it does not enlarge common law rights within a State where the mark has not been used. *General Baking Co.* v. *Gorman,* 3 F. (2d) 891, 894. Some attempt was made to support the decision upon other grounds, but we do not think them presented by the record, and they are not mentioned by the Ohio Court.

Judgment reversed.

GILCHRIST ET AL., CONSTITUTING THE TRANSIT COMMISSION, ET AL. *v.* INTERBOROUGH RAPID TRANSIT COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 159. Argued October 16, 17, 18, 1928. Reargued January 14, 15, 16, 1929.—Decided April 8, 1929.

A New York street railway corporation, operating in the City of New York (1) subway lines belonging to and leased from the city, and which were part of the city streets, in connection with (2) elevated lines belonging to and leased from another corporation, and (3) extensions of such elevated lines, sought to increase the rate of fare, which had been fixed at five cents for all the lines by the leases and by the agreement under which the extensions had been constructed, and to that end proposed a seven cent fare and applied to the Transit Commission of New York to sanction the change, on the ground that the existing rate was confiscatory. The commission, acting within the time allowed it by statute, made an order denying the application for want of power to change the rate fixed by the subway contracts, and brought proceedings in a state court, as did also the city, to compel the company to observe that rate. On the same day when this formal action was taken, but earlier and when there was merely a consensus among the commission's members that it should be taken, the company filed its original bill in the federal court alleging that the five cent rate had become confiscatory and that the commission had failed to grant relief, and praying an injunction against any attempt on the part of the commission or the city to enforce that rate, or to interfere with the establishment of the one proposed; and thereafter it filed a sup-

plemental bill reciting the action taken by the commission after the filing of the original bill, renewing its prayer for an injunction, and especially asking that further prosecution of the proceedings in the state court be forbidden. The case, involving complex contracts and intricate state statutes, raised questions of state law, particularly as to the binding effect of the contract rate and the power of the commission to grant a higher one, which had not been authoritatively settled by the state courts. It was not shown with fair certainty that the contract rate was so low as to be confiscatory, that the one proposed in lieu was reasonable, or that, before the original bill was filed, the commission had taken, or was about to take, any improper action; the attitude of the commission on the questions presented had been manifested on former occasions; there had been abundant opportunity to test the questions in the state courts, and there was no ground for anticipating undue delay or hardship from having them so decided.

Held that an order of the federal court granting the interlocutory injunction prayed, was improvident and an abuse of discretion. P. 207.

26 F. (2d) 912, reversed.

APPEAL from an order of a district court of three judges granting an interlocutory injunction in a suit brought by the Interborough Rapid Transit Company against Gilchrist and other individuals constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the City of New York; William A. Prendergast, as Chairman of that Department; The Manhattan Railway Company, and the City of New York. The Manhattan Railway Company filed a cross-bill praying affirmative relief against the other defendants. The order, among other provisions, restrained the commission and the city, pending the suit, from enforcing against the plaintiff a five cent rate of fare upon the rapid transit lines operated by it, part of which were elevated railways leased to it by The Manhattan Company, and from preventing higher charges and from prosecuting actions in the state court. The commission and the city appealed and the Interborough and Manhattan Companies ap-

peared as appellees. An ancillary suit brought in the District Court after the original bill in this case had been filed, also resulted in an injunction. See 25 F. (2d) 164.

*Mr. Irwin Untermyer,** with whom *Messrs. Samuel Untermyer* and *Charles Dickerman Williams* were on the brief, for appellant Transit Commission of New York.

The federal court has no jurisdiction to enjoin the Commission, as a contractual party, from instituting judicial proceedings to enforce the contracts in the state courts, even assuming the contracts to be unenforceable. *St. Paul Gas Light Co.* v. *St. Paul,* 181 U. S. 142; *Des Moines* v. *Des Moines R. Co.,* 214 U. S. 179; *South Covington Ry. Co.* v. *Newport,* 259 U. S. 97; *Western Union* v. *Georgia,* 269 U. S. 67; *Cincinnati* v. *Cincinnati & Hamilton Traction Co.,* 245 U. S. 446; *St. Augustine* v. *St. Johns Electric Co.,* 286 Fed. 474; *American T. & T. Co.* v. *New Decatur,* 176 Fed. 133. Property taken by orderly judicial proceedings, however erroneous the decision may be, is not taken "without due process of law" (*Ross* v. *Oregon,* 227 U. S. 150), and there is no more reason to exercise jurisdiction in cases to which a state contract-making body is a party than there is to review the decision of a state court in any ordinary contract case.

The plaintiff could not at the time it instituted this suit enjoin the Commission in its regulatory capacty from taking action under the Public Service Commission Law with respect to its amendatory schedules, on the theory that the action of the Commission, if taken, would be unconstitutional. The regulatory powers of the Commission here with respect to rates are indisputably legislative

* *Mr. Irwin Untermyer,* for the Transit Commission, *Mr. Charles L. Craig,* for the City of New York, and *Messrs. William L. Ransom* and *George W. Wickersham,* for the Interborough and Manhattan Companies, participated in the first argument of the cause.

since it acts under the rate-making authority of the legislature. *Prentis* v. *Atlantic C. L. R. Co.,* 211 U. S. 210.

If action by the Commission may be enjoined before it is taken, then upon identical principles, action by the legislature may be enjoined before it is taken, on the theory that the legislature intends to enact an unconstitutional statute.

It has been uniformly held that a federal court may not enjoin the enactment of legislation or the exercise of powers of a legislative character on the theory that, if thus exercised, they would be unconstitutional. Such a suit would, moreover, constitute a suit against the State. *Fitts* v. *McGhee,* 172 U. S. 516.

Until a statute has been enacted, or an order made, no injury to anyone is possible, and thereafter any person is in a position, in a proper case, to protect himself from injury by an injunction against its execution. *New Orleans Water Co.* v. *New Orleans,* 164 U. S. 41; *McChord* v. *L & N. R. Co.,* 183 U. S. 483; *Southern Pacific Co.* v. *Bartine,* 170 Fed. 725; *Chicago, B. & Q. R. Co.* v. *Winnett,* 162 Fed. 242; *Alpers* v. *San Francisco,* 32 Fed. 503. Other cases to the same effect are: *Rico* v. *Snyder,* 134 Fed. 953; *Missouri R. Co.* v. *Olathe,* 156 Fed. 624; *Gas & Electric Co.* v. *Manhattan & Queens Corp'n,* 266 Fed. 625; *Stevens* v. *St. Mary's Training School,* 144 Ill. 332.

Under the construction of § 49 of the Public Service Commission Law in *Matter of Quinby* v. *Public Service Comm'n,* 223 N. Y. 244, the Commission, in the absence of contract, would have been authorized to increase, as well as to reduce, the rate stipulated in any "general or special statute," including Chapter 743 of the laws of 1894. Moreover, since the plaintiff is not entitled to any relief except under the Public Service Commission Law, it may secure relief only as provided thereby and not by litigation in the federal courts. *Henderson Water Co.* v. *Corp'n*

Comm'n, 269 U. S. 279; *Galveston, H. & S. A. R. Co.* v. *Wallace,* 233 U. S. 481; *Pollard* v. *Bailey,* 20 Wall. 520; *Farmers' Nat'l Bank* v. *Dearing,* 91 U. S. 29; *United States* v. *Babcock,* 250 U. S. 328.

Since the plaintiff had no cause of action at the time it filed its original bill, that defect cannot be cured by allegations, by supplemental bill, of facts that occurred thereafter. *Chicago Grain Door Co.* v. *Chicago, B. & Q. R. Co.,* 137 Fed. 101; *Mellor* v. *Smither,* 114 Fed. 116; *Putney* v. *Whitmire,* 66 Fed. 385; *N. Y. Security & Trust Co.* v. *Lincoln Street R. Co.,* 74 Fed. 67; *Bernard* v. *Toplitz,* 160 Mass. 162.

It must be admitted, and the District Court concedes, that were it not for the existence of the Public Service Commission Law, the plaintiff would not be entitled to relief from the contractual rate of fare, no matter how unremunerative that rate may be. *Columbus R. & P. Co.* v. *Columbus,* 249 U. S. 399; *Public Service Comm'n* v. *St. Cloud,* 265 U. S. 352; *Paducah* v. *Paducah R. Co.,* 261 U. S. 267; *Georgia R. Co.* v. *Decatur,* 262 U. S. 432; *Southern Utilities Co.* v. *Palatka,* 268 U. S. 232.

Since, therefore, the right to collect a fare in excess of the contract rate is not a right existing under the Constitution, the "right" asserted here involves the enforcement of a statutory right which proceeds exclusively from the Public Service Commission Law. So far as the constitutional rights of the plaintiff are concerned, an increase in the rate is a mere privilege which the State might withhold or grant at its pleasure and with respect to which it could impose whatever conditions it pleased. It must, therefore, be evident that the State was under no obligation to enact, nor has the plaintiff any standing in a federal court to compel the execution of the provisions of the Public Service Commission Law. *Arkansas Gas Co.* v. *R. R. Comm'n,* 261 U. S. 379.

That the legislature has provided for review by certiorari of any order made by the Commission under the statute is merely the grant of an additional privilege, that, under the Constitution, the legislature was not under any obligation to allow.

Inherently this is not a rate case in any accurate sense of that term. It is a case involving contracts from which the plaintiff claims to be entitled to relief only on account of the existence of a state statute, which, the plaintiff contends, is not being properly executed by the administrative agency. For this alleged misconstruction of the statute, not impairing any constitutional right, neither the State nor the agent is responsible to any federal authority. Although under the statute the refusal of the Commission to act might involve the denial of a legal right, yet so far as the Constitution is concerned, the right thus denied is a mere privilege or act of grace, the denial of which presents no federal question. It is therefore no inconsistency to say that a statutory right may be a constitutional privilege. *Brearly School* v. *Ward,* 201 N. Y. 358; *Laird* v. *Carton,* 196 N. Y. 169; *Bull* v. *Conroe,* 13 Wis. 233; *In re Seaholm,* 136 Fed. 144; Cooley, Const. Lim., 7th ed., p. 546; *Henderson Water Co.* v. *Corp'n Comm'n,* 269 U. S. 278; *People* v. *Rosenheimer,* 209 N. Y. 115; *People* v. *Crane,* 214 N. Y. 154, s. c., 239 U. S. 195; *Christ Church* v. *Philadelphia,* 24 How. 300.

Since no right of the plaintiff under the Constitution is involved, it is immaterial whether the denial of relief occurred upon the plaintiff's application under § 29 in 1928, or under § 49 in 1920 and in 1921. It is the nature of the right that must determine the question of federal jurisdiction. *Wichita R. & L. Co.* v. *Public Utilities Comm'n,* 260 U. S. 48.

It has been directly held by this Court that the binding effect of such contracts as between the parties was not impaired because, under state law or constitution,

the legislature retained "unfettered power" at any moment to revise the contract rate. *Southern Utilities Co.* v. *Palatka,* 268 U. S. 232; *Opelika* v. *Opelika Sewer Co.,* 265 U. S. 215.

The delegation of legislative power to revise, even though coupled with the duty, does not constitute an exercise of the rate-making power. The State would not exercise its rate-making power until the Commission exercised that power by making an order increasing, or by approving the increase of, the contract rate. This is evident from a consideration of the provisions of the Public Service Commission Law, which show that the provisions of the Law do not operate directly on the contract or the rate, but operate only by order to be made by the Commission. Indeed, if it had been intended that the provision of the Law that rates should be "just and reasonable" should operate directly on the contract or the rate, what was the Commission established for and why was it required to "determine" the rate whenever "in its opinion" that was necessary and to "fix the same by order to be served upon all common carriers"?

This principle has been sustained and applied by this Court and by the courts of every State in which the question has arisen. *Missouri Pacific R. Co.* v. *Larabee Mills,* 211 U. S. 612; *Manitowoc* v. *Manitowoc & Northern Traction Co.,* 145 Wis. 13; *Milwaukee Electric R. & L. Co.* v. *R. R. Comm'n,* 238 U. S. 174; *Monroe* v. *Detroit M. & T. R. Co.,* 187 Mich. 364; *Lanawee County G. & E. Co.* v. *Adrian,* 209 Mich. 52; *Henrici* v. *South Feather Land Co.,* 177 Cal. 442; *Southern Pacific Co.* v. *Spring Valley Water Co.,* 173 Cal. 291; *Salt Lake City* v. *Utah L. & T. Co.,* 52 Utah 476; *Traverse City* v. *Michigan R. R. Comm'n,* 202 Mich. 575.

This also is the law of New York State. *People ex rel. N. Y. etc. R. Co.* v. *Public Service Comm'n,* 193 App. Div. 445; *Buffalo* v. *Frontier Telephone Co.,* 203 N. Y. 589; *People ex rel. New York* v. *Nixon,* 229 N. Y. 356.

The District Court failed to distinguish between a contract that is void and a contract that is subject to modification under the regulatory power of the State. *Southern Iowa Electric Co.* v. *Chariton,* 255 U. S. 539; *San Antonio* v. *San Antonio Public Service Comm'n,* 255 U. S. 547, are for that reason inapplicable. *Henderson Water Co.* v. *Corp'n Comm'n,* 269 U. S. 278.

The question of whether or not the State, in the exercise of its police power, may reduce or increase the rate, is entirely different from the question of whether the parties may escape the obligations of the contract in the absence of action by the State. Cf. *Opelika* v. *Opelika Sewer Co.,* 265 U. S. 215; *Southern Utilities Co.* v. *Palatka,* 268 U. S. 232.

The contracts prohibited in the *Chariton* and *San Antonio* cases were expressly authorized here by the Rapid Transit Act.

Every presumption is against the jurisdiction of the Commission to demolish the very contracts that were constructed with legislative authority. The rule here applicable is precisely the converse of the rule where the question is whether the legislature has permanently alienated its police power over rates. *Quinby* v. *Public Service Comm'n,* 223 N. Y. 241; *People ex rel. N. Y., etc. R. Co.* v. *Wilcox,* 200 N. Y. 423; *Silver* v. *L. & N. R. Co.,* 213 U. S. 175.

There is a fundamental distinction between rate contracts executed without legislative authority and rate contracts which the legislature has expressly authorized. The conflict here is not between a private contract and the Public Service Commission Law of 1907; it is between the general regulatory provisions of the Public Service Commission Law of 1907 and the special provisions of the Rapid Transit Act of 1912 by which the contracts were authorized to be made. If it be true that the provisions of the Public Service Commission Law were "written

into" the contracts, *People ex rel. City of New York* v. *Nixon,* 229 N. Y. 356, it is likewise true that the provisions of the Rapid Transit Act were to the same extent "written into" them. And, when those provisions are examined, it is found that the legislature expressly authorized the contracts to be made, which is equivalent to declaring that they should be binding during the contract term, unless the word "contract" is without legal significance. This distinction is the test to determine whether or not the contract is entitled to protection under § 10 of Art. I of the Constitution. *Cleveland* v. *Cleveland City R. Co.,* 194 U. S. 517; *Home T. & T. Co.* v. *Los Angeles,* 211 U. S. 265; *Vicksburg* v. *Vicksburg Water Works Co.,* 206 U. S. 496; *Detroit* v. *Detroit Citizens R. Co.,* 184 U. S. 368; *Los Angeles* v. *Los Angeles Water Co.,* 177 U. S. 558; *Superior Water, L. & P. Co.* v. *Superior,* 263 U. S. 125; *St. Cloud Public Service Co.* v. *St. Cloud,* 265 U. S. 352; *Georgia R. & P. Co.* v. *Decatur,* 262 U. S. 432; *New Orleans Gas Co.* v. *Louisiana Light Co.,* 115 U. S. 650.

By the Rapid Transit Act the State delegated to the parties the power to contract concerning the rate of fare both on the subway and elevated lines. The character of these contracts and the direct participation of the State in their execution is evident from the fact that they are required to be executed, not directly between the Interborough and the City of New York, but between the Interborough and the Commission whose action, although taken on behalf of the City, was that of state officials. *Litchfield Construction Co.* v. *City of New York,* 244 N. Y. 251; *Gubner* v. *McClellan,* 130 App. Div. 716. The only limitation upon the action of the Commission is that it shall receive the approval of the Board of Estimate and Apportionment.

The five-cent fare provisions in the certificate and in Contract 3 were authorized by the Rapid Transit Act, §§ 24, 27.

A fare provision is plainly authorized by the broad grant of power contained in § 24 to "fix and determine . . . such other terms, conditions and requirements as to the said boards may appear just and proper." *Cleveland* v. *Cleveland City R. Co.*, 194 U. S. 517; *Columbus R. & P. Co.* v. *Columbus,* 249 U. S. 399; *Omaha Water Co.* v. *Omaha,* 147 Fed. 1.

Section 27, under which Contract 3 was executed and which in part provides "Every such contract shall contain such terms and conditions as to the rates of fare to be charged . . . as said Commission shall deem to be best suited to the public interests," granted unqualified authority to contract for a fixed fare for the entire life of the contract.

On account of the special provisions of the Rapid Transit Act, the fare stipulations in these contracts are withdrawn from the rate-regulatory powers of the Commission. Since a "reasonable" rate of fare as defined by the Public Service Commission Law, will rarely, if ever, coincide with a "contractual" rate as determined by the parties, it follows that the contract made by legislative authority must be supreme, because if not supreme, the authority to contract becomes meaningless and nugatory.

To hold that the contracts concerning rates of fare on the subway and elevated lines did not protect both parties against an increase or reduction in the rate of fare, renders those provisions of the Rapid Transit Act authorizing such contracts to be made meaningless, if not ridiculous. The very purpose of the authority thus delegated to the parties was to permit them to accomplish a result that could not be secured except by contract and that might not be consistent with the limitations and provisions of the Public Service Commission Law.

The case at bar falls directly within *Public Service Co.* v. *St. Cloud,* 265 U. S. 352.

People ex rel. N. Y., N. H. & H. R. Co. v. *Wilcox,* 200 N. Y. 423, and other decisions of the Court of Appeals have established that matters specially authorized by the legislature are withdrawn from the operation of the Public Service Commission Law. *Village of Fort Edward* v. *Hudson Valley R. Co.,* 192 N. Y. 139; *New York City* v. *Brooklyn City R. Co.,* 232 N. Y. 463.

The Rapid Transit Act, amended in 1912 to authorize the contracts here and which deals specially with the subject of rapid transit in cities of over one million inhabitants, withdrew those contracts from the regulatory powers of the Commission with respect to fare. *Parker* v. *Elmira, etc. R. Co.,* 165 N. Y. 274.

The conditions under which the amendments of 1912 were enacted, taken in connection with the decision of the Court of Appeals in the *Admiral Realty Company* case, 206 N. Y. 110, prove that the rates stipulated in the contracts were not intended to be subject to the Public Service Commission Law.

Other considerations which establish that the legislature could not have intended rapid transit contracts to be subject to the jurisdiction of the Commission are to be found in important amendments of 1921, 1922, and 1923, to the Public Service Commission Law; in a memorial to the legislature of 1925 to enact a statute increasing the rate of fare, and the failure of the legislature to do so; the approval of the contracts by the City required by the Rapid Transit Act, together with the amendments of 1925 to the Public Service Commission Law requiring similar approval of any modification thereof, proving that it could not have been intended to permit the rate of fare to be altered against the opposition of the Commission and the City; the amendment of § 7 of the Rapid Transit Act of 1894, which required any franchise privately to construct and operate a rapid transit railway to contain a provision limiting the rate of fare to five cents. Notwith-

standing the enactment of the Public Service Commission Law in 1907, and notwithstanding that the legislature during that period twice amended the Rapid Transit Act, it did not undertake to alter this provision of § 7 until, by the amendments of 1909, it further extended the powers of the Commission by removing this, the only limitation even with respect to privately constructed rapid transit lines.

The consequences of holding that the Commission was under the duty to revise rates in contracts, which it was its duty to enforce, demonstrate that the Commission was not intended to exercise such regulatory authority over these contracts.

The Rapid Transit Act expressly provides for the character of public regulation that may be exercised. It may be such, and only such, as the Interborough and the Commission might agree upon with the approval of the City.

People ex rel. City of New York v. *Nixon,* 229 N. Y. 356, is inapplicable because the provisions of the State Constitution under which the franchise contract there had been granted did not authorize, nor had the legislature authorized, any stipulation with respect to the rate of fare.

By Contract 3 the fare provisions of Contracts 1 and 2 were not superseded. Both Contracts 1 and 2 were made before the enactment of the regulatory provision respecting fares contained in § 49 of the Public Service Commission Law. Hence, as the Court of Appeals has decided, the provisions of § 49 can, in no event, have any relation to those contracts. *Matter of Quinby* v. *Public Service Comm'n,* 223 N. Y. 224, s. c. 227 N. Y. 601; *People ex rel. City of New York* v. *Nixon,* 229 N. Y. 356; *People ex rel. Garrison* v. *Nixon,* 229 N. Y. 645; *Matter of Evans* v. *Public Service Comm'n,* 246 N. Y. 224.

Even if Contract 3 had superseded Contracts 1 and 2, it is " so related to the earlier contracts " as to fall within

the exception stated in the *Nixon* case and applied in the *Garrison* case.

The earnings of the Interborough since 1920, even as alleged in the complaint, have consistently increased, notwithstanding the increased cost of labor and materials. The plaintiff is earning more than a fair return on its property, both subway and elevated, based upon its actual investment therein.

The value upon which the plaintiff is entitled to a fair return is determined by the character of its interest in the property, and that value is limited by the provisions of Contract 3 and of the certificate. The value of the property upon which the plaintiff is entitled to a fair return is exactly the equivalent of the value to which it would be entitled if its property were taken by eminent domain.

On account of the recapture and amortization provisions of Contract 3 and the certificate, the value of the property on which the plaintiff is entitled to earn a fair return can in no event exceed by more than fifteen per cent. its original investment cost.

At a five-cent fare the Interborough is earning a reasonable return upon the present fair value of its property devoted to the public service. On account of the Interborough's preferentials under Contract 3 and the certificate, it is not entitled to a return of eight per cent.

Mr. Charles L. Craig, with whom *Messrs. George P. Nicholson, Joseph A. Devery,* and *Edgar J. Kohler* were on the brief, for appellant City of New York.

The contracts between the City and the Interborough Company are not subject to regulation.

While these contracts contain what is called a "lease," they are, in effect, contracts of employment, or for personal service, by which the Company operates for the City the subway system, constructed at public expense, to effectuate a great city purpose. There is nothing in the Rapid

Transit Act that requires the contractor to be a railroad corporation. *Sun Printing Ass'n* v. *Mayor,* 152 N. Y. 257; *City of New York* v. *Brooklyn City R. Co.,* 232 N. Y. 470. *People ex rel. Interborough Rapid Transit Co.* v. *Tax Comm'rs,* 126 App. Div. 610, affirmed, 195 N. Y. 618; *Interborough Rapid Transit Co.* v. *Sohmer,* 237 U. S. 276.

While the rate of fare was one of the terms and conditions of the first two contracts resulting from the acceptance of a proposal submitted in response to an advertised letting, it was not a matter that the City or the Board ever discussed with the contractor or in which he had any voice any more than in the location of the road.

Chapter 226 of the Laws of 1912, which authorized Contract No. 3 to be made, re-enacted the requirement that the contract contain the "terms and conditions as to the rates of fare to be charged." Amendments of 1909 and 1912 provided for readjustment of operator's compensation, but not by a change of fare.

Moreover the statute provided that any readjustment of compensation was not by regulatory authority under the Public Service Commission Law, but by agreement, arbitration or the court. The Interborough conclusively elected no readjustment of compensation.

In case of municipal operation, changes in the rate of fare were to be made by readjustment from time to time by the Board of Rapid Transit Railroad Commissioners, but always with the public interest in mind, of furnishing service at cost. Laws of 1909, § 34-d, now Rapid Transit Act, § 30; *Matter of Rapid Transit R. Comm'rs,* 197 N. Y. 81.

It is clear, therefore, that the rates of fare, and whether compensatory or not, were no concern of the regulatory authority created by the Public Service Commission Law. Surely, the circumstance that the City employed a contractor to operate, instead of doing so itself, could make no difference.

The Public Service Commission Law does not purport to regulate the compensation of individuals who might constitute any "person" or "firm" performing the service of operation for the City of New York in carrying into effect the City purpose of providing rapid transit facilities for its inhabitants; or of any corporation doing so.

Neither the legislature nor the courts of New York have ever recognized any authority to fix or change the rates on the rapid transit lines owned by the City of New York, other than that exercised by the City of New York through its own Boards. *Matter of Rapid Transit R. Comm'rs,* 197 N. Y. 81; *Sun Printing Ass'n* v. *Mayor,* 8 App. Div. 230, 152 N. Y. 257; Rapid Transit Act, §§ 27, 30, 58; Board of Transportation Act, Laws 1924, c. 573, § 135. Cf. *Arkansas Natural Gas Co.* v. *Arkansas R. R. Comm'n,* 261 U. S. 379.

The power of regulation is never exercised except in the public interest. It is not in the public interest to frustrate the City's plan and policy of distribution of population. The powers and duties of the Municipal Government cannot be transferred to or vested in or subordinated to the Transit Commission, a body of state officers, in disregard of the local self-government provisions in the State Constitution.

Among the important powers and duties of the Board of Estimate and Apportionment, the governing body of the City, are those relating to streets. Under the Constitution and the Rapid Transit Act, its consent and approval is required for the location of all rapid transit railroads, and no appropriation for the construction or operation thereof can be made by any other board or body.

The order appealed from requires state officers—the Transit Commissioners—to exercise dominion over the streets and property of the City, which can only be validly exercised by local elective officers in the manner prescribed

in the State Constitution. Art X, § 2. Cf. *Louisiana Public Service Comm'n* v. *Morgan's Louisiana & Texas R. Co.*, 264 U. S. 393. It makes the Transit Commission the policy determining board of the City.

Now, when according to the contract the Interborough's return and accumulated deficits, with compound interest, have been paid in full, the order appealed from takes away from the Interborough all of the incentive for careful and economic operation, removes all of the elements of contingency, and substitutes coercion for contract right; and decrees virtually immediate discharge of the City's deficits by extra tolls from its inhabitants, so that the contingency of profits to the Interborough may be turned into certainty and cash.

The Interborough is employed by the City to render a service for it, namely, to maintain and operate its rapid transit properties. Its preferential of $6,335,000 covered in part its "services in connection with the operation of the property." Its compensation is a matter of agreement, requiring for its fixation the exercise of discretion by the City's officers. It is something that neither the legislature nor any state officers or agency can do for the City. *People ex rel. Rodgers* v. *Coler*, 166 N. Y. 1.

There is no equity in the Interborough's position. It is being paid in full according to the contract, the terms of which were dictated by it. The counterclaim in the City's answer opens the way for complete relief to the Interborough from existing contracts, upon terms just and equitable, to be fixed by the Court.

If it be assumed that it is a public service corporation, as distinguished from a private corporation rendering a service for the City of New York, valid contracts existing between the City of New York and the Interborough fix the rate of fare at five cents during the term thereof. Such contracts were made under full and express legislative authority. The validity thereof, and the constitutionality

of such legislation, have been adjudicated and sustained by the Court of Appeals of the State of New York. Where there is a contract, there is no confiscation.

The Rapid Transit Act, pursuant to which such contracts and Elevated Railroad Certificates were made, is a comprehensive special statute excluding any possible subordination to the Public Service Commission Law.

The legislature has not at any time empowered the Public Service Commission to regulate the rates of fare agreed upon in contracts made by the City pursuant to the Rapid Transit Act.

The decisions of the state courts in gas and street surface railway cases cited in the opinion, do not sustain the conclusion of the court below, but are contrary thereto. In particular, the decisions in the *Garrison* cases on reargument are fatal to the claims of the Interborough Company based on the *Nixon* case.

Contract No. 3 is not a franchise. Under it the contractor acquires no right, privilege or license in or to the City's streets or any part thereof. It is a contract for equipment, maintenance and operation of a road and equipment wholly owned by the City. The operator is employed to discharge the duties of operation.

The Rapid Transit Act, which alone gave the Public Service Commission power to act in the preparation and execution of Contract No. 3, conferred such power only "subject to the approval of the Board of Estimate and Apportionment." Whatever terms and conditions as to rates of fare and character of service the Commission deemed best suited to the public interests, and whatever supervision, conditions, regulations and requirements were determined upon by the Commission, had to be determined upon prior to the execution of the contract.

The statutory court concedes Contracts Nos. 1 and 2 inviolable unless controlled by Contract No. 3, executed after passage of the Public Service Commission Law.

The entire force of the opinion of the statutory court is lost unless there was a "modification and waiver" notwithstanding the provisions of the contract to the contrary.

The property owned by the City, constituting a part of its streets, is not the subject of confiscation. It is elementary that confiscation relates to private property and not to public property.

So far as the City is concerned, its subways could be operated free of charge, as are its bridges; or it could make such charges as it saw fit and support its subways, partly from such charges and partly from taxation. The Interborough Company has no property in subways and no interest in the cost of reproduction thereof.

The absurdity of the Interborough's claim is illustrated by the fact that, according to it, every time the City, at its own expense, makes an improvement in its facilities, the Interborough would be entitled to 8% per annum on the cost, even though such improvement reduced the Interborough's cost of operation and increased its profits.

It is wholly immaterial to the Interborough Company whether the value of the City's property increases or diminishes. It has no recourse against anything but revenues. From revenues it is entitled to the stipulated rate of interest upon its investment (tax exempt) and the repayment in annual instalments of the principal and profit.

Under Contract No. 3 the Interborough Company pays no rental. While it has a charge upon the revenues, it has no interest in, ownership of, or lien upon any of the property by which such revenues are produced.

The Interborough is being paid in full according to the terms of the contracts and its return on actual investment under Contracts Nos. 1, 2, and 3, is in excess of 8.3 per cent. per annum.

The valuation of $898,793,648 claimed by Interborough Company as the basis of return of eight per cent. is inflated to the extent of at least $600,000,000.

The Elevated Railroad Certificates for additional tracks and extensions are affected by like statutory authority and contract obligations. Section 34 of the Rapid Transit Act, as amended, Laws of 1894, c. 752, had no reference or relation to elevated railroads or their additional tracks or extensions. Section 32–a added by c. 472, Laws of 1906, was renumbered § 24 by c. 498, Laws of 1909, and as amended by the Wagner bill, c. 226, Laws of 1912, authorized the certificates. The Act specifically provided that the acceptance of such certificates should constitute a contract between the City and the grantee according to the terms thereof. § 24, subd. 4.

Messrs. Charles E. Hughes and *William L. Ransom,* with whom *Messrs. James L. Quackenbush, Charles E. Hughes, Jr., Jacob H. Goetz, Harry L. Butler,* and *John Fletcher Caskey* were on the brief, for appellee Interborough Rapid Transit Company.

The federal courts have jurisdiction of this case. The plaintiff is entitled in the federal court to protection against the enforcement of a confiscatory rate. It has not contracted away its right to reasonable compensation. To have such effect, the contract in question must have been duly authorized by the State. Such authority must be clearly and unmistakably conferred. Such authority may not be implied where the legislative policy of the State, as expounded by its highest court, is inconsistent therewith. *Southern Iowa Electric Co.* v. *Chariton,* 255 U. S. 539; *San Antonio* v. *Public Service Co.,* 255 U. S. 547. See also *Railroad and Warehouse Comm'n* v. *Duluth Street R. Co.,* 273 U. S. 625.

The question is not whether the parties have signed a contract providing the amount of the fare, but is

whether, in view of existing legislation, they had authority to make an effective contract for an inflexible fare.

The legislative policy of the State of New York, as embodied in the Public Service Commission Law, is prohibitive of unalterable contract rates. *People ex rel. City of New York* v. *Nixon,* 229 N. Y. 356; *Matter of Quinby* v. *Public Service Comm'n,* 223 N. Y. 244; *People ex rel. South Glen Falls* v. *Public Service Comm'n,* 225 N. Y. 216; *People ex rel. Garrison* v. *Nixon,* 229 N. Y. 575; *Matter of Evens* v. *Public Service Comm'n,* 246 N. Y. 224.

The result of all of the decisions of the New York Court of Appeals under the Public Service Commission Law is that no statute authorizing the making of a contract between a municipality and a utility as to a rate or fare may be deemed, after the passage of that law, to authorize a contract for an unchangeable rate of fare, and, therefore, that no such contract made after that law may be deemed effectively to provide for an unchangeable rate or fare; and that the provisions of the Act providing for continuous regulation of rates and fares applied also to rates and fares prescribed in contracts made prior to the passage of the law, except in the single case of contracts made as conditions of consents of municipalities under § 18 of Art. III of the State Constitution between 1875 and 1907.

No New York case has ever held that any rate or fare prescribed in any contract made prior to the Public Service Commission Law was not thereafter subject to regulation, except where the contract was made in connection with a constitutional consent.

And no New York case has ever held that any such contract made after the passage of the Public Service Commission Law could effectively provide for an unchangeable rate or fare.

Thus the effect of the Public Service Commission Law, as interpreted by the highest court of New York, brings

the contracts here involved squarely within the decisions of this Court in *Southern Iowa Electric Co.* v. *Chariton,* 255 U. S. 539, and *San Antonio* v. *Public Service Comm'n,* 255 U. S. 547, *supra.* The attempt of the defendant Transit Commission to distinguish these decisions on the ground that the contracts there involved were "expressly prohibited" cannot succeed. The question is whether the legislature has authorized a contract for a permanent fare. Such a contract was at least as clearly prohibited by the Public Service Commission Law as were the contracts involved in the *Chariton* and *San Antonio* cases. By that law all rates were to be just and reasonable and were to be fixed by the Commission by orders made in the exercise of its regulatory power; the lawful rates were to be filed, and the charging of "a greater or less or different compensation" than such filed rates was prohibited. Rates which were unreasonable because not compensatory were just as unlawful as those which were unreasonable because excessive.

The Public Service Commission Law applies to rapid transit railroads in New York City. They are within its express definitions and manifest policy.

Every intendment must be against imputing to the legislature an intention to exclude rapid transit railroads from the policy of the Public Service Commission Law.

No interest of the City of New York in rapid transit railroads excludes them from the legislative policy of the State. The lines are in fact being operated by the plaintiff, which was incorporated under the Railroad Law, and is certainly both a "street railroad corporation" and a "common carrier." The traveling public are the "customers" of the plaintiff, not of the City. While rapid transit may be a city purpose, "it is, however, subject to regulation at all times by the power of the State except as the State has divested itself of such power." *Matter of McCabe* v. *Voorhis,* 243 N. Y. 401.

If the City took over the operation, an unremunerative fare supported by taxation would be unlawful. Rapid Transit Act, as amended, Laws 1906, c. 472, § 34–d; § 135, Public Service Commission Law (added by Laws 1924, c. 573).

The state powers reposed in the Commission are not inconsistent with the local self-government provisions of the New York Constitution. Art. X, § 2.

The Public Service Commission Law had been in effect for six years when Contract No. 3 was made and was, in the language of the Court of Appeals, " notice to municipalities that franchises thereafter granted must be coupled with no conditions inconsistent with the jurisdiction thus conferred " on the Public Service Commission. In making Contract No. 3, the City of New York was acting not in any governmental, but purely in a proprietary, capacity. The City, in dealing with the subway, " is a railroad corporation so far as the construction, operation and leasing thereof is concerned." *Matter of Rapid Transit R. Com'rs,* 197 N. Y. 81. Even where a five cent fare was indisputably the chief moving consideration of a contract, it was subject to later regulation, either up or down. *Ortega Co.* v. *Triay,* 260 U. S. 103.

But Contract No. 3 does not support the City's contention that the five cent fare was the primary inducement. The emphasis is upon the operation of the lines already built, in conjunction with those to be built, as a unified system " for a single fare," rather than for a fare of any particular number of cents.

The provisions of the Rapid Transit Act do not exclude contracts regarding the fares of rapid transit railroads from the operation of the Public Service Commission Law. Its language in itself does not import such intention.

Even in the absence of an actual existing statute, such as the Public Service Commission Law, embodying the public policy of continuous supervision of public utilities,

every doubt is to be resolved against the authority of a municipality to contract for an unchangeable rate. *Home Telephone Co.* v. *Los Angeles,* 211 U. S. 265. See, to the same effect, *Freeport Water Co.* v. *Freeport,* 180 U. S. 587; *Milwaukee Electric R. & L. Co.* v. *R. R. Comm'n,* 238 U. S. 174; *Southern Iowa Electric Co.* v. *Chariton,* 255 U. S. 539; *San Antonio* v. *Public Service Co.,* 255 U. S. 547; *Paducah* v. *Paducah R. Co.,* 261 U. S. 267; *St. Cloud Public Service Co.* v. *St. Cloud,* 265 U. S. 352. Tested by this standard, the provisions of the Rapid Transit Act upon which defendants rely are utterly insufficient.

The continuation in the Rapid Transit Act after 1907 of the provisions of §§ 24 and 27, does not import an intention to exclude the fare provisions from the policy of the Public Service Commission Law. The language authorizing a provision regarding fares remained unchanged from the time of its enactment in 1894 through all of the re-enactments by which that section was in other respects amended between then and the year 1913 when Contract No. 3 was executed. These are to be construed as continuations of the prior law modified or amended according to the language employed, and not as new enactments. § 95, General Construction Law of New York. *Matter of Allison* v. *Welde,* 172 N. Y. 421; *People ex rel. City of New York* v. *Nixon,* 229 N. Y. 356.

After the enactment of the Public Service Commission Law, the statutes which had themselves fixed specific fares, including the five-cent fare provision of § 7 of the Rapid Transit Act, as amended by c. 752, Laws of 1894, were for the most part either repealed or amended so as expressly to be made subject to the Public Service Commission Law. But many statutes which had authorized simply the making of contracts were continued, and often "re-enacted" after 1907 without change in this respect. The Court of Appeals of New York has never held that after 1907 a contract for an unchangeable rate or fare

could be made thereunder. It has expressly held that certain of these continued and re-enacted statutes did not, at least after 1907, authorize a contract for a rate or fare which should not be subject to revision up or down. *People ex rel. City of New York* v. *Nixon,* 229 N. Y. 356; *People ex rel. Garrison* v. *Nixon,* 229 N. Y. 575; *Matter of Evens* v. *Public Service Comm'n,* 246 N. Y. 224; *North Hempstead* v. *Public Service Corp'n,* 231 N. Y. 447; *Public Service Comm'n* v. *Pavilion Natural Gas Co.,* 232 N. Y. 146. The statutes under which the rate contracts involved in those cases were made, were just as clear legislative authority therefor as were the provisions of the Rapid Transit Act for Contract No. 3 and the Elevated Extension Certificates.

Amendments to § 49, made in 1921 and 1922, showed clearly that the legislature regarded rapid transit railroads as governed by the provisions of that section, and that, if any special provisions were to be made as to those railroads, they should be embodied in amendments to the Public Service Commission Law. The amendments of 1921 and 1922 are not here material, because in 1923, § 49 was again amended to substantially the same language as had been in force prior to the 1921 amendment. *Matter of Village of Mamaroneck* v. *Public Service Comm'n,* 208 App. Div. 330, affirmed, 238 N. Y. 588, and *Matter of Brownville* v. *Public Service Comm'n,* 209 App. Div. 640, affirmed, 240 N. Y. 586, held that the final result of the legislation which defendants emphasize was to leave the regulatory power over contract rates in exactly the position that it was prior to 1921. The *Nixon* and *Garrison* cases had construed that law as it existed prior to 1921.

The circumstance that the 1912 amendments of the Rapid Transit Act were made with particular reference to proposed Contract No. 3 does not evidence any legislative intention to authorize an unchangeable fare. The lan-

guage of § 27 of the Rapid Transit Act relating to provisions as to the fare had been in the Act since 1894 and was not touched in the statute of 1912. The provisions of proposed Contract No. 3 which necessitated the 1912 amendments were those authorizing both the City and the plaintiff to invest millions of dollars in the building and equipment of subways, repayment of which was to be secured only from the earnings of the roads. *Admiral Realty Co.* v. *City of New York,* 206 N. Y. 110.

See *People ex rel. Bridge Operating Co.* v. *Public Service Comm'n,* 153 N. Y. (App. Div.) 129; *People ex rel. South Glens Falls* v. *Public Service Comm'n,* 225 N. Y. 216.

The fare provisions in Contracts Nos. 1 and 2 do not affect the plaintiff's right to a compensatory fare. Contract No. 3, which applied to all of the subway lines, both those already in existence and those to be thereafter constructed, was executed in 1913, six years after the passage of the Public Service Commission Law. Under all the New York authorities it could not be regarded as effectively embodying a contract for an unchangeable fare.

The fare provisions of Contracts Nos. 1 and 2 were wholly superseded by Contract No. 3. *Admiral Realty Co.* v. *City of New York,* 206 N. Y. 110; *Matter of Evens* v. *Public Service Comm'n,* 246 N. Y. 224; *Matter of Fagal* v. *Public Service Comm'n,* 131 Misc. (N. Y. Sup. Ct.) 398.

The contention that this case is within the "reservation" in the last paragraph of the opinion of the Court of Appeals in the *Nixon* case is wholly inadmissible.

But, whether superseded or not, the fare provisions of Contracts Nos. 1 and 2 were subject to the later exercise by the State of New York of its police power to regulate them. *City of New York* v. *Campbell,* 277 U. S. 573 (involving a contract with the City of New York); *Trenton* v. *New Jersey,* 262 U. S. 182; *Englewood* v. *Denver &*

S. P. R. Co., 248 U. S. 294; *Hunter* v. *Pittsburgh*, 207 U. S. 161; *People* v. *Budd*, 117 N. Y. 1; *People ex rel. N. Y. Electric Lines* v. *Squire*, 107 N. Y. 593; *People ex rel. Bridge Operating Co.* v. *Public Service Comm'n*, 153 N. Y. App. Div. 129. The State of New York did exercise its police power in 1907 by its delegation to the Public Service Commission thereby created of the power to regulate substantially all public utility rates. *People ex rel. City of New York* v. *Nixon*, 229 N. Y. 356. Under the decisions of the Court of Appeals, the only contract rates to which that enactment did not apply retroactively were provisions for stated fares exacted by local authorities under § 18 of Art. III of the Constitution between 1875 and 1907 as conditions for giving their consent to the occupation of public streets. The fare provisions in Contracts Nos. 1 and 2 were not made as conditions of constitutional consents.

Since the enactment of the Public Service Commission Law the Public Service Commission and its successor have fully exercised every other regulatory power over the plaintiff and the railroads operated by it, which that law conferred.

As to the elevated lines, there is even less basis for argument of legislative authority for a contract as to fares. The five-cent fare on them has its origin in c. 743 of the Laws of 1894. Section 27 of the Rapid Transit Act, which was the basis for Contract No. 3, did not apply to the elevated lines. The sole authority for the Elevated Extension Certificate was § 24 of the Rapid Transit Act, which did not authorize any contract with respect to fares.

The decisions of this Court upon which the defendants rely are wholly inapplicable, being all cases interpreting the laws of the several States and holding that particular franchises, contracts or licenses amounted to " contracts " within the meaning of § 10 of Art. I of the Constitution, which protected the utilities involved from impairment

thereof by subsequent action of the municipality or of the legislature. Those cases go off on their own particular facts and statutes, none of which bear sufficient resemblance to the facts and statutes involved in the present case to require discussion. And in *Home T. & T. Co.* v. *Los Angeles,* 211 U. S 265, this Court held that there was not such a contract free from impairment because legislative authority therefor did not " clearly and unmistakably " appear.

No more apposite are the cases particularly relied on by the defendants in which utilities have been denied the protection of the federal courts against alleged confiscation. In none of these was there at the time the contract was made any state-wide regulatory statute like the New York Public Service Commission Law.

The theory that plaintiff was bound by a contract for a fixed fare, subject to a privilege to apply to the Commission for an increase thereof, and that a denial of such increase by the Commission raises no federal question, is contrary to express decisions of this Court. No such meaning may properly be ascribed to the language of this Court in the *Henderson* case, and the contrary has been more recently directly decided. *R. R. Comm'n* v. *Duluth Street R. Co.,* 273 U. S. 625; *Denney* v. *Pacific T. & T. Co.,* 276 U. S. 97.

The action of the Transit Commission was state action enforcing the five-cent fare against the plaintiff. The plaintiff has complied with all the procedural requirements of the Public Service Commission Law and its suit in the federal courts is not premature. *North Hempstead* v. *Public Service Corp'n,* 231 N. Y. 447. When the Commission rejects the new schedules filed by the utility and refuses to allow them, there can be no question but that state action enforcing the old rate has been taken. *Denney* v. *Pacific T. & T. Co.,* 276 U. S. 97; *Banton* v. *Belt Line R. Corp'n,* 268 U. S. 413; *Pacific T. & T. Co.* v.

Kuykendall, 265 U. S. 196; *Augusta-Aiken R. Corp'n* v. *R. R. Comm'n,* 281 Fed. 977.

Nor can there be any question that in this case the Transit Commission did reject the increased rates filed by the plaintiff.

Quite aside from the action of the Commission on plaintiff's application under § 29 in February, 1928, there had already been state action enforcing the five-cent fare. The effect of § 28 of the Public Service Commission Law requiring every common carrier to file with the Commission schedules showings its rates, fares and charges, and the filing of the five-cent fare from time to time pursuant thereto, itself constituted a legislative imposition of that fare. Moreover, as to a substantial part of the elevated lines, the five-cent fare was imposed by the direct statutory requirement of c. 743 of the Laws of 1894, and it may be observed that the plaintiff's first cause of action is directed solely against that state action. The denial by the Commission of the plaintiff's applications in 1920 and 1922 constituted a fixation by the Commission of the five-cent fare as the rate for the future, and hence was legislative action. The effect of the Commission's adverse action on plaintiff's new schedules filed under § 29 was to compel plaintiff to continue the five-cent fare previously fixed. *Banton* v. *Belt Line R. Corp'n,* 268 U. S. 413.

In every substantial respect, the Transit Commission had rejected plaintiff's filed rates several days before the complaint herein was filed and nothing remained to be done but the mere formality of evidencing by a formal order a decision already made.

To pretend, therefore, that the plaintiff has not exhausted its remedies under the state law, but might have had relief by further delay or supplication, is the merest sophistry. To have made further motions looking to consideration of the case by the Transit Commission would have been an utterly vain thing.

This Court has upheld recourse by utilities to the federal courts where the facts showing state action and exhaustion of state remedies were far less clear. *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587; *R. R. Comm'n* v. *Duluth Street R. R. Co.*, 273 U. S. 625; *Prendergast* v. *N. Y. Telephone Co.*, 262 U. S. 43; *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290; *Banton* v. *Belt Line R. Corp'n*, 268 U. S. 413; *Denney* v. *Pacific T. & T. Co.*, 276 U. S. 97; *Pacific T. & T. Co.* v. *Kuykendall*, 265 U. S. 196.

The five-cent fare yields such a low return as to be confiscatory. Plaintiff is entitled to a reasonable return upon all the property used in the public service. The company's application is not for permission to charge a rate of fare which will enable it to pay its rental obligations, interest upon its bonds and dividends on its stock. All it seeks is a fair return upon the value of the property which it uses in the public service. *Darnell* v. *Edwards*, 244 U. S. 564. The figures upon every hypothesis show confiscation.

Messrs. George Welwood Murray and *William Roberts* were on the brief for appellee Manhattan Railway Company.

The elevated railroads owned by the Manhattan Railway Company and leased to the Interborough Company were constructed under their own franchise which does not limit the fare to be charged to five cents a ride. A certificate authorizing the construction of extensions to the elevated railroads was granted to the Interborough Company, as lessee, which purported to limit to five cents a ride the fare on the elevated railroads and on the extensions added thereto. The statute, Rapid Transit Act, 1891, as amended, § 24, under which the certificate was granted did not give the Commission, as grantor, the power to change the fare to be charged on the railroads to which the extensions were added. Without such statutory authority the Com-

mission had no power to change the fare and the purported restriction in the Extension Certificate is invalid. The City relies on a section of the statute which authorizes the construction of extensions, but does not refer to rates of fare and does not apply to the railroads to which the extensions are added. The rule of construction is that, as the power to regulate fares is part of the police power, it cannot be delegated by the legislature except by the use of language which could not fairly and reasonably have any other meaning.

The Constitution of the State required that no law should authorize the construction of a street railway except upon condition that the consent of the local authorities having control of the streets upon which it is proposed to construct the railroad be first obtained. The City urges that the local authorities in consenting to the construction of the extensions conditioned their consent on a change of the fare on the railroads to which the extensions were added. Such a condition, if it was in fact made, is invalid. The constitution merely requires the consent to the construction of the railroad. The statute gives authority to the Commission to authorize the construction of the extensions and prescribes the terms and conditions on which the local authorities must consent or refuse to consent to its construction. Under the terms of the statute, the local authorities had no power to condition their consent to a change of fare on the properties to which the extensions were added.

The statute causes the City to assume a fiduciary relation toward the elevated railroads which is inconsistent with power in the City to regulate the rates of fares on such railroads. The City under the statute and under the Extension Certificate is given the following rights: To share in the profits from the elevated railroads; to purchase the extensions for less than their value, the balance of the compensation, if any, to come out of earnings;

to own easements at the end of the franchise period without payment of any compensation; to compete by city-owned railroads with the elevated railroads in whose profits the City shares; to participate in the management of the elevated railroads in order to protect the right to share in the profits and the right to purchase the extensions for less than their value. The Court will not give an unnatural and strained meaning to language in order to give to the City additional and inconsistent power under such extraordinary circumstances.

The elevated railroads under the restriction of fare contained in the Extension Certificate do not earn the return on their properties which the franchise and the law permit and which the railroads are capable of earning. A part of the properties of the elevated railroads consists of the easements of light, air and access purchased by the company from the owners of properties abutting on the streets where the railroads are located, and of improvements to the elevated railroads made by the Interborough Company as lessee at its own expense after 1913 with Public Service Commission approval. Before the improvements were made the elevated railroads were a complete operating unit which carried 349,000,000 passengers in 1917. The actual net earnings from the elevated railroads under the fare restriction contained in the Extension Certificate are not sufficient to pay a reasonable return even on the combined cost of the easements of light, air and access and the improvements made by the Interborough Company which constitute only a small part of the elevated railways.

Mr. Justice McReynolds delivered the opinion of the Court.

This direct appeal is from an order of May 10, 1928, by the District Court, Southern District of New York, three judges sitting, which authorized an interlocutory injunc-

tion to restrain appellants—the Transit Commission and New York City—from requiring, or attempting to enforce, further acceptance by the Interborough Rapid Transit Company of a five cent passenger fare over the lines operated by it and from seeking to prevent a charge of seven cents. This Court stayed the order pending further hearing. The cause has been twice orally argued before us and helpful briefs are on file.

In support of the action below, appellees maintain:—The five cent fare originally stipulated and long observed had become non-compensatory. Although specified in the agreements with the City under which the transit lines are being operated, that fare was not immutable, since, by implication, provisions of the Public Service Law of 1907 directing that reasonable rates should be granted to subways, elevated and other street railways, were incorporated into the contracts. The Transit Commission in effect denied an application for compensatory rates, insisted upon observance of the five cent one and intended to take immediate steps to secure enforcement of it. This amounted to action by the State which would deprive the Interborough Company of property without due process of law, contrary to the Fourteenth Amendment.

The City of New York is a municipal corporation, whose charter vests control of streets and other executive powers in the Board of Estimate and Apportionment. The Transit Commission of three members created by Chap. 134, New York Laws, 1921, exercises powers theretofore entrusted to the Public Service Commission for the First District (Chap. 429, Laws, 1907) successor to the Board of Rapid Transit Railroad Commissioners organized under the Rapid Transit Act of 1891.

The Interborough Rapid Transit Company, a New York corporation, with $35,000,000 capital stock, operates elevated and subway lines in four boroughs of Greater

New York City. Some of these it owns; some the City owns and lets to it for operation; others—the original elevated lines—it hired in 1903 from the Manhattan Railway Company for 999 years, agreeing to pay therefor interest on $45,000,000 of outstanding bonds, 7% (now 5%) on $60,000,000 capital stock of the lessor and $35,000 annually for administrative expenses. At this time the total yearly payments for use of elevated lines is about $4,900,000.

Greater New York City contains five Boroughs—Manhattan, coterminous with Manhattan Island (ten miles long) with area of 19 square miles; The Bronx, 41 square miles; Queens, 117; Brooklyn, 80; and Richmond (Staten Island), 57. The population of the City in 1910 was 4,785,000 (in 1927, 5,970,000) of whom 2,330,000 resided within Manhattan, in the southern portion of which are located the great business centers of the Metropolitan district. The Bronx, on the mainland north of Harlem River, and Queens and Brooklyn on Long Island, have undergone very rapid development and increased greatly in population since 1900. The expanse of the Greater City, together with its peculiar physical characteristics, render exceedingly difficult any effort to provide rapid and cheap transportation for its residents and the crowds of outsiders who travel therein daily for business or pleasure. See *Sun Publishing Assn.* v. *The Mayor,* 152 N. Y. 257, 273.

Prior to 1903, under franchises dating from 1875, the Manhattan Railway, or its predecessors, constructed, owned and operated the four original elevated railway lines extending northward from South Ferry along Second, Third, Sixth and Ninth Avenues. All these were leased by the Interborough Company in 1903 and now constitute the oldest part of its system. Long before, and ever since, 1913 they have charged five cents per passenger, and from this the lessee for many years derived substantial net

profits. During 1910 and 1911 the average was $1,589,348.

The subway first constructed begins at City Hall, Manhattan, and extends northward to 96th St.—six miles.[1] From the latter point two branches diverge; one continues north across Harlem River to 230th St., in The Bronx—seven miles; the other (West Farms Branch) runs northeast and under Harlem River to 182nd St. at Bronx Park—seven miles. These lines were constructed for the City, became its property and were let to the Interborough's assignor under "Contract No. 1," executed February 21, 1900,[2] and authorized by the Rapid Transit Act of 1891 as amended.

This contract—an elaborate instrument of 125 printed pages—provided with great detail that the lessee should equip and thereafter operate the road at its own expense under direction of the Board of Rapid Transit Railroad Commissioners; and further undertook to secure uninterrupted service. Among other things it declared—"The Contractor [Interborough's assignor] shall during the term of the Lease be entitled to charge for a single fare upon the Railroad the sum of five (5) cents, but not more. The Contractor may provide additional conveniences for such passengers as shall desire the same upon not to exceed one (1) car upon each train, and may collect from each passenger in such car a reasonable charge for such additional convenience furnished him, provided that the amount to be charged therefor and the character of such additional convenience shall from time to time be subject to the approval of the Board. The Contractor may provide not to exceed one (1) car in each train for persons smoking."

---

[1] These and similar figures are mere rough approximations.

[2] This and subsequent contracts designate agreements for operation as leases.

The lease was for fifty years (with right of renewal), the rent a sum equal to the annual interest on City bonds issued to secure the necessary funds for construction, plus one per centum for amortization. The lessee retained title to all equipment and the City agreed to purchase this at fair value when the lease ended.

Construction under Contract No. 1 cost the City around $60,000,000.[3]

By " Contract No. 2," dated July 21, 1902, the City contracted with the Interborough's assignor for the construction and operation during thirty-five years (with privilege of renewal) of an extension to the first subway, commencing at City Hall, Manhattan, and extending under East River to Borough Hall and thence to Atlantic Avenue, Brooklyn—4 miles. The lessee undertook to furnish equipment, act under direction of the Board of Rapid Transit Railroad Commissioners, and to pay for use of the lines a sum equal to the interest on bonds issued by the City to meet construction costs, plus one per centum for amortization. Also, to carry out the proposal that passengers should have the right to transportation without change of cars and for a single fare not exceeding five cents for one continuous trip over the Railroad and connecting lines. A clause identical with the one above quoted from Contract No. 1 prescribed a five cent fare; another provision obligated the City to purchase the equipment when the lease terminated.

For the construction of this extension the City paid out $6,600,000.

Under Contracts 1 and 2, ways extending over approximately twenty-four miles (seventy-five of single track) were constructed and then equipped. The longest pos-

[3] These and similarly stated figures are intended only to give a fair idea of the problems presented—they do not indicate adjudication of any disputed question.

sible continuous trip by a passenger was 17.4 miles. For equipping them the lessee claims a capital investment of $60,000,000—but large items are questioned and the true sum may be less than $40,000,000. This equipment, with real estate valued at $300,000 and office sundries, is all the property connected with the subways which the Interborough now owns. The lines were opened for traffic October 27, 1904, and prior to 1919 their operation yielded annually large net profits.

The court below thought that, unless modified by Contract No. 3 (*infra*), Contracts Nos. 1 and 2 established an inflexible five cent fare, and this view has not been seriously questioned here.

In order to meet the insistent demand for quick transportation, after prolonged negotiations, the Public Service Commission, acting for the City with approval of the Board of Estimate (being specially authorized by the Rapid Transit Act as amended in 1912), entered into elaborate separate, but related, agreements (dated March 19, 1913) with the Interborough and Manhattan Companies for (1) the construction and operation of extensions to the old lines and certain new subways—"Contract No. 3;" (2) a third track on the elevated lines—"Third Track Certificate;" (3) extensions to the elevated lines—"Extension Certificate;" (4) for operation of elevated trains over designated portions of the new subways—"Supplementary Agreement."

Contract No. 3—122 printed pages—with great detail provided for immediate (and possible future) extensions of and additions to the subway system then existing, also their equipment and operation until the end of 1967. Under it the following lines were constructed, equipped and put into operation.* (1) From the end of old sub-

* These new lines in Brooklyn, Queens and The Bronx are mostly above ground.

way in Brooklyn eastwardly with two branches—nine miles. (2) From Borough Hall, Brooklyn, northwesterly under East River and lower Manhattan to Seventh Avenue and thence north to 42nd St. (Times Square)—six miles. (3) The Queensboro Bridge Line from Times Square eastward under 42nd St. through Steinway Tunnel under East River to Queensboro Bridge Plaza and beyond—12 miles. (4) From Grand Central Station northward along Lexington Avenue under the Harlem and beyond with two branches—eighteen miles. (5) An extension of West Farms Branch northward—five miles.

Fifty miles of subways were thus added to the original system—146.8 miles of single track. The longest distance between terminals became 26.78 miles. For the construction of these additions and extensions the City expended from its own treasury $113,000,000 and the Interborough Company advanced $58,000,000. For equipment the latter paid not above $62,000,000. Title to both road and equipment vested in the City and both were let to the Interborough Company until December 31, 1967, for operation in conjunction with the older subways. The lessee owns none of the equipment provided under this contract and is not obligated thereby to pay anything to the City as rental for the ways; but it did agree to make certain payments out of the earnings after named deductions are satisfied. The leases under Contracts 1 and 2 were adjusted to expire with 1967.

The following provisions of "Contract No. 3" are of special importance here—

"Article I. . . . The City and the Lessee further agree upon the modification of Contract No. 1 and Contract No. 2 in the respects herein set forth, but nothing in this contract shall be construed as a modification or waiver of any of the rights or obligations of the respective parties under Contract No. 1 and Contract No. 2, except in the respect and to the extent herein specifically set forth."

[Certain modifications of Nos. 1 and 2 are specified but the five cent fare provisions are not mentioned.]

"Article III. This contract is made pursuant to the Rapid Transit Act which is to be deemed a part hereof as if incorporated herein."

"Article XLIX. . . . the gross receipts from whatever source derived directly or indirectly by the Lessee or on its behalf in any manner from, out of or in connection with the operation of the Railroad and the Existing Railroads [old subways] (hereinafter referred to as the 'revenue') shall be combined during the term of this contract and the City shall receive for the use of the Railroad at the intervals provided a specified part or proportion of the income, earnings or profits of the Railroad and the Existing Railroads, . . ." [Broadly speaking, the part payable to the City is to be ascertained as follows: The Interborough Company shall deduct and retain each year sums sufficient to pay rentals on old lines required by Contracts 1 and 2 (say $3,000,000); taxes; operating expenses; maintenance; depreciation; $6,335,000, the estimated average profit derived during the years 1911–1912 from operation of the old lines under Contracts 1 and 2; 6% on $80,000,000 advanced for construction and paid for original equipment under Contract No. 3; interest on other cost of equipment. These are cumulative. Thereafter the City shall receive 8.76% on the cost of construction paid out under Contract No. 3. The remainder will be equally divided between the City and the Interborough.]

"Article LIV. The payment of the rental [to City] for the existing Railroads referred to in paragraph 1 (a) of Article XLIX shall be made as provided in Contract No. 1 and Contract No. 2 for the full term of such contracts as herein modified. . . ."

"Article LIX. The Lessee shall operate the Railroad [to be constructed] and the Existing Railroads [those

constructed under Contracts 1 and 2] as one complete system and shall furnish with respect thereto such service and facilities as shall be safe and adequate and in all respects just and reasonable. Free transfers shall be given, as required by the Commission . . . so as to afford a continuous trip in the same general direction for a single fare."

"Article LXII. The Lessee shall during the term of the contract be entitled to charge for a single fare upon the Railroad [to be constructed] and the Existing Railroads the sum of five (5) cents but not more."

"Article LXXVIII. Upon giving one year's notice in writing to the Lessee the City, acting by the Commission with the approval of the Board of Estimate, may terminate this contract as to all of the Railroad [to be constructed] (including Extensions and Additions) at any time after the expiration of ten (10) years from the date when operation of any part of the Railroad shall actually begin; or the City, acting by the Commission, upon like notice and with like approval may terminate [certain specified] portions thereof: . . ." [In the event of such termination the City agreed to pay the Lessee a varying per centum (never above 115%) of amounts contributed towards cost of construction or for equipment.]

The "Third Track Certificate" authorized the Manhattan Railway Company (owner of original elevated lines), subject to definitely prescribed conditions, terms and requirements, to lay third tracks on the Second, Third and Ninth Avenue Lines for accommodation of express trains.

The "Extension Certificate" authorized the Interborough Company to construct and operate four defined connections between the old elevated and the new subway lines. It carefully specified conditions intended to insure uninterrupted operation and protect the parties and contained the following clause—

"The Interborough Company shall be entitled to charge for a single fare for each passenger for one continuous trip in the same general direction over the Railroads (including the parts of the municipal railroad over which the Interborough Company is provided with trackage rights as in this Certificate provided) and the additional tracks (which shall mean the additional tracks authorized by the Commission by certificate to the Manhattan Railroad Company bearing even date herewith) and the Manhattan Railroad the sum of five (5) cents but not more. . . ."

There is also a provision for terminating the right to operate elevated trains over the extensions and additions and for taking them by the City upon payment of varying percentages of their cost, never exceeding 115%.

These extensions and connections rendered possible the operation of trains far beyond the original extremities of the old elevated lines over roads in the Boroughs of Queens and The Bronx belonging to the city.

By the "Supplementary Agreement," the City granted to the Interborough Company the right to use certain parts of subways constructed under Contract No. 3 in connection with the elevated roads, extended as above shown, and reserved as possible compensation a named per centum of any increased receipts.

January 1, 1919, all the lines, both elevated and subway, were constructed, equipped and in operation with uniform five cent fare.

The record indicates that when this suit was begun the City had expended from its own treasury for construction of subways $180,000,000; that the Interborough Company had advanced for such construction $58,000,000; and had expended for equipment not above $120,000,000—probably much less. The cost to the Interborough for laying third tracks on the elevated lines and building extensions thereto was $44,000,000. The original cost of the

old elevated lines is not disclosed and perhaps cannot be definitely ascertained; it did not exceed $90,000,000. Expenditures under Contract No. 3 greatly exceeded estimates; and the cost of operation has been much higher. The present values of the above-mentioned properties is very large, but to determine this with fair accuracy would be exceedingly difficult.

The following excerpts from an affidavit offered by the City are enlightening. The record supports the facts and figures used so far as here important; also in general the stated conclusions.

"The operation under Contract No. 3 has been highly profitable to the Interborough, as was the prior operation under Contracts Nos. 1 and 2. For the year ended June 30, 1926, the Interborough realized from the subway operation a net surplus of $6,569,573.03, after the payment of all operating expenses, taxes, interest and other fixed charges, including the rentals of $2,655,186.26 to the City under Contracts Nos. 1 and 2. The surplus is the amount available for the payment of dividends upon the capital stock of the Company so far as subway operation by itself is concerned. The amount of total capital stock outstanding is $35,000,000 . . . The subway earnings alone, therefore, under Contract No. 3, provide for dividend payments of over 18% on the par value of the stock . . .

"For 1927 the surplus amounted to $6,380,017.34. [The decline was due to a strike.]

"For the current fiscal year ended June 30, 1928, the figures for the first six months are available and show a net surplus amounting to $3,687,000, which exceeds the surplus for the corresponding six months of the fiscal year before by $1,609,000.

"These earnings are, of course, enormous and leave no room for claim that the five-cent fare fixed by Contract No. 3 is inadequate to give a fair return upon the investment of the Company in the subway properties, or

that the five cent fare is without due regard of the rights of the Company under the contract. . . .

"The financial difficulties of the Interborough during the past eight years, have been due to the elevated lease from the Manhattan Railroad Company, and not to the subway contract with the City. The terms of the elevated lease provide that the Interborough must pay as rental the interest upon the Manhattan Railway Company bonds outstanding and dividends after an initial period, at 7% upon the capital stock. The dividend rate, however, was adjusted in 1922 so that the Interborough is now paying 5% upon about 94% of the capital stock, only if and as earned by the Interborough, and 7% upon the minority interest. The Manhattan Railway Company bonds outstanding amount to about $45,000,000 and the capital stock to $60,000,000, . . . In 1927, the interest payments on the bonds amounted to $1,808,240 and the dividends on the stock to $3,086,756. In addition to these amounts, however, the Interborough must pay also interest and sinking fund charges on its own bonds and notes issued for the third tracking, the extension of the elevated lines, and other improvements. The total fixed charges resting on the elevated division, including the dividend rentals, amounted for the year ended June 30, 1926, to $8,062,274.85. The income above operating expenses and taxes available for these charges, was only $3,936,396.50. The net revenues from the elevated fell short of earning all charges, including the dividends to the Manhattan Railway stockholders, by $4,125,878.35. For the year ended June 30, 1927, the corresponding shortage amounted to $4,909,129.66.

". . . The elevated and subway operations have been kept financially distinct. The revenues, expenses, taxes and fixed charges have been segregated, so that each system has had its own financial set-up under the contract controlling its operation. . . .

"Notwithstanding the extreme crowding which has existed for several years on the trunk subway lines, the number of passengers has increased steadily upon the subways, while on the elevated it has been decreasing. Since 1920 the transportation revenue [on subways] at a five cent fare has increased from $29,300,000 to $40,731,000 in 1927. For the first six months of the current fiscal year, the subway revenue was $21,433,000, compared with $18,647,000 for the same six months the year before; the growth is still continuing unimpeded.

"On the elevated lines the total transportation revenues in 1920 amounted to $18,450,000 and for the year ended June 30, 1927, to $17,951,000. During the first six months of the current fiscal year the elevated transportation revenues were $8,874,000, compared with $9,098,000 for the same six months the year before. The decline has not stopped. . . ."

In 1891 the Legislature of New York enacted what is known as the "Rapid Transit Act" to "provide for Rapid Transit Railways in cities of over one million inhabitants," intended to meet the special needs of New York City, the only municipality with so large a population. It has been amended some forty times. Originally no provision permitted construction of railways at public expense—only privately-owned lines were contemplated. A Board of Rapid Transit Railroad Commissioners, with general supervisory powers over the construction and operation of rapid transit lines, was authorized and given authority to contract concerning fares; also to issue "extension certificates" upon such terms, conditions, and requirements as might appear just and proper. In 1894 an amendment directed that the question whether the City should construct rapid transit facilities at its own expense be submitted to the voters, and further provided—

"In case it shall be determined by vote of the people, as provided by Sections 12 and 13 of this Act, to construct

by and at the city's expense, then, and in that event, the road or roads so constructed shall be and remain the absolute property of the city so constructing it or them, and shall be and be deemed to be a part of the public streets and highways of said city, to be used and enjoyed by the public upon the payment of such fares and tolls and subject to such reasonable regulations as may be imposed and provided for by the Board of Rapid Transit Railway Commissioners. . . ."

"The said board for and on behalf of said city shall enter into a contract with any person, firm or corporation which in the opinion of said board shall be best qualified to fulfill and carry out said contract for the construction of such road or roads. . . ."

"Such contract shall also provide that the person, firm or corporation so contracting to construct said road or roads shall at his or its own cost and expense equip, maintain and operate said road or roads for a term of years to be specified in said contract not less than thirty-five nor more than fifty years and upon such terms and conditions as to the rates of fare to be charged and the character of service to be furnished and otherwise as said board shall deem to be best suited to the public interests and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said board."

The voters approved the proposal. On February 21, 1900, and July 21, 1902, Contracts Nos. 1 and 2 were excuted, and the lines therein specified were constructed and put into operation.

In 1906 the Rapid Transit Act was so amended as to require approval by the Board of Estimate and Apportionment of all contracts for construction, equipment, maintenance or operation of rapid transit railways built at public expense. Another amendment (Chap. 498, Laws of 1909) authorized the termination of operating contracts and the

taking by the City of the equipment upon payment of cost and not exceeding 15%. In 1912, as specially requested by the Board of Estimate and with full knowledge of the circumstances, the Legislature enacted the Wagner Bill which amended the Rapid Transit Act so as definitely to authorize the Contracts and Certificates, finally signed March 19, 1913 and above described, whose provisions, after long negotiations, had been tentatively agreed upon prior to the amendment—*Admiral Realty Co.* v. *City of New York*, 206 N. Y. 110.

Concerning Extension Certificates Sec. 24 of the amended act declares—"4. The certificate or certificates prepared by the commission as aforesaid when delivered and accepted by such person, firm or corporation shall be deemed to constitute a contract between the said city and said person, firm or corporation according to the terms of the said certificate; and such contract shall be enforceable by the commission acting in the name of and in behalf of the said city or by the said person, firm or corporation according to the terms thereof, but subject to the provisions of this act. . . ."

The Public Service Commission Law, entitled "An Act to establish the public service commissions and prescribing their powers and duties, and to provide for the regulation and control of certain public service corporations and making an appropriation therefor," Chap. 429, Laws of 1907, became effective July 1, 1907. It authorized appointment of two commissions and directed: "The jurisdiction, supervision, powers and duties of the public service commission in the first district [New York City] shall extend under this act: 1. To railroads and street railroads lying exclusively within that district, and to the persons or corporations owning, leasing, operating or controlling the same. . . ."

This is a general law relative to regulation and control of public utilities throughout the State. It contains no

words purporting to amend or modify the Rapid Transit Act except:—Those abolishing the Board of Rapid Transit Railroad Commissioners and directing that, in addition to other duties, ". . . the Commission in the First District shall have and exercise all the powers heretofore conferred upon the Board of Rapid Transit Railroad Commissioners under Chapter 4 of the Laws of 1891 entitled 'An Act to provide for rapid transit railways in cities of over one million inhabitants' and the Acts amendatory thereto." And, "All the powers and duties of such Board shall thereupon be exercised and performed by the Public Service Commission of the First District." Among other things it provides—

"SEC. 26. Safe and adequate service; just and reasonable charges.—Every corporation, person or common carrier performing a service designated in the preceding section [Railroads, Street Railroads and Common Carriers] shall furnish, with respect thereto, such service and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such corporation, person or common carrier for the transportation of passengers, freight or property or for any service rendered or to be rendered in connection therewith, as defined in section two of this act, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction and made as authorized by this act . . ."

"SEC. 28. Every common carrier shall file with the commission having jurisdiction and shall print and keep open to public inspection schedules showing the rates, fares and charges for the transportation of passengers and property. . . ."

"SEC. 29. Unless the commission otherwise orders no change shall be made in any rate, fare or charge, or joint rate, fare or charge, which shall have been filed and published by a common carrier in compliance with the require-

ments of this chapter, except after thirty days' notice to the commission and publication for thirty days . . . The commission, for good cause shown, may allow changes in rates without requiring the thirty days' notice and publication herein provided for, . . . Whenever there shall be filed with the commission by any common carrier as defined in this act any schedule stating a new individual or joint rate, fare or charge . . . the commission shall have and it is hereby given authority, . . . upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, fare, classification, regulation or practice; and pending such hearing and decision thereon, the commission upon filing with such schedule, and delivering to the carrier or carriers affected thereby, a statement in writing of its reasons for such suspension may suspend the operation of such schedule . . ."

"SEC. 49. 1. Whenever either commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation . . . , or that the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall . . . determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by general or special statute, and shall fix the same by order . . ."

No provision of the Rapid Transit Act subjects it to the Public Service Commission Law. An amendment to the Railroad Law (Chap. 481, Laws 1910) does this in respect of that enactment. *People ex rel. Ulster, etc. R. R. Co.* v. *Public Service Commission,* 171 App. Div. 607.

May 28, 1920, the Interborough Company, purporting to proceed under Sec. 49, Public Service Law, complained to the Commission that a five cent fare on the subways was insufficient and asked a higher one. The petition was denied "for want of jurisdiction to determine and fix a rate of fare different from that fixed by Contract No. 3." A proceeding begun in a state court to annul this order was discontinued before final hearing. Another application—March, 1922—for increased fares upon both elevated and subway lines was likewise denied for lack of jurisdiction. No review was sought. In 1925 the Interborough memorialized the Governor and Legislature, set out the result of operations under the five cent fare, the refusal of the Commission to grant any increase, and asked relief. No action was taken upon this application.

February 1, 1928, the Interborough Company, adopting the method prescribed by Sec. 29, Public Service Law, filed with the Transit Commission new schedules which purported to establish, effective March 3, 1928, a seven cent fare upon all its lines and requested permission to put them into effect on five days' notice. Prior to February 14, 1928, the Commission took no official action. But, it appears that counsel for the Commission and the Mayor expressed the opinion that no relief should or would be granted and perhaps used some threatening and ill-advised language; also that the members of the Commission had concluded no relief could be granted and that proceedings should be begun at once in a State court to enforce observance of the contract rate.

At 9:20 A. M. February 14, 1928, the original bill now before us was filed. It alleged the five cent rate had become confiscatory, that the Commission had failed to grant relief; and asked an injunction against any attempt to enforce it, also against any interference with the establishment of a seven cent fare.

Later during the same morning the Transit Commission entered an order which denied its authority to grant

any new rate and rejected the new schedules. It further directed counsel to institute suits in the State court to prevent threatened violation of law by the Interborough Company through failure to observe the contract rate. Thereupon, being already prepared, three proceedings were begun.

On March 3, 1928, the Interborough Company filed a supplemental bill reciting the action taken by the Commission subsequent to the filing of the original bill, renewed the prayer for relief by injunction and especially asked that further prosecution of the proceedings in the State court be forbidden.

Voluminous affidavits were submitted by both sides, and upon these and the pleadings the District Court, three judges sitting, heard the cause and authorized the interlocutory injunction described above.

Considering the entire record, we think the challenged order was improvident and beyond the proper discretion of the Court.

The record is voluminous; the contracts between the parties are complex; the relevant statutes intricate. No decision of this Court or of any court of New York authoritatively determines the questions at issue. The basic one calls for construction of complicated State legislation.

To support the action of the court below it would be necessary to show with fair certainty, first, that before the original bill was filed the commission had taken, or was about to take, some improper action in respect of the Interborough Company's new schedules or its application for leave to discontinue the five cent rate and establish one of seven cents; and secondly, that the five cent fare was so low as to be confiscatory while the proposed charge of seven cents was reasonable. We think neither of these things adequately appears from the record.

At most, prior to the original bill, the Commission's members had accepted the view that it lacked jurisdiction

to permit a new rate because the existing one was irrevocably fixed by lawful contracts, and had determined promptly to seek enforcement of the City's supposed rights by proceedings in the State courts. This was neither arbitrary nor unreasonable. No ground existed for anticipating undue delay or hardship. The purpose of the Commission was in entire accord with rulings announced as early as 1920 and seemingly no longer controverted when, in 1925, the Interborough applied for legislative relief. There had been abundant opportunity to test the point of law by appeal to the State courts.

The power of the City to enter into contracts Nos. 1 and 2 was affirmed in *Sun Publishing Assn.* v. *The Mayor, supra;* likewise the validity of Contract No. 3 was declared in *Admiral Realty Co.* v. *City of New York, supra.* These cases point out that the object of those contracts was to secure the operation of railways properly declared by statute to be part of the public streets and highways and the absolute property of the City.

The statute under which the Interborough undertook to proceed gave thirty days after filing of the new schedules during which the Commission might take action. The effect of the contracts, long the subject of serious disputation, depended upon the proper construction of State statutes—a matter primarily for determination by the local courts. The members of the Commission intended to take official action appropriate to the circumstances, and neither what they did nor what they intended to do gave any adequate cause for complaint. Alleged newspaper stories and unbecoming declarations by counsel or City officials can not be regarded here as of grave importance.

Under the doctrine approved in *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 231, and *Henderson Water Company* v. *Corporation Commission,* 269 U. S. 278, the Interborough Company could not have resorted to a federal court without first applying to the Commission as pre-

scribed by the statute. And having made such an application it could not defeat orderly action by alleging an intent to deny the relief sought.

Both the bill of complaint and the argument of counsel here proceed upon the theory that under the law of New York, as clearly interpreted by definite rulings of her courts, the contracts for operating the transit lines impose no inflexible rate of fare. With this postulate we cannot agree. *People ex rel. City of New York* v. *Nixon,* 229 N. Y. 356, decided July 7, 1920, is especially relied upon; but the circumstances there were radically different from those now presented. The effect of a contract with the City, expressly authorized by amendment to the Rapid Transit Act adopted subsequent to enactment of the Public Service Commission Law, was not involved. The court carefully limited its opinion. And it said: "The conditions of other franchises may supply elements of distinction which cannot be foreseen. Contracts made after the passage of the statute (Consol. Laws, ch. 48) [Public Service Commission Law] may conceivably be so related to earlier contracts either by words of reference or otherwise as to be subject to the same restrictions. We express no opinion upon these and like questions. They are mentioned only to exclude them from the scope of our decision. In deciding this case, we put our ruling upon the single ground that the franchise contract of October, 1912, was subject to the statute, and by the statute may now be changed."

Counsel for appellants refer with confidence to *Parker* v. *Elmira, C. & N. R. R. Co.,* 165 N. Y. 274; *Village of Fort Edwards* v. *Hudson Valley R. R.,* 192 N. Y. 139; *Matter of Quinby* v. *Public Service Commission,* 223 N. Y. 244; *People ex rel. Garrison* v. *Nixon,* 229 N. Y. 575, 645; *City of New York* v. *Brooklyn, etc.,* 232 N. Y. 463.

Although both the elevated and subway lines are operated by the same Company, the two systems have been

treated as separate and upon this record must be so regarded. The receipts from the subways show steady increase. If this continues, the Interborough Company ultimately will receive its entire investment on account of subways, with large profits. The elevated roads, the present value of which for rate making purposes is said to be above $150,000,000, are not prospering; their net receipts are diminishing. Appellees seek a seven cent fare for all lines based upon alleged present values and the requirements of a supposed unified system.

The claim for an eight per cent. return upon the values of subways, which are the property of the City and distinctly declared by statute to be public streets, *Sun Publishing Assn.* v. *The Mayor, supra,* is unprecedented and ought not to be accepted without more cogent support than the present record discloses. The operating equipment supplied under Contracts Nos. 1 and 2, which originally cost not over $60,000,000, real estate valued at $300,000 and office sundries of small value, is the only property connected with the subways to which the Interborough holds title; but it seeks remuneration based upon total values of all these ways and their equipment said to represent investments amounting to $360,000,000 and present value exceeding $600,000,000. At the current rate of return, after paying operating expenses, taxes, and rentals to the City, the Interborough will realize annually from the subways more than $17,000,000. The annual income of the elevated lines, after deducting operating expenses, maintenance, taxes, etc., probably will not hereafter exceed $4,000,000, and as the Interborough must pay rentals therefor amounting to $4,900,000, also interest on bonds, notes, etc., (issued for third tracks, extensions, etc.) in excess of $3,000,000, its loss by reason of this lease is heavy and apparently will increase.

During 1927, passengers carried on the subway lines numbered 814,600,000; on the elevated 359,000,000; total

1,173,600,000. An increase of two cents upon each fare would have added to the subway receipts $16,292,000; to the elevated $7,180,000.

The transit Commission has long held the view that it lacks power to change the five cent rate established by contract; and it intended to test this point of law by an immediate, orderly appeal to the courts of the State. This purpose should not be thwarted by an injunction. Upon the record before us we cannot accept the theory that the subways and elevated roads constitute a unified system for rate-making purposes. Considering the probable fair value of the subways and the current receipts therefrom no adequate basis is shown for claiming that the five cent rate is now confiscatory in respect of them. The action below was based upon supposed values and requirements of all lines operated by the Interborough Company treated as a unit; and the effort to support it here proceeds upon a like assumption.

The interlocutory order must be reversed. The cause will be remanded to the District Court for further proceedings in conformity with this opinion.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER dissent.

PAMPANGA SUGAR MILLS *v.* TRINIDAD.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 325. Argued March 1, 1929.—Decided April 8, 1929.

1. Under § 138 of the Philippine Administrative Code, 1917, which makes a concurrence of five judges necessary for pronouncement of judgment by the Supreme Court in a case involving 10,000 pesos if there is no vacancy, an equal division among eight of the judges when the ninth does not sit because of disqualification, will not operate as an affirmance of the judgment below. P. 214.