other factors, "to the estimated prospective earning capacity of such property at the rate of fare at the time fixed and existent."

It was settled that in evaluating the rate base of a gas company under Sec. 66, the Commission could not simply find the amount of "capital actually expended," but was required to find the "present value" of the property. But

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207 Under these circumstances, it was held error for the Commission to take into account, in connection with the return, the income from the company's miscellaneous investments in Pennsylvania, which investments were not included in the rate base.

no rule was laid down as to how this "present value" could be ascertained.

At first the court upheld the Commission in refusing to apply the test of reproduction cost new, less depreciation. After pointing out that such a test involved estimates that are highly conjectural, and would result in constant fluctuations in rates as the costs of building varied, the court said:

"Except where there has been an actual, considerable, and more than temporary increase in values and in costs, the actual investment shown upon the books of the corporation, fully, fairly, and honestly kept, is a more certain and more true guide to that 'reasonable average return upon the capital actually expended' which the statute contemplated, than is the fluctuating uncertainty which attends upon the attempt to apply the reproduction cost, less depreciation, as the sole or the controlling element in determining fair value. * * * The reproduced plant would probably cost twice as much as the existing plant, although the existing plant is entirely adequate to the service required, and * * * the reproduced plant would probably be much more efficient, less expensive to operate, and the saving in operating expenses would largely account for or affect the extra cost."

The court admits, of course, that the fair present value must include "actual appreciation in the value of the property acquired by the capital actually expended" (as distinct from extensions and permanent improvements). But the company cannot claim to have the reproduction cost of laying mains, e. g., when the increased cost of excavation is caused by the fact that the municipality has paved the streets.

A method like this, if intelligently applied, would seem to yield results that were fair to company and public alike. Thus the court reversed the Commission's valuation when it

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110 193 N. Y. Supp. at 190.
111 People ex rel. Kings County Lighting Co. v. Willcox, 210 N. Y. 479, 494, 104 N. E. 911 (1914).
was based on actual pre-war costs, and the value of the property had increased greatly during and after the war.\(^{112}\) This was all the stronger in the case of a carrier, where reference must be had to the "value of the property actually used" rather than of the "capital actually expended." The court repeated that the Commission was not required to adopt the test of reproduction cost new, but said the error was in taking past value rather than present value. When the Commission did, under certain circumstances, adopt the test of reproduction cost new less depreciation, the court approved it.\(^{113}\)

But then the United States Supreme Court handed down the decisions in the *Southwestern Telephone* case\(^ {114}\) and the *Bluefield Waterworks* case,\(^ {115}\) so that the courts of New York were now obliged to say that "the dominating element in fixing present value is reproduction cost, rather than historical cost, or actual cost, or prudent investment."\(^ {116}\) The Commission was ordered to consider spot reproduction cost at the time of valuation (1921), and not average reproduction cost for the ten-year period preceding.\(^ {117}\) While this rule was reaffirmed in this term of the United States Supreme Court by the *McCordle* case,\(^ {118}\) it seems highly unsatisfactory, but any adequate discussion of it is beyond the limits of this paper.

Another vexing problem was the way in which the "depreciation reserve" should be treated. The wear and tear of the plant and fixtures over a period of years is estimated and rates are fixed so as to provide for a fair return on the

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\(^{113}\) *Pennsylvania Gas Co. v. Pub. Serv. Comm.*, 204 App. Div. 73, 198 N. Y. Supp. 193 (3rd Dept. 1923). The determination was reversed on another ground, for which see note 121, infra.


\(^{118}\) *McCordle v. Indianapolis Water Co.*, 272 U. S. 400 (1926).
capital or property, plus enough to accumulate this reserve (to be applied to replacements and improvements as the property deteriorates from use). Obviously this reserve is not spent immediately, since it is apportioned in advance in order to spread the burden equitably over the years during which the machinery, etc., is being worn out, but before actual replacement is necessary. The question arises whether this “depreciation reserve,” while it is as yet unspent and is being carried on the books of the company, should be taken into account in evaluating the rate base.

If the property is taken at assessed value, this reserve account should not be taken into consideration. For in such a case the appraiser values the property in its deteriorated condition, and has thus made an actual allowance for depreciation. To deduct this reserve would be to compute the depreciation twice.\(^1\) If, however, the property was taken at book value, this reserve account should be deducted. For the book value represents original cost, and in order to find present value we must subtract the deterioration in use,—and this is estimated by and represented in the depreciation reserve.\(^2\)

But what if the original estimate of the wear and tear was erroneous, so that, after making the proper replacements during the period contemplated, the company has a surplus left in this reserve fund, and then invests this surplus in new additions or extensions? The court held that this investment should not be considered as an addition to the book value of the company’s property, because it did not represent new money contributed by the stockholders, but had been paid by the consumers in the form of rates which are now shown by experience to have been too high.\(^3\) This seems clearly the

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\(^3\) Ibid. In the Pennsylvania Gas cases, supra, note 119, the court had refused to deduct the entire reserve fund, as pointed out in the text, because the property had been taken at assessed, and not at book value. The Commission then put forward the claim that at least this excess in the fund should be deducted from the assessed value, on the theory that the entire sum was a trust fund for the benefit of the customers, and that whatever was not needed
desirable rule, but the United States Supreme Court has recently taken the opposite point of view, holding that the company may keep as its own, and add to the rate base if reinvested, any excessive past sums thus collected for depreciation. The New York principle will therefore have to yield.

In addition to the physical property, it is established by the Kings County Lighting case that the company is entitled to a return on its intangible property or "going value." The decision by Judge Miller contains an excellent discussion of the meaning, and the manner of applying this most elusive principle of valuation. The plant in that case had been valued at spot reproduction cost, less depreciation. The court pointed out that this was to take account only of the "bare bones" of the plant, and that the company was entitled to be reimbursed for the proper and reasonable cost of building up the business,—of developing the most efficient method of operation and of acquiring good will. The best way to make this reimbursement is to add these development expenses to the capital structure (for rate-making purposes only, not as a basis for security issues), rather than to allow the company to recoup them out of very high rates at the beginning, or to amortize them over a period of years.

Judge Miller said:

"I define "going value" for rate purposes to be the amount equal to the deficiency of net earnings below a fair return on the actual investment due solely to the time and expenditures reasonably necessary and proper to the development of the business and for replacements should be credited as customers' capital invested in the enterprise, and therefore should not be included in the rate base. The court expressed its disapproval of this line of argument, but avoided a positive decision on it by finding as a fact, in view of the substantial depletion of the gas wells, that the amount of the reserve was not unreasonable.


[Note 210] N. Y. at 492 and 493.
property to its present stage, and not comprised in the valuation of the physical property.

"Obviously "the most satisfactory method" of appraising it "is to show the actual experience of the company, the original investment, its earnings from the start, the time actually required and expenses incurred in building up the business, all expenditures not reflected by the present condition of the physical property, the extent to which bad management or other causes prevented or depleted earnings, and any other facts bearing on the question, keeping in mind that the ultimate fact to be determined is not the amount of the expenditures, but the deficiency in the fair return to the investors due to the causes under consideration."

The Commission subsequently adopted the rule of allowing 12% of the intangible assets for "going value," but whether this is in lieu of the above test or is an added something allowed for good will does not appear. It was sustained by the court as applied to the facts of one case.20

The principles of law laid down in regard to what are proper expenses and how they should be figured, are not of very general importance. It was held that an allowance for working capital of one-eighth of the operating expenses was sufficient.26 This working capital is necessary so that the company can pay its way while it is waiting to be paid for its services.

Another decision says that the federal income tax should be allowed as an operating expense, but that in fixing the rate of return, the Commission should take into consideration the fact that this return will be net, since the deduction for taxation will already have been made.27 This is unobjectionable if conscientiously applied, but it does seem a cumbersome method, and might open the door to fraud in some cases. It

26 Ibid. The court said it would have favored an allowance of one-sixth of the operating expenses, so as to provide for two months instead of for a month and a half, but it did not consider the difference important enough to reverse for that reason.
27 Pennsylvania Gas cases, supra, note 119. See the Adirondack Power case, supra, note 120, 193 N. Y. Supp. at 194.
would be much simpler mathematics to allow the utility a fair rate of return compared with that received in other industries,¹²⁸ and then compel it to pay the tax out of that income, as the other industries do.

There is one indefensible decision holding that the Commission must make a fair allowance for necessary engineering, administrative, and legal expenses, when these services had been rendered by the regular operating force of the company, and had therefore already been charged once to operating expenses.¹²⁹ It would puzzle any accountant to find a reason for paying a company twice for doing the same thing, simply because it was called by a different name each time.

The Commission was confronted with a difficult problem when the prices of materials rose very markedly during and after the war. The Commission argued rightly that they could not figure these prices at their low levels, so as to compel the utility to speculate against a rise in the market. On the other hand, it was unfair to the public to fix a rate on the basis of an inflated price condition which might be only short-lived. The Commission found the best way out of the difficulty is making a six-months rate, subject to revision according to fluctuations in the market, and this was upheld by the court.¹³⁰

Where a gas-distributing company obtains its supply of natural gas from a producing company with which it is connected by an interlocking directorate, the Commission may inquire into the reasonableness of the price paid to the producer.¹³¹

¹²⁸ The court has never laid down any set rule as to what is a fair return, and specific cases are of no value in this connection, since they rest on their own peculiar facts. Expressions concerning rate of return are found in the Pennsylvania Gas cases, supra, note 119; in the Adirondack case, supra, note 117; and in the Adirondack case, supra, note 120.


IV.

SUPERVISION OF SERVICE AND PUBLIC SAFETY.

A. Certificates of Convenience and Necessity.

No utility is allowed to construct a plant or any additions thereto, nor to operate any facilities, unless it has been granted a certificate of convenience and necessity by the Public Service Commission.\(^1\)

Carriers had always been required to obtain such a certificate from the board of railroad commissioners. But the jurisdiction of the Public Service Commission was narrower than that which the old board had. So it was held that if the public convenience and necessity require the construction of a railroad along the general line indicated in the company’s charter, the Commission must issue the certificate, —it cannot object to nor prescribe any particular route along the designated line.\(^2\) Again, if a street railway is found necessary in the public interest, the Commission may not refuse its certificate on the ground that it disapproves of the conditions attached to the consents given by the municipal authorities.\(^3\)

In one case, the Commission was reversed for granting a certificate where the company had not complied with the requirement under the old Railroad Law of having subscribed and in good faith paid up ten per centum of its capital stock.\(^4\)

\(^1\) Carriers are covered by Secs. 53 and 53a of the Public Service Commission Law and Sec. 9 of the Railroad Law; busses and stage lines (since 1913) by Sec. 25 of the old and Sec. 65 of the new Transportation Corporations Law; gas or electric corporations, steam corporations, and telephone and telegraph lines by Sec. 68, Sec. 81, and Sec. 99 (1), respectively of the Public Service Commissions Law.


\(^3\) People ex rel. South Shore Traction Co. v. Willcox, 196 N. Y. 212, 89 N. E. 459 (1909).

But in another case the Commission was allowed, by its certificate, retroactively to validate an existing structure which had been erected in violation of law. Such a decision is open to grave criticism, because it frequently gives an opportunity to the utility to circumvent the plain purpose of the statute.

Bus and stage lines were brought under the jurisdiction of the Commission in 1913. In 1915 the proviso was added that any of these vehicles which carried passengers at a fare of fifteen cents or less within city limits must secure the consent of the local authorities (given subject to whatever conditions they might prescribe) as a prerequisite to getting a certificate from the Commission. This includes interurban busses which do not carry any intra-urban passengers, so long as they are operating within city limits, and receiving or discharging interurban passengers, and special jitneys operated for the employees of a single factory. Both of these additions to the statute apply to vehicles which had been given municipal licenses prior to 1915. This requirement of consent from the municipality and a certificate from the Commission for bus and stage lines is constitutional, the difference in classification between jitneys on the one hand, and taxicabs and similar vehicles on the other, being a reasonable one.

Unlike railroads and other carriers, gas and electric corporations were not required to get such certificates of convenience and necessity until the enactment of the Public Service Commission Law in 1907. In its original form, Sec. 68 read as follows:

"No gas corporation or electrical corporation* * * shall begin construction, or exercise any right or privi-

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6 People v. Delaware & Hudson Co., 228 N. Y. 279, 127 N. E. 244 (1920).
6 Laws of 1913, c. 495, Sec. 1.
7 Sec. 26 of the old Transportation Corporation Law, added by Laws of 1915, c. 667, Sec. 1; now Sec. 66 of the new law.
lege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised without first having obtained the permission and approval of the * * * Commission."

The Court of Appeals interpreted these words according to what it thought the policy of the statute was, and decided their meaning to be that a corporation whose franchise had been heretofore granted and had been heretofore actually exercised, could exercise any further right or privilege under the franchise without obtaining the Commission's approval; except that no corporation, not even one which held a franchise actually exercised, could begin construction without such permission. In other words, they construed the section to read as follows:

"No gas corporation or electrical corporation shall begin construction * * * without first having obtained the permission and approval of the Commission. * * * No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised * * * without first having obtained the permission and approval of the * * * Commission."

If this was a judicial tour de force, the suggested phraseology was adopted by the Legislature in the codification of 1910, so the court seems to have read aright the legislative mind, though it had been clumsily expressed.

While a person may generate electricity for his own use without the Commission's approval, he must get permission if he attempts to sell to others,—this is so even if the plant has been constructed on private property with the consent of the owner thereof. The Commission should not grant a

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13 People ex rel. N. Y. Edison Co. v. Willcox, 207 N. Y. 86, 100 N. E. 705 (1912).


certificate to a company which has started out as a private corporation, and then, without dissolution, tries to amend its charter so as to become a public service corporation.16

B. Orders Regarding Service.

The Commission has jurisdiction to compel a utility to extend its service over all parts of its franchise area. This method is much more efficacious than for the Attorney General to bring *quo warranto*. In the latter case, the entire franchise will be forfeited; the public wants the franchise to be used more, not to be abandoned altogether. The Commission's orders on this subject are only of specific interest in their application to the facts in hand; these orders have generally been sustained by the courts as having been made in the exercise of a proper discretion.16 But if the validity of the franchise is in doubt because of non-user, the Commission should not make such an order until the question of the existence of the franchise can be litigated in the courts.17

In addition to requiring service on franchise routes, the Commission has power to compel extensions of the existing facilities, so as to take care of the needs of new customers.18 In fact, the utility is under a duty to serve new customers, and it cannot be relieved of this duty by the Commission. So even though the supply had become inadequate to meet the demand, it was held illegal for the Commission to issue an

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18 This power is given by Sec. 49 (2); Sec. 65 (1) and Sec. 66 (2) of the Public Service Commissions Law and Sec. 62 (new Sec. 12) of the Transportation Corporations Law; Sec. 79 (1) and Sec. 80 (2) of the Public Service Commissions Law; Sec. 97 (2) and Sec. 98 of the Public Service Commissions Law.
order preferring existing over new customers,\(^{10}\) or domestic over industrial users.\(^{20}\) In exceptional circumstances, however, as where the supply is diminishing because of depletion of the gas fields, a gas company is excused from this obligation to serve new customers, and the Commission cannot require it to do so.\(^{21}\) An amendment to the statute subsequently authorized the Commission to make a classification between gas required for domestic and for industrial purposes.\(^{22}\)

The Commission is often called upon to step in when a utility will not serve a competitor, or will not serve him properly. Thus, it had to compel telephone and telegraph lines to extend to their competitors the same privileges as were enjoyed by other customers.\(^{23}\) Again, in the electrical field, it is a common arrangement for a manufacturing company to generate power for its own use, and to sell the surplus to private consumers at a low rate. Such a company is not equipped, however, to give service in an emergency nor on Sundays and odd hours. The large electric companies refused to supply this so-called "break down service" to a competitor's customer, hoping in this way to compel the customer to buy all his electricity from the large company. The Commission held that this "break down service" must be furnished, and that the company can make an adjustment in the rate if there is an additional cost because of the uncer-


\(^{21}\) People ex rel. Pennsylvania Gas Co. v. Pub. Serv. Comm., 196 App. Div. 514, 189 N. Y. Supp. 478 (3rd Dept. 1921). An important factor in this case, and one which very likely controlled the decision, was that the company was a foreign corporation and so was not subject to Sec. 62 (now Sec. 12) of the Transportation Corporations Law.

\(^{22}\) Laws of 1920, c. 540, Sec. 1, amending Sec. 66 (2).

\(^{23}\) People ex rel. Western Union Telegraph Co. v. Pub. Serv. Comm., 230 N. Y. 95, 129 N. E. 220 (1920), motion to amend remittitur denied, 230 N. Y. 657, 130 N. E. 933. See People ex rel. N. Y. Telephone Co. v. Pub. Serv. Comm., 157 App. Div. 156, 141 N. Y. Supp. 1018 (3rd Dept. 1913). This conclusion would seem to be clearly called for by Sec. 103 (now Sec. 28) of the Transportation Corporations Law and Sec. 91 (3) of the Public Service Commissions Law.
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...ertainty of this particular demand. But obviously the company will not be required to extend this service to its competitor, if the latter desires it not for his own private use, but in order to pass it on to his customer, and thus to undersell the more effectively.

This lack of cooperation between competitors is most injurious to the public in the case of railroads. In order to remedy this situation, the Commission is given the power to require proper facilities for the transfer of passengers and freight at connecting points, subject of course to the provision that no carrier shall be required to allow another to use his tracks or terminal facilities. This exception precludes the Commission from ordering an interchange at or near a point where one road has industrial switches which are used as a terminus for freight shipments. Furthermore, this power of the Commission does not apply unless the railroads intersect each other physically,—connection by means of an abandoned spur track is not enough. The Commission is also authorized to order a railroad to construct and operate, on its own property, a switch connecting with a private sidetrack. But the carrier can't be required to build on the shipper's land, nor to operate a side-track on the latter's property.

The Commission has had occasion to make many service orders for carriers (under Sec. 50), and its determinations

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26 Sec. 35 (see amendment made by Laws of 1920, c. 637, Sec. 1). Compare Sec. 97 (3) and amendment made by Laws of 1919, c. 624.


in this connection have usually been approved. Thus, it may
require the construction of stations,\textsuperscript{32} and decide on the
nature of the structure.\textsuperscript{33} It can compel additional facilities
in the way of cars \textsuperscript{34} and waiting-rooms.\textsuperscript{35} In the interests of
public safety, it may require power-brakes on street rail-
ways,\textsuperscript{36} and interlocking devices between intersecting rail-
roads,—in the latter case apportioning the expense accord-
ing to its own discretion.\textsuperscript{37} But the Commission cannot re-
quire a railroad to elevate its bridge across the barge canal,
—that power is only in the Barge Canal Board.\textsuperscript{38}

One order about gas service got into the courts, and it
was held there that the Commission cannot require a gas
company to substitute at its own expense a block meter for a
prepayment meter.\textsuperscript{39}

\textbf{C. Grade Crossings.}

The Commission gets its power over grade crossings from
the Railroad Law. Sec. 89 deals with new railroads across
streets, and Sec. 90 deals with new streets across railroads.
This last section originally applied only to the extension, not
to the widening of streets, but the courts construed this provi-
sion liberally,\textsuperscript{40} and the statute was subsequently amended so
as to include widening of streets.\textsuperscript{41}

\textsuperscript{33}\textit{In re} Pub. Serv. Comm. \textit{In re} Steinway Tunnel and Queensboro Plaza
Route, 157 App. Div. 211, 141 N. Y. Supp. 891 (2nd Dept. 1913), aff'd without
opinion, 211 N. Y. 550, 105 N. E. 1096 (1914).
580, 156 N. Y. Supp. 323 (2nd Dept. 1915).
\textsuperscript{36}People \textit{ex rel.} Brooklyn Heights R. R. Co. v. Pub. Serv. Comm., 157
App. Div. 698, 142 N. Y. Supp. 942 (1st Dept. 1913). And see Sec. 49 (2).
N. Y. Supp. 649 (1st Dept. 1915), aff'd without opinion, 217 N. Y. 607, 111
N. E. 1100 (1916). See Sec. 62 (now Sec. 12) of the Transportation Corpora-
tions Law, and Sec. 67 (5) of the Public Service Commissions Law.
\textsuperscript{40}\textit{In re} Third Ave., 183 App. Div. 688, 170 N. Y. Supp. 470 (1st Dept.
1918).
\textsuperscript{41}Laws of 1914, c. 378.
The Commission and the municipal authorities must determine the "necessity" of such an extension, but this requirement is satisfied by a showing of "reasonable convenience," which allows a wide margin of discretion. If the local municipal authorities have found such necessity, the Commission can't go behind this finding. But the Commission, and not the local authorities, must determine how the crossing is to be made. Generally speaking, the Commission should be guided by considerations of safety, not of expense. Sec. 91 treats of alteration of existing crossings, and is superior to any other section on this subject (if there be a conflict). Under this section, the Commission may order a change in the line of the railroad, if that is necessary. Proceedings to eliminate existing grade crossings may be instituted by the Commission on its own motion.

Sec. 94 provides the following method of distributing the expense:

1. Whenever a new railroad is constructed across an existing street, under Sec. 89, the railroad pays the entire cost.

2. Whenever a new street is constructed across an existing railroad, under Sec. 90, the railroad and the municipality each bears half the expense.

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45 In re Town Board of Royalton, supra, note 44. See dissenting opinion in In re Village of Hobart, supra, note 43, 198 N. Y. Supp. at 642.
46 Thus, it was held to take precedence over Sec. 22 in New Paltz, Highland & Poughkeepsie Traction Co. v. Central New England Ry. Co., 84 Misc. 528, 147 N. Y. Supp. 624 (Erie County, 1914).
3. Whenever an existing grade crossing is eliminated, under Sec. 91, the railroad bears half the expense and the municipality and the state each pays one-quarter (except that the state pays the entire half in the case of a state highway). The municipality contemplated by the statute is the place where the crossing is, not where the approaches are.\textsuperscript{50}

All of the cases have come up under Sec. 91. If the existing railroad structure was unlawful,\textsuperscript{51} or if crossings over private ways are eliminated,\textsuperscript{52} the entire cost must be borne by the railroad. And if the railroad desires the new overhead or subway crossing to be long enough to permit the construction of an additional track later, the railroad alone must bear the cost of this additional span.\textsuperscript{53} Conversely, if the span is longer than is required to cross the tracks, the railroad does not bear any part of the cost of this additional length,\textsuperscript{54} nor can the railroad be charged with the cost of paving anything beyond the approaches.\textsuperscript{55} And none of the railroad's right of way can be taken, beyond what is reasonably necessary.\textsuperscript{56}

V.

CONTROL OVER CORPORATE AFFAIRS.

A. Inter-Corporate Relations.

The Public Service Commissions Law has certain provisions designed to prevent the control of these utility companies by stock corporations or any corporation other than one

\begin{footnotes}
\textsuperscript{50} People ex rel. Town of Scarsdale v. Pub. Serv. Comm., 220 N. Y. 1, 114 N. E. 1050 (1917).
\textsuperscript{52} Matter of New York Central & Hudson River R. R. Co., 200 N. Y. 121, 93 N. E. 515 (1910).
\textsuperscript{55} Matter of State Highway Comm., \textit{supra}, note 53.
\textsuperscript{56} Matter of State Comm. of Highways (Town of Ripley), 239 N. Y. 279, 146 N. E. 379 (1925).
\end{footnotes}
which is engaged in the same kind of public service, except that an electrical corporation may buy and hold stock of any carrier, and that a street railway corporation may buy and hold stock in a gas or electric or a steam corporation. A corporation which is permitted thus to acquire the stock of a utility must secure the consent of the Commission. Furthermore, the Commission must approve any transfer or lease of a utility or of a franchise. The consent or approval of the Commission in each of these cases may, of course, be given subject to conditions.

B. Issuance of Securities.

The statute provides that any issue of securities for a term longer than one year must be approved by the Commission. In granting such order, the Commission shall state the purposes to which the proceeds are to be applied, and must certify that those purposes are not chargeable to operating expenses nor to income. The following are specified as the proper purposes:

(a) the acquisition of property;
(b) the construction, completion, extension, or improvement of facilities;
(c) the improvement or maintenance of service;
(d) the reimbursement of moneys actually expended from income, or from sources other than security issues within the preceding five years, for any of

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1 Sec. 54 (2), Sec. 70, Sec. 83, Sec. 100. Sec. 70 was amended by Laws of 1918, c. 420, so as to allow a stock corporation to buy and hold the stock of a gas or electric corporation, with the consent of the Commission.


2 Sec. 54 (1) of the Public Service Commission Law and Sec. 148 of the Railroad Law; Sec. 70, Sec. 83, and Sec. 99 (2) and (3) of the Public Service Commission Law.

Sec. 54 (1) and Sec. 148, supra, were applied in Westchester Fire Insur. Co. v. Syracuse, Binghamton & New York R. R. Co., 192 App. Div. 463, 183 N. Y. Supp. 602 (1st Dept. 1920), aff'd without opinion, 233 N. Y. 600 (1922).

3 Sec. 55, Sec. 69, Sec. 82, Sec. 101.
the above purposes except maintenance of service, and replacements;

(e) the discharge or lawful refunding of obligations.

The Commission must also state its opinion to be that the money to be procured or the property or labor to be paid for is or has been reasonably required for the purposes specified in the order. No permission is required for the issuance of securities for a term of less than a year, but if a refunding issue is then desired for a longer term, the approval of the Commission must be had.

These sections of the statute are enforceable only by proceedings for penalties against the companies violating them. Even if the bonds are issued in violation of the law, bona fide purchasers who take them are protected. And these sections do not apply to a change in the form of the stock, as substituting stock of no par value for par value stock; so long as no change is made in the capital structure, the statute does not give the Commission jurisdiction.

The issuance of securities should not be allowed unless the applicant has previously obtained the proper certificate of convenience and necessity for construction and operation. This is because an applicant without such certificate does not have the present and absolute right to accomplish the uses for which the securities are issued, and therefore is unable to satisfy the statutory purposes. And the issue should not be approved if the proceeds are to be used for operating expenses, or for replacements and renewals.

A refunding issue should not be permitted if the original obligation was incurred for running expenses, even though at the time of that obligation it was lawful to issue long-term securities to take care of current expenses. On the
other hand, if a railroad's securities now sought to be refunded had been applied to the purchase of coal and trolley properties, which was legal at the time (though now illegal), the refunding issue must be authorized. The distinction is that if the general purpose of the original issue was one not approved by the present statute, it cannot be refunded, even though it was lawful at the time of issue; but if the general purpose satisfies the statute, then the fact that the method or conduct of the transaction is prohibited now will not prevent a refunding issue if such method was allowed at the time of the transaction. A utility cannot float a security issue on the strength of money taken from the depreciation reserve for capital improvements—for this reserve was allowed to the company as an additional expense to be applied to that very purpose.

One very important limitation on the Commission's power over security issues is that the Commission cannot attach any conditions to its orders—if the purpose is proper and the other requirements are met, the issue must be approved; otherwise it must be rejected.

If the collateral offered to secure the loan is reasonably satisfactory, the Commission cannot require another kind of collateral which it finds preferable. These sections of the statute were designed only to prevent the issuance of watered stock; the courts have been very strict in restraining the Commission from trying to substitute its judgment for the judgment of the directors and stockholders. The Commission may require carriers to help uniform system of accounts, but this may not be used as a basis for giving any orders as to how the carrier should spend his money, etc.

The statute further provides that the capital stock of a utility corporation formed by the merger or consolidation

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9 People ex rel. Delaware & Hudson Co. v. Stevens, 197 N. Y. 1, 90 N. E. 60 (1909).
12 See authorities cited in note 11, supra.
13 Sec. 52.
of two or more other corporations shall not exceed the sum of the capital stock of the old corporations (at par value) plus any additional sums paid in cash. The Commission understood this to be the outside limit, and by analogy refused to allow a corporation which had been reorganized under the provisions of the Stock Corporation Law to issue securities in excess of the actual physical value of the property, though less than the capital stock of the old corporation. The court reversed this determination, holding that the Commission's interpretation would defeat the purposes of the corporate reorganization provisions referred to above. But this applied only if the sale is made in pursuance of such a reorganization plan,—it could not be involved by an ordinary purchaser at foreclosure sale. And the statute was subsequently amended so as to provide that even in reorganization proceedings, the amount of securities issued should not exceed the physical value of the property.

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15 Laws of 1909, c. 61, amended and revised by Laws of 1923, c. 787 (Consol. Laws, c. 59). The provisions were Secs. 9-12 of the old law, Secs. 96-99 of the new law.


18 Sec. 55a, added by Laws of 1912, c. 289, Sec. 1; Sec. 69a, added by Laws of 1913, c. 505, Sec. 3; Sec. 101a, added by Laws of 1912, c. 289, Sec. 3.