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JUDICIAL REVIEW OF THE NORTH CAROLINA CORPORATION COMMISSION

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I. INTRODUCTION: GROWTH IN IMPORTANCE OF ADMINISTRATIVE LAW

THE GROWTH in importance of administrative law in the English and American legal systems during the past half-century has been phenomenal. "Typically administrative treatment of a situation is a disposition of it as a unique occurrence, an individualization whereby effect is given to its special rather than its general features," while typically judicial treatment of a controversy is a "measuring of it by a rule in order to reach a universal solution for a class of causes of which the cause in hand is but an example."¹ The interesting query immediately presents itself: why the belated emphasis on this seemingly important element in the administration of justice? There are two significant aspects to the problem—juristic and economic.

To the jurist, the nineteenth century was a period of the maturity of law. Equity, which had been received during the period of adolescence as a sort of liberalizing influence—a "perennial reversion to justice without law,"² was now old and staid. The end and purpose of law was to insure certainty and stability of acquisition and transactions.³ So, in the application of law, each case was stretched upon a veritable bed of Procrustes and adjusted to a rule. Administration was reduced to the minimum; it was a proud boast that ours was a "government of laws and not of men." As Dean Pound observes, the "nineteenth century

¹ Pound, *An Introduction to the Philosophy of Law*, 108-9.

² Pound, *Justice According to Law*, 14 *Columbia Law Review*, 18.

³ Pound, *Introduction to the Philosophy of Law*, 86.

abhorred judicial discretion and sought to exclude the administrative element from the domain of judicial justice."⁴ Obviously, there must be a return to "justice without law" to bring the law abreast the needs of the times.

This suggests the economic phase of the problem. During the formative period of our law, the Puritan and the Pioneer wrought lasting impressions upon the fabric, each being conceived in a vital aversion for administrative governmental interference.⁵ So, the traditional common law jealousy was even more accentuated in America. But far-reaching social and economic changes in the period following the Civil War caused a complete change of front. The rapid growth of population, the concentration of people in crowded urban centers, the expansion of commerce and industry, the concentration of wealth, the pressure of social legislation, of industrial accidents—these changes made imperative demands on administration. The erstwhile law, substantive and adjective, failed to meet the changing needs.

The result was the remarkable growth of administrative tribunals. Although covering a wide field of activity, this restriction of judicial power has been most pronounced in the regulation of public-service corporations. As Mr. McCarthy asks, "Why not demand that when monopoly of any kind exists, it shall be restricted to a reasonable gain? Why not say that it shall not discriminate unjustly nor use its great power against the public welfare? If monopolies possess such Force that one man cannot compete with them, why not let the state—all men combined—control them? Why not oppose Force by Force? . . . When business affects the interest of all, is it not something more than a private matter for the concern of a private individual?"⁶ Such was done; and North Carolina was among the vanguard.

II. THE NORTH CAROLINA CORPORATION COMMISSION

A. *The Legislative History*

The General Assembly of North Carolina of 1891 passed an act establishing a "Railroad Commission" to consist of three commissioners.⁷ The Commission was authorized to exercise a general supervision of railroad, steamboat and canal companies doing business in the state, in respect to the fixing of reasonable freight and passenger tariffs, the prevention of unjust discriminations, and the regulation of other matters pertaining to transportation within the state in which the public was interested.⁸ Further, the Commission was authorized to provide reasonable rates for the transportation of packages by express companies, and for the transmission of messages by telegraph companies in the state.⁹ Just four days later, the Gen-

⁴ Pound, *An Introduction to the Philosophy of Law*, 113.

⁵ Pound, *The Spirit of the Common Law*, 44-5; 119.

⁶ McCarthy, *The Wisconsin Idea*, 12.

⁷ Laws of N. C., 1891, chap. 320.

⁸ Sections 4-9; street railways were expressly excepted from the act, but were included in the amendment of 1897. See note 12.

⁹ Section 26.

eral Assembly passed an act to make the Railroad Commission a court of record, inferior to the supreme court, with all the powers and jurisdiction of a court as to all subjects embraced in the act which created it.¹⁰

As the eminent Chief Justice has rightly remarked, the state, in creating the Railroad Commission, "made a radical change in its attitude toward railroads. . . . This act was passed after the fullest discussion for years before the people of the state. It expressed their deliberate conviction that the time had arrived when the state, in the public interest, should supervise and control the charges and the conduct of common carriers, including express companies, telegraphs, telephones and steamboats."¹¹

The legislature of 1897 passed an amendatory act to chapter 320 of the laws of 1891¹² which somewhat extended the jurisdiction of the Railroad Commission. The forty-second section, chapter 169 of the Acts of 1897, made the Railroad Commission a board of appraisers of the property belonging to public-service companies in these words: "shall constitute a board of appraisers and assessors for railroad, telegraph, canal and steamboat companies."

Such, then, was the status of the Railroad Commission when the General Assembly of 1899 passed an act to repeal the Railroad Commission,¹³ and acts amendatory thereof, and on the same day passed and ratified an act to establish the Corporation Commission.¹⁴ Obviously, these acts were in *pari materia*; the question immediately suggests itself, what effect did this legislation have on the pre-existing Railroad Commission?

Section 23 of chapter 164 (Acts of 1899), in declaring the powers of the Corporation Commission, re-enacts the former laws in the following words: "To perform all the duties and exercise all the powers imposed or conferred by chapter 320 of the Public Laws of 1891 and the acts amendatory thereto." By a comparison of the act of 1891, creating the Railroad Commission, with the act of 1899, establishing the Corporation Commission, it may be readily discerned that the former is virtually incorporated into the latter. Each section of the Railroad Commission Act has its counterpart, expressed with but few exceptions in identically the same terminology, in the act of 1899.¹⁵

There is, then, an act professing to repeal chapter 320, Acts of 1891, and yet, in an act passed the same day, it is bodily incorporated into the new law. The proper interpretation seems to be that the acts of 1899, chapters 506 and 164, are construed to be amendments to the Railroad Commission Act, and to continue the same in force as thus amended. The Supreme Court adopted this construction in

¹⁰ Laws of N. C., 1891, chap. 498.

¹¹ *The Railroad Connection Case* (1904) 137 N. C. 1, 13, 49 S. E. 191.

¹² Laws of N. C., 1897, chap. 206. This amendment extended the jurisdiction of the Commission to street railways not wholly within the limits of a town, and conferred the power to require telegraph companies to extend their lines and establish new agencies, and to make rules for receiving, forwarding, and delivering messages.

¹³ Laws of N. C., 1899, chap. 506.

¹⁴ Laws of N. C., 1899, chap. 164.

¹⁵ In section 2 (act of 1899), there are some extensions of the jurisdiction of the Commission, including telephone companies, public and private banks, and all loan and trust companies. Sections 3, 4 and 5 also contain slight changes.

Abbott v. Beddingfield.¹⁶ The Court observed, "It seems to us that no one can read the acts of 1899, chapters 506 and 164, without coming to the conclusion that it was not the purpose of the Legislature to abolish the Railroad Commission—the duties and functions of that institution or commission, but to abolish—to change—the officers holding and exercising the duties and functions of the Commission."¹⁷

B. The Constitutionality of Such Administrative Action

True to expectations, the constitutionality of the Railroad Commission Act was challenged in the first case on appeal to the Supreme Court.¹⁸ First, according to the prevailing custom of the times, it was claimed that such was an unauthorized delegation of legislative powers. The Court disposed of this objection in short order. "That the Legislature has the authority to provide reasonable rules and regulations for the effectuating of such purposes (i. e. supervision of railroads and other public-service corporations) is too well settled to admit of discussion. . . . And it is equally well settled that in delegating such authority to a commission, it does not transcend its constitutional powers. . . . 'The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed is apparent and great, and this we understand to be the distinction recognized strikingly by all the courts as the true rule in determining whether or not in such cases a legislative power is granted. . . . The former would be unconstitutional, whilst the latter would not.'"¹⁹ In other words, under the dogma of separation of powers, the Legislature cannot abdicate in favor of a commission.

The second ground was the traditional one that the Legislature could not commingle judicial powers with the other functions of the Commission. But the Court disposed of this objection in equally concise fashion. "Neither is there any force in the argument that the Legislature cannot confer judicial powers upon the Commission, as the Constitution (Art. IV, sec. 2) expressly authorizes the establishment of such courts inferior to the Supreme Court as the Legislature may deem proper."²⁰ And, as the Court remarks, the Legislature has constituted the Commission a court.

Seemingly, the Court experienced no difficulty with the constitutional provision that the "legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other,"²¹ as related to the Commission—a synthesis, within its sphere, of each of the powers. But it is now generally regarded that the doctrine of separation of powers is rather a

¹⁶ 125 N. C. 256 (1899). Furches, J., in the opinion intimates clearly that the purpose of changing the name from "Railroad Commission" to "Corporation Commission" was to place the office of Commissioner in the hands of a person in harmony with the political sentiment of the party which controlled the Legislature.

¹⁷ In view of this construction, for the purposes of this paper, no effort will be made, in references to the Commission, to distinguish between the Railroad and Corporation Commission.

¹⁸ *Express Co. v. Railroad Co.* (1892) 111 N. C. 463, 16 S. E. 393.

¹⁹ *Ibid.*, at page 472.

²⁰ *Ibid.*, at page 473.

²¹ The Constitution of N. C., Art. I, sec. 8.

practical policy of government, and that it is impracticable—yea impossible—to delimit the respective functions into watertight compartments.²² It is submitted that the Court has dealt with the problem in a proper and commendable fashion.

The constitutional validity of specific provisions in the Commission Acts has often been in issue. The power to make reasonable rates and to devise regulations to enforce them has been repeatedly sustained; ²³ likewise, the power to require intersecting railroads to make reasonable connections,²⁴ to order railroads to construct track-scales²⁵ and industrial sidings,²⁶ and finally, to require several railroads entering a city to establish a union depot.²⁷ But one single provision of the Acts has been held to be unconstitutional, namely, section 29 of the Railroad Commission Act, which authorized an appeal direct to the Supreme Court when no exception was taken to the facts as found by the Commission.²⁸

C. The Administrative Machinery—Its Nature and Jurisdiction

1. *A Court of Record.* As we have seen,²⁹ the Commission is a court of record. But apparently the Court has not placed very much emphasis on this fact for, to use the language of Justice Douglas in *Caldwell v. Wilson*, "it was clearly the object of the Act (i. e. making the Commission a court of record) simply to give authenticity to its records and proceedings, as it added nothing to its duties and powers."³⁰

2. *An Administrative Not a Judicial Court.* In the first case on appeal, Chief Justice Shepherd made the following observation: "Whether a court, having no power to enforce its judgment, fulfills the definition of a court of record and of general jurisdiction is *unnecessary to be considered*."³¹ But that very important query has now been definitely settled. In *Express Co. v. Railroad*, it was held that ample authority was conferred upon the Commission to entertain and pass upon complaints for the violations of rules and regulations respecting matters embraced within section 4 of the act, and in *Mayo v. Telegraph Co.*,³² this was extended to all subjects with regard to which the act in question empowers the Commission to make rules and regulations. Yet, the decisions are uniform in holding the Commission to be an *administrative* rather than a *judicial* court. This distinction impels further analysis. What is the real nature of this tribunal?

The sessions of the court for the hearing of contested cases are held at Raleigh, the state capital. Special sessions may be held at other places, and not infrequently, the Commissioners visit at the "situs" of the controversy for the purpose

²² 26 Harvard Law Review, 744; 753.

²³ *In re Utilities Co.* (1919) 179 N. C. 151, 161, 101 S. E. 619; *Commission v. Railroad* (1900) 127 N. C. 283, 37 S. E. 266.

²⁴ *Railroad Connection Case* (1904) 137 N. C. 1, 49 S. E. 191.

²⁵ *Commission v. Railroad* (1905) 139 N. C. 126, 51 S. E. 793.

²⁶ *Commission v. Railroad* (1905) 140 N. C. 239, 52 S. E. 941.

²⁷ *Dewey v. Railroad* (1906) 142 N. C. 392, 55 S. E. 292.

²⁸ *Commission and Pate v. Railroad* (1898) 122 N. C. 877, 29 S. E. 334.

²⁹ See note 10, *supra*.

³⁰ (1897) 121 N. C. 425, 472, 28 S. E. 554.

³¹ *Express Co. v. Railroad* (1892) 111 N. C. 463, 474, 16 S. E. 393.

³² (1893) 112 N. C. 343, 345, 16 S. E. 1006.

of personal inspection, etc. Any person may lay his complaint of grievance before the Commission, or petition it for any relief which it has power to afford. This petition must set forth the grounds of the complaint in writing, and if the respondent contests the claim, an answer, in writing, must be filed within ten days from the date notice was mailed.³³ Amendment and extensions of time are, however, allowed in the discretion of the Commission.

The hearing of the case is assimilated to the ordinary civil action. "Upon issue being joined by the service of the answer," the Commission assigns a time and place for hearing the same. Witnesses are examined orally before the Commission. Section 1093 of the Consolidated Statutes provides that the rules of evidence shall be the same as in other civil actions. The petitioner must prove the existence of the facts alleged as the basis for the relief sought, unless the respondent admits them or fails to answer. In case of failure to answer, the Commission will take such proof of the charge as may be deemed reasonable and proper, and make such order thereon as the circumstances of the case appear to require. Subpoenas will issue requiring the attendance of witnesses or the production of books, papers, documents, etc., relating to any matter pending before the Commission. And depositions may be taken in any cause at issue.³⁴

So far, the Commission might well be called a judicial court, but here is where the distinction arises. The Commission makes such order as the circumstances of the case justify, but these orders are not judgments of a court.³⁵ The Commission cannot issue execution to enforce them;³⁶ they simply serve as the basis for judicial action in the superior court to enforce them or to punish their violation.³⁷ On appeal, the Commission occupies the position of relator and not that of a lower court from which an appeal has been taken; so, in *Pate v. Railroad*,³⁸ it was held that, if appeals lay direct to the Supreme Court, the latter would be assuming original jurisdiction of a matter as to which there had been no judicial adjudication, whereas the jurisdiction of the Supreme Court was appellate only, except in claims against the state.

3. *Jurisdiction of the Commission.* The jurisdiction of the Corporation Commission extends to:

a—All railroad, street railway, steamboat, canal, express and sleeping-car companies, and all other companies engaged in the carrying of freight or passengers.

b—All telegraph and telephone companies, and all other companies engaged in the transmission of messages.

c—All electric light, power, water, and gas companies, other than those owned by municipal corporations.

³³ Section 1092 of the Consolidated Statutes expressly authorized the Commission to prescribe the rules of practice and procedure in all matters before it. The rules adopted in accordance therewith may be found in the annual reports of the Commission under the caption, "Rules of practice in cases and proceedings before the Court of the North Carolina Corporation Commission."

³⁴ C. S., sec. 1809-22.

³⁵ *Commission v. Railroad* (1909) 151 N. C. 447, 66 S. E. 427.

³⁶ *Mayo v. Telegraph Co.* (1893) 112 N. C. 343, 16 S. E. 1006.

³⁷ C. S., sec. 1102-3.

³⁸ (1898) 122 N. C. 877, 29 S. E. 334.

d—All flume companies availing themselves of the power of eminent domain.

e—All water power, hydro-electric power and water companies.

f—All corporations or individuals, other than municipal corporations, operating public sewerage systems.

g—All public and private banks, all loan and trust companies.³⁹

The statute expressly provides that the powers and duties vested in the Commission in regard to these public-service companies shall be the same as those vested with respect to railroads.⁴⁰

Such, in brief, is the general nature of the North Carolina Corporation Commission—a typical administrative tribunal conceived in response to the needs of the times.

III. JUDICIAL REVIEW OF THE NORTH CAROLINA CORPORATION COMMISSION

A. Judicial Review of Administrative Action—the Problem

1. *Due Process of Law.* The growth in importance of these administrative tribunals has been termed a reversion to “justice without law”—a liberalizing, modernizing influence to bring the law abreast the needs of the day.⁴¹ Indeed, Grotius’ definition of Equity, a similar influence of a former day, might well be applied: “the correction of that, wherein the law (by reason of its universality) is deficient.”⁴² The guiding purpose of this type of “executive justice”⁴³ is to more or less individualize each particular case, and at the same time to expedite the administration of justice in such cases. Now, the question arises, how far are we willing to dispense with out “traditional safeguards” in this effort to get results at any price? What are the limitations on this endeavor?

The most important and far-reaching restriction on commission action is the fundamental limitation imposed by the Fourteenth Amendment to the Federal Constitution: “nor shall any state deprive any person of life, liberty or property, without due process of law.” Where, then, there is a taking of property by the order of the Commission, as, for instance, the fixing of a reasonable rate, who is to say whether or not “due process of law” has been observed? Can a Legislature confer such finality upon a commission which, in view of the powers conceded to it by the courts, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice? The question is now definitely answered in the negative. Where the owner claims that confiscation of his property will result from the order, or that such order is so unreasonable or arbitrary as to amount to a denial of the protection afforded by the Federal Constitution, the state *must* provide for a *judicial* (as opposed to *administrative*) determination of that fact.⁴⁴ In other words, where the commission’s order constitutes a taking of property, an

³⁹ C. S., sec. 1035.

⁴⁰ *Ibid.*

⁴¹ See page 1 herein.

⁴² Tucker’s Blackstone, I, 61-2.

⁴³ Pound, *Justice According to Law*, 14 Columbia Law Review, 12.

⁴⁴ *Chicago &c. Railway Co. v. Minnesota* (1889) 134 U. S. 418.

opportunity for a judicial review of that decision is a necessity. And, as this amounts to a "federal question," a potential⁴⁵ right of appeal to the Supreme Court of the United States attaches as of course, by writ of error to the State Supreme Court. If the state law does not provide for such judicial review of the Commission's order, then the order is invalid⁴⁶ and its enforcement can be restrained by bill in equity.⁴⁷ Generally, however, ample provision is made for judicial review of administrative action, (particularly in North Carolina as we shall see later) and the more important problem is the nature and extent of this judicial review.

2. *The Nature and Extent of Judicial Review.* Beginning with the rule enunciated in *Interstate Commerce Commission v. Illinois Central R. R. Co.*,⁴⁸ it appears that there were, broadly speaking, two instances in which the courts would set aside the orders of an administrative commission:

- (a) Where the order was beyond its constitutional powers. This includes the proposition whether the commission could constitutionally exercise the power; likewise, whether the order was within its statutory powers.
- (b) Where the order was unreasonable. This includes the question whether the order was so unreasonable or arbitrary as to amount to an invasion of the constitutional rights of the complaining party; likewise, whether there was sufficient evidence to support the order.

This deduction was, of course, predicated upon the proposition that the reviewing court would not interpose its own judgment or opinion for that of the Commission, and a review of these questions of law (including questions whether findings of fact were based on adequate evidence) was held to be sufficient. But the equilibrium of this seemingly satisfactory rule was seriously threatened, if not destroyed, by the recent case of *Ohio Valley Water Co. v. Ben Avon Borough*,⁴⁹ which held that in some cases at least the reviewing court must exercise "its own independent judgment as to both law and facts." So, this changed the general rule to this effect: the reviewing court can and will substitute its judgment for that of the Commission in the matter of rate-regulation. Whether or not this construction will be extended to other matters by analogical reasoning remains to be seen.

3. *Character of Courts on Review.* In *Commission v. Southern Railroad Co.*,⁵⁰ Justice Brown observes that when the state courts "undertake to review the propriety of the regulation in question, they do not exercise strictly judicial functions, but those which are more legislative in character," citing *Prentis v. Railroad*.⁵¹ That case was a bill in equity to restrain the enforcement of a rate which had been established by the Virginia State Corporation Commission and which was alleged to be confiscatory. The Supreme Court held that the Federal Courts should not interfere until the railroads had taken the case to the State

⁴⁵ Potential because "with such exceptions and subject to such regulations as the Congress shall make," U. S. Constitution, Art. III.

⁴⁶ *Chicago & N. W. Ry. Co. v. Minnesota* (1889) 134 U. S. 418.

⁴⁷ *Prentis v. Railroad* (1908) 211 U. S. 210, 230.

⁴⁸ (1909) 215 U. S. 452.

⁴⁹ (1920) 253 U. S. 287.

⁵⁰ (1909) 151 N. C. 447, 453, 66 S. E. 427.

⁵¹ (1908) 211 U. S. 210.

Supreme Court. It must be remembered that the Virginia State Corporation Commission, unlike the North Carolina Corporation Commission, was created by a constitutional provision.⁵² There it was provided that appeals should lie direct to the Supreme Court of Appeals, and further, if that court should reverse what had been done, it was empowered to substitute such order as in its opinion the Commission should have made.⁵³ Obviously, that is not a "strictly judicial" function. There is, of course, a marked distinction between judicial review of court action and judicial review of legislative action. In the former, the lower court has applied law and the reviewing court reviews the correctness of the actual decision; in the latter, the legislature has made law and the reviewing court determines merely whether, in so doing, the legislature acted within its constitutional jurisdiction. But in each instance, such is strictly a judicial function. And the general rule that reviewing courts are quasi-legislative in character is applicable only when such courts are vested with legislative functions by constitutional provisions. Clearly, under the North Carolina Act, the duties of the courts on appeals from the Commission are judicial in character.

Such, then, briefly is the problem of judicial review of administrative action. Where the order amounts to a taking of property, an opportunity for a judicial review thereof is a requisite; in the matter of rate-regulation, this is extended to include a determination by a "judicial tribunal . . . upon its own independent judgment as to both law and facts." To what extent is this problem accomplished under the North Carolina Commission Act?

B. The Problem Related to the North Carolina Corporation Commission

In relating the problem of judicial review of administrative action, as outlined *supra*, to the North Carolina Corporation Commission, we must consider each element briefly.

(i) Due process of law: As we shall see, the fullest possible provision is made for appeal and review. No attempt was made to confer finality upon the Commission. Every regulation and order of the Commission is subject to a *judicial* determination if the parties see fit to appeal, and such determination is made by a tribunal acting upon its own independent judgment as to both law and facts.⁵⁴

(ii) The nature and extent of the review: The powers and duties committed to the jurisdiction of the Commission are exclusive and cannot be exercised or accomplished by the courts of the state.⁵⁵ But, acting upon their own independent judgment, the courts can and will set aside the Commission's order when such order is beyond its constitutional powers or when it is unreasonable, as pointed out before.

(iii) Character of the courts on review: It is respectfully submitted that when the state courts undertake to review the action of the Commission, they act in a judicial capacity.

⁵² Virginia Constitution of 1902, Art. XII, sec. 155.

⁵³ *Ibid.*, sec. 156g.

⁵⁴ See *infra*, note 61.

⁵⁵ *Service Co. v. Power Co.* (1919) 179 N. C. 330, 334, 102 S. E. 625.

C. The Scope of Judicial Review of the Commission

1. *Provisions in the Act re Appeal and Review.* Section 7 of the Railroad Commission Act provided, inter alia, "that any company may appeal to the judge of the Superior Court in term time, and thence to the Supreme Court from any determination of the board fixing or refusing to change the rate of freight or fare."⁵⁶ Section 29 further provided that "from all decisions and determinations arising under the operation or enforcement of this act the party or corporation affected thereby shall be entitled to appeal therefrom as in other causes of appeal." Similar provisions are contained in the Corporation Commission Act, sec. 7 and 28.⁵⁷ In an opinion holding that an appeal will not lie direct to the Supreme Court from the Commission, Clark, J., quotes section 29 of the Railroad Commission Act to provide that "when no exception is made to the facts as found by the Commission," an appeal is authorized direct to the Supreme Court.⁵⁸ After a careful examination of chapter 320 of the Laws of 1891, no trace is found of such a provision. The language of section 29, however, might easily be interpreted to authorize such an appeal. And it is interesting to note that in section 28 of the Corporation Commission Act of 1899, which corresponds to section 29 of the Railroad Commission Act, there is an express provision to that effect, although that act was passed a year after the case of *Pate v. Railroad*, *supra*, had held such an appeal to be unconstitutional. Also, that an appeal was allowed direct to the Supreme Court in *Leavell v. Telegraph Co.*,⁵⁹ as no objection was taken to the validity of the above provision. But it is now well settled that when no exception is taken to the facts as found by the Commission, the appeal shall be to the judge of the Superior Court at chambers; otherwise, to the Superior Court in term time.⁶⁰

No mention is made in the acts of the writs of certiorari or prohibition. Mandamus is the method employed to enforce the order of the Commission.

Thus, the State of North Carolina has endeavored to impose the highest safeguards possible upon the exercise of the power conferred upon the Corporation Commission by making its decisions subject to the approval of the same historic bodies that are entrusted with the preservation of our other constitutional rights, if the parties see fit to appeal.

2. The Course of Review.

a. Trial "de novo" in the Superior Court.

As a general proposition, as we have seen, either party may appeal from an order or decision of the Commission. The trial in the Superior Court is "de novo."⁶¹ This fact denies to the Commission certain finality in matters of procedure which is often found in similar acts in other jurisdictions. In two states,

⁵⁶ Laws of N. C. 1891, chap. 320.

⁵⁷ Consolidated Statutes of N. C., sec. 1097.

⁵⁸ *Pate v. Railroad* (1898) 122 N. C. 877, 880, 29 S. E. 334.

⁵⁹ (1895) 116 N. C. 211, 21 S. E. 391.

⁶⁰ Consolidated Statutes of N. C., sec. 1097.

⁶¹ *Commission v. Railroad* (1912) 161 N. C. 270, 271, 76 S. E. 554.

the findings of fact by the public utility commission are pronounced conclusive,⁶² while in five states, the courts, in reviewing administrative proceedings on appeal, are restricted to the case certified to them by the Commission.⁶³ This acutely presents the interesting question as to which is the better plan for our Commission. But here the constitutional guaranty of trial by jury would seem to control. Article I, section 19 provides: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." Article IV, section 13 provides for the waiver of jury trial by agreement, but it seems that, in the absence of such consent, parties to a proceeding on appeal from the Corporation Commission could demand the right to have all facts determined by a jury. On theory, however, it is obviously unprofitable and inexpedient to provide a trial "de novo" in the Superior Court. It is indisputable that the Commission, which proceeds more or less informally and which often visits the actual scene, concerning which the claim or petition is made, can glean a more accurate and intelligent knowledge of the needs and conditions in question than can be ascertained by evidence, often entangled with conflicts. Particularly is this true in the matter of fixing rates in view of the expert knowledge of the Commissioners derived from their capacity as a board of appraisers. And furthermore, an analysis of the cases which have been appealed from the Commission to the Supreme Court supports this conclusion even more strikingly.

In eighteen cases on appeal from the Commission,⁶⁴ the superior courts have reversed the decision of the Commission in seven instances.⁶⁵ Of these, one was dismissed on purely procedural grounds;⁶⁶ four were reversed as a matter of law as beyond the statutory powers of the Commission;⁶⁷ and two were submitted to the jury to pass upon the reasonableness or practicality of the Commission's order.⁶⁸ In the *Railroad Connection Case*, the jury sustained the reasonableness and propriety of the order of the Commission, and yet, the Superior Court judge ruled as a matter of law that the order was beyond the statutory powers of the Commission.⁶⁹ And in *Commission v. Railroad*, the jury found *contra* to the Commission on the issue of practicality of the proposed union depot, but the Supreme Court, in reversing the decision of the Superior Court, held that evidence had been improperly admitted, and the Chief Justice, in a concurring opinion, said: "In this case the Corporation Commission found as a fact that a union station at Rutherfordton was 'practicable,' and there was no evidence to the contrary. The court, in my opinion, should have submitted the only issue contemplated by the

⁶² California Public Utilities Act, 1912, 67; Vermont, Laws of 1908, No. 116, 12.

⁶³ California, same; Vermont, same; New Jersey Public Utilities Act, 1911, 38; Oklahoma Constitution, Art. IX, sec. 22; Washington Public Service Commission Act, 1911, 86. (Quoted from Pound, *Justice According to Law*, 14 Harvard Law Review, 16.)

⁶⁴ See my summary, note 137.

⁶⁵ *Ibid.*

⁶⁶ *Commission v. Railroad*, 151 N. C. 447.

⁶⁷ *Express Co. v. Railroad*, 111 N. C. 463; *Mayo v. Telegraph Co.*, 112 N. C. 343; *Commission v. Railroad*, 139 N. C. 126; *Commission v. Railroad*, 153 N. C. 559.

⁶⁸ *The Railroad Connection Case*, 137 N. C. 1; *Commission v. Railroad*, 161 N. C. 270.

⁶⁹ 137 N. C. 1, 7.

statute, i.e., whether the establishment of the union station was 'practicable,' and on the evidence should have directed a verdict and entered judgment affirming the order of the Commission."⁷⁰

Thus, it is seen that in each case in which the reasonableness or practicality of the Commission's findings was submitted to the jury as an issue of fact, the jury made a like finding, with but one exception, and even in that case, the Supreme Court intimated that there was not sufficient evidence to support the finding of the jury and that the court should have directed a verdict in accordance with the order of the Commission. In view of these facts, there can be but one conclusion. On theory and in practice, needless repetition, delay and expense could be avoided, and without any appreciable sacrifice of protection and security, by a provision that the findings of fact by the Corporation Commission should be made final. But, as pointed out above, this would necessitate a constitutional amendment.

b. Final orders and decisions. An appeal, of course, presupposes a final appealable order or determination. To use the language of Justice Hoke, this means a "decision which affects or purports to affect some right or interest of a party to the controversy and in some way determinative of some material questions involved."⁷¹ Accordingly, where the Commission simply made an investigation relative to the petitioner's claim to a penalty for delay in delivering freight, it was held that such was not an appealable order, reviewable by the courts.⁷²

c. Appeal to the Supreme Court. Section 1100 of Consolidated Statutes provides that either "party may appeal to the Supreme Court from the judgment of the Superior Court under the same rules and regulations as are prescribed by law for appeals." And section 1103 provides, inter alia, that an "appeal shall lie to the Supreme Court in behalf of the Corporation Commission, or the defendant corporation, from the refusal or the granting" of a peremptory mandamus by the Superior Court to enforce an order of the Commission. In no case, will an appeal lie direct to the Supreme Court from an order of the Commission.⁷³

3. *Conclusiveness of Findings by the Commission.*

a. Presumption of reasonableness; burden of proof.

We have seen that in some jurisdictions, findings of fact by the Commission are declared to be final,⁷⁴ but that, under the North Carolina act, the trial on appeal to the Superior Court is "de novo." What weight is given to the findings of fact by the Commission, or its orders and decisions, at this trial? The statute expressly provides that "the rates fixed or the decision or determination made by the Commission shall be prima facie just and reasonable."⁷⁵ This much is clear, then, that in the "de novo" trial in the Superior Court, there is a presumption in favor of the validity of the Commission's order, which fact shifts the burden on the appel-

⁷⁰ 161 N. C. 270, 275.

⁷¹ *Hardware Co. v. Railroad* (1908) 147 N. C. 483, 490, 61 S. E. 271.

⁷² *Hardware Co. v. Railroad*, 147 N. C. 483.

⁷³ See note 58, *supra*.

⁷⁴ See note 62, *supra*.

⁷⁵ Consolidated Statutes, sec. 1098.

lant to prove the contrary.⁷⁶ Will a mere preponderance of evidence overcome this presumption? If so, it means nothing. The Supreme Court has not, as yet, delimited the exact weight to be accorded to this presumption. The Supreme Court of the United States, in holding a similar provision in the Interstate Commerce Commission Act to be constitutional, observed, "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacles to a full contestation of all the issues, and takes no fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury nor take away any of its incidents, nor does it in any way work a denial of due process of law."⁷⁷

In a concurring opinion to *State v. Railroad*, in which the Commission had ordered the defendant railroads to erect a union depot, Clark, C. J., after stating that the finding of the Commission to the effect that such was "practicable" was prima facie correct and that the burden was upon the defendants to show evidence to the contrary, says, "In this case none was shown, and the judge should have directed a verdict affirming the order of the Commission."⁷⁸ Again, in approving the assessment placed upon the defendant corporation, Justice Brown says, "We see no reason, *even if we had the power*, to revise this finding. There is abundant evidence to support it."⁷⁹ In a recent case, Hoke, J., makes the following observation, "In the case on appeal, there is no allegation or suggestion that the relevant facts have not all been disclosed, and, on careful consideration of these facts, we find nothing which shows or that would uphold the conclusion that the action of the Commission in the present instance was either unreasonable or unjust. On the contrary, it appears that they had fully and impartially considered the case, that the decision made by them rests on good and sufficient reason, and in a cause of this character, that there is no issue of fact or law presented that would require or permit further investigation."⁸⁰

From these delineations relative to the immediate problem under consideration, it is readily observed that the presumption in favor of the validity of the decisions and orders of the Commission is of real value and significance. And again, an analysis of the cases bears out this conclusion. There are only four cases in which the Supreme Court has failed to sustain the validity of the orders and decisions of the Commission.⁸¹ Each of these turned on a difficult question of law, namely, that the decision in question was beyond the statutory powers of the Commission. There is not one single instance in which the Supreme Court has held that there was error in the finding of fact by the Commission, or that there was not sufficient evidence to support that finding. In every instance, the reasonableness of the Commission's order has been sustained by the Court of last resort

⁷⁶ *State v. Railroad*, 161 N. C. 270, 274.

⁷⁷ *Meeker v. Lehigh Valley Railroad Co.*, 236 U. S. 412.

⁷⁸ 161 N. C. 270, 274.

⁷⁹ *State v. Morrison and Sons Co.* (1911) 155 N. C. 53, 55, 70 S. E. 1079.

⁸⁰ *Commission v. Railroad* (1915) 170 N. C. 560, 565.

⁸¹ *Express Co. v. Railroad*, 111 N. C. 463; *Mayo v. Telegraph Co.*, 112 N. C. 343; *Commission v. Railroad*, 153 N. C. 559; and *Commission v. Telegraph Co.*, 113 N. C. 213. In the last case, the decision of the Commission was modified and affirmed.

where, as a matter of law, the order was within its statutory powers. This demonstrates clearly that real, appreciable weight is given to the presumption in favor of the validity of such orders. Furthermore, in three other cases,⁸² the judgment of the Superior Court reversing the decision of the Commission was, in turn, reversed by the Supreme Court which held to that effect, and expressly in one,⁸³ that the appellant had been unsuccessful in the endeavor to overcome that presumption.

A very interesting query arises in this connection. If, as in the case cited in note 72, the Commission makes an investigation and ascertains that its rules have been violated and determines what recompense should be made therefor, what effect would be given to this determination in an action before a justice of the peace, or other court having jurisdiction, to recover the penalty?

b. Functions of the court and jury. Another problem, inherently akin to the one just discussed, is involved in the question whether the reasonableness of the order or regulation is a matter for the court or the jury on appeal to the Superior Court. It seems that the Supreme Court has cautiously—if not consciously—avoided commitment on this important issue. We have already seen⁸⁴ that there are but four instances in which the courts on appeal will interfere with the orders and decisions of the Commission. So, in this connection, we find that the action of the Commission "should not be disturbed unless it is made to appear that, in a given case, it is clearly unreasonable and unjust."⁸⁵ The cases fail to delimit the respective spheres of the court and jury in this process. As Justice Connor expresses it, "The usual rule is that what is a reasonable time, or a reasonable notice, or a reasonable regulation upon the facts admitted, or found by the jury, if disputed, is a question of law. The practice in regard to the validity of orders made by the Corporation Commission not being well settled. . . . I do not wish to be understood as expressing any opinion in regard to it."⁸⁶ The reasonableness of an order of the Commission which quickened the schedule of a train twenty-five minutes in order to make connection with another line was submitted to the jury as an issue of fact and decided by them in the affirmative.⁸⁷ Where the Commission had ordered a railroad to furnish a shipper with track scales, and on appeal to the Superior Court the judge ruled as a matter of law that the Commission had "no power under the law to make the order appealed from," the Supreme Court held that the court "should have left the reasonableness of the order to the jury upon proper instructions as to the law. The ruling that the Commission 'had no power' to make such orders deprived the complainant of any opportunity of presenting his contentions as to the reasonableness of the order for review."⁸⁸ The propriety of an order requiring a railroad to construct a spur

⁸² *The Railroad Connection Case*, 137 N. C. 1; *Commission v. Railroad*, 139 N. C. 126; and *Commission v. Railroad*, 161 N. C. 270.

⁸³ *Commission v. Railroad*, 161 N. C. 270, 275.

⁸⁴ See note 49, *supra*.

⁸⁵ *Commission v. Railroad*, 170 N. C. 560, 565.

⁸⁶ *The Industrial Siding Case*, 140 N. C. 239, 245.

⁸⁷ *The Railroad Connection Case*, 137 N. C. 1.

⁸⁸ *Commission v. Railroad*, 139 N. C. 126, 131.

siding for the convenience of the petitioner was submitted to the jury in the *Industrial Siding Case*.⁸⁹ And, in *State v. Railroad*,⁹⁰ it was stated that when an appeal is taken from the order of the Commission requiring railroads to establish a union depot, "the sole query for a jury, under the statute, is whether the execution of the order is 'practicable'."⁹¹ The reasonableness of a rate has not been submitted as an issue of fact to a jury. The question was only incidentally involved in *State v. Railway*, where the Legislature had directly fixed the passenger rate and the defendant railroad was indicted for a violation of that law.⁹² And, in the case of *In re Utilities Co.*,⁹³ the judge, by consent, took the case under advisement and later entered judgment to the effect that the question of the reasonableness of the rate fixed by the Commission should be referred to a referee for investigation and report; whereupon the petitioner appealed because of the refusal to dismiss the appeal of the respondent.

The cases thus show a tendency to submit the question of reasonableness of regulations by the Commission to the jury. But as Justice Connor remarked in the *Industrial Siding Case*, *supra*, "there was no exception." In no case has an exception been taken to this practice. The interesting query is, how would the Supreme Court deal with such an exception? This problem would, of course, be entirely eliminated by the suggestion made relative to a provision that the findings of fact be declared final with the Commission.

4. *Parties on Appeal.* Having inquired into the nature and scope of the appeal from the Corporation Commission, the question naturally arises, who is entitled to appeal from these decisions and determinations? Consolidated Statutes, section 1097, provides: "From all decisions or determinations made by the Corporation Commission any party affected thereby shall be entitled to appeal." And section 1098 provides further: "The cause shall be entitled 'State of North Carolina on relation of the Corporation Commission against (here insert name of appellant)'." These provisions seem to indicate that the right of appeal is confined to a party to the proceedings. Are the so-called petitioners parties to the proceedings within the intendment of the statute? The question arose for the first time in *Commission v. Railroad*.⁹⁴ There the citizens of Morganton, informally organized as the Morganton Retail Merchants Association, petitioned the Commission to require the Southern Railroad Company to construct an adequate freight depot in that city. The Commission so ordered, and the Railroad Company excepted and appealed. At the trial in Superior court, the petitioners moved to dismiss the appeal because the president of the association had not been served with notice, and the judge sustained the motion. The Supreme Court held that the president of the association was not a party to the proceeding, and that it was immaterial whether the association was a legal entity—it, too, was not a party.

⁸⁹ 140 N. C. 239, 242.

⁹⁰ 161 N. C. 270, 274.

⁹¹ *Ibid.*

⁹² *State v. Railway* (1907) 145 N. C. 495, 59 S. E. 570.

⁹³ 179 N. C. 151, 158.

⁹⁴ 151 N. C. 447.

The next case in which the question was directly involved was "*The Commission, Upon the Complaint of W. D. Redfern and Others v. Railroad*"—the case which gave rise to the Chief Justice's "protest, which is also prophecy."⁹⁶ The petitioners sought to have the Commission to require the defendant railroad company to re-locate its depot for their convenience. The Commission found that this was unreasonable under the circumstances, and refused to make the order. The petitioners appealed to the Superior Court under the title indicated, and that court in turn dismissed the appeal. The Supreme Court sustained this decision in significantly explicit terms. After quoting the statute, the court says, it "plainly indicates that the right of appeal is confined to the state and the corporation whose legal rights are affected by the Commission's order. . . . The statute does not contemplate that every complainant may appeal and litigate the matter before the courts in his own name. It must be done in the name of the state upon the relation of the Corporation Commission. If every individual complainant is allowed to appeal and bring his grievance before a jury, it would defeat the very purpose for which the Commission was created."⁹⁶

In other words, this language of the court limits the right of appeal to the defendant corporation whose interests have been adversely affected, for it would be, indeed, a solecism for the Commission to appeal from its own decision. Thus, it would seem that the action of the Commission in denying the relief sought by the petitioners is irreviewable by the courts. But other language of the court seems to graft a very important limitation upon this doctrine. "The petition sets forth no property or proprietary right in the petitioners that is affected by the order of the Commission. They are affected only as citizens of the community, and have no more interest than the intervenors and other citizens who oppose the removal of the station." In other words, it would seem that if the petitioners had a *certain interest* in the relief sought, they would be entitled to prosecute the appeal.

The tenor of the "protest" by the Chief Justice was to this effect: "But to give to the Corporation Commissioners the absolute and irreviewable refusal of relief when demanded by the private citizen and property owner, while giving to the railroad company every opportunity for the review of any decision of the Corporation Commission against it, would be indeed to create the most perfect and irresponsible 'despotism of three men' that could be conceived." He would substitute "person" for "party."⁹⁷

Just what interest is requisite to enable the petitioner to appeal from an order of the Commission denying the relief sought has not been clearly delimited. In a case just two years after the above decision,⁹⁸ the petitioner appealed from the decision of the Commission and the point was not even mentioned. The A Railroad agreed to construct such system of switches as the B Railroad should specify if the latter would allow it to cross the latter's tracks. The B Company demanded

⁹⁶ 170 N. C. 560, 572.

⁹⁶ *Ibid.*, p. 563.

⁹⁷ 170 N. C. 560, 571.

⁹⁸ *Commission v. Railroad* (1917) 173 N. C. 413, 92 S. E. 150.

the construction of the "tower interlocking system" which the A Company claimed was unreasonably elaborate and expensive; wherefore the A Company petitioned the Commission to prescribe what kind of a switch should be installed. The Commission refused the relief on the grounds that the contract should prevail in the absence of a controlling public interest.⁹⁹ From this decision, the petitioner appealed to the Superior Court, thence to the Supreme Court, and in each instance, the decision of the Commission was duly affirmed. It was so obvious that this was sufficient interest in the determination to support an appeal that issue was not taken on the question. Thus, where a private property right of the petitioner is directly involved, there can be no doubt that such a petitioner is entitled to appeal from an adverse order of the Commission.

The question was raised in the last case to be appealed to the Supreme Court¹⁰⁰ but in a slightly different form. There a Utility Company petitioned the Commission to authorize an increased rate. The City of Charlotte, in which the company operated its lines, was made a party (respondent) by notice at the direction of the Commission, and it appeared and resisted the application. And, too, the city held, or made a reasonable bona fide claim to hold, rights under a contract subsisting between it and the Utility Company. From an order granting the relief prayed for, the city appealed, and in the Superior Court, the petitioner moved to dismiss on the grounds that the city was not a party to the proceeding and so had no right to appeal. The Supreme Court held that this motion was properly disallowed as the order of the Commission was adverse to the interests which the city represents, and, as it had been made a party and recognized as such by the Commission, it was therefore a party "affected by the decision and determination of the Commission." But the appeal was taken in this instance, not by the petitioner, but by the respondent. Our immediate problem is, could the petitioner have maintained an appeal from the order of the Commission?

The most that can be said, then, is that the action of the Corporation Commission will be judicially reviewed on appeal: 1—When the order of the Commission is adverse to the defendant corporation; 2—when the petition sets forth a *sufficient proprietary interest* in the petitioners which is adversely affected by the order. The prophecy of the Chief Justice has not, as yet, come true.

5. *Review by the Federal Courts.* We have seen that where the Commission's order amounts to a taking of property, an opportunity for the judicial review of that decision is a necessity. But, we have also seen that ample provision is made for judicial review of the action of the Commission in the state courts of North Carolina. Now, the question remains, can the Federal courts exercise any control over this administrative action?

There are two elements to the problem. First, on appeal to the Superior Court, does the proceeding from the Commission become a "suit at law" within the terms of the Federal statute authorizing removals? It has been definitely determined

⁹⁹ The Commission found as a fact the system proposed by the petitioner was adequate and safe; likewise the tower system; hence, the public safety was not involved.

¹⁰⁰ *In re Utility Co.* (1919) 179 N. C. 151, 101 S. E. 619.

that even on appeal these administrative proceedings are not suits at law within the intendment of the removal acts.¹⁰¹ And it is equally well established that the inferior Federal courts do not have jurisdiction of the subject matter.¹⁰² The subject-matter of the controversy is a mere regulation under the police power of the state. "While the justness and feasibility of such regulations may be reviewed upon appeal by the state's own tribunals, endowed by legislation with such supervisory power, the Federal courts have no jurisdiction over them unless the regulation is of such an unreasonable or arbitrary character as to be in effect not a mere regulation but an infringement upon the right of ownership, or in some other way repugnant to the protective clauses of the Fourteenth Amendment to the Federal Constitution. . . . That court (Supreme Court of the United States) has expressly repudiated the idea that the Federal courts, under the guise of protecting private property, may extend their authority to the subject of state regulation, a matter not within their competency."¹⁰³ An earlier case had intimated that if the petition for removal had sufficiently alleged the amount involved, removal to the Federal courts would have been allowed.¹⁰⁴

Secondly, even if these administrative regulations are not within the purview of the removal acts of Congress, it would seem that if the regulation "is of such an unreasonable or arbitrary character as to be in effect not a mere regulation but an infringement upon the right of ownership," then, the enforcement of such an order could be enjoined in the Federal courts in a collateral proceedings. And this has often been done. In *Railroads v. Commission*,¹⁰⁵ decided prior to the construction placed upon the Corporation Commission Act in *Abbott v. Beddingfield*,¹⁰⁶ the Commission was enjoined from assessing the property of railroads for taxation. But this judgment was reversed in a re-hearing after the decision of *Abbott v. Beddingfield*.¹⁰⁷ In *Matthews v. Commissioners*, the claimant, a stockholder in the Railroad Company, sought to restrain the enforcement of an order of the Commission reducing rates. The question of the reasonableness of the rates was referred to a master,¹⁰⁸ and in a later case which came up on the report of the master, it having been found that the rates were not unreasonably low, the injunction was denied.¹⁰⁹ And, when removal was denied in *Commission v. Railroad*,¹¹⁰ a perpetual injunction was granted in a Federal court enjoining the enforcement of the order which was held to be void as an interference with interstate commerce,¹¹¹ and this was sustained by the Supreme Court of the United States.¹¹² In the last cited cases, it was observed that the proceeding was not

¹⁰¹ *Commission v. Railroad* (1909) 151 N. C. 447, 66 S. E. 427.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*, p. 452.

¹⁰⁴ *Commission v. Railroad* (1904) 135 N. C. 80, 47 S. E. 229.

¹⁰⁵ (1899) 97 Fed. 513.

¹⁰⁶ See note 16, *supra*.

¹⁰⁷ *Railroads v. Commission* (1900) 99 Fed. 162.

¹⁰⁸ (1899) 97 Fed. 400.

¹⁰⁹ *Matthews v. Comrs.* (1901) 106 Fed. 7.

¹¹⁰ (1904) 135 N. C. 81, 47 S. E. 229.

¹¹¹ *Railroad v. Ice and Coal Co.* (1904) 134 Fed. 82.

¹¹² (1906) 202 U. S. 543.

bad as against the state within the Eleventh Amendment. It is submitted that, if the functioning of the Commission is not state action, it is difficult to apprehend how such action could contravene the Fourteenth Amendment with respect to due process of law.

In the light of *Prentis v. Atlantic Coast Line*,¹¹³ the North Carolina Supreme Court has intimated that the Federal courts should not interfere with the action of the Commission until the complainant "has exhausted the right of review and appeal open to it under the laws of the state."¹¹⁴ And further, that even then this can be done only by the Supreme Court of the United States upon writ of error. It is respectfully submitted that such a conclusion is untenable. In this connection, it must be borne in mind that the *Prentis Case* dealt with legislative action of the Virginia State Corporation Commission, and as we have seen, ¹¹⁵ the Supreme Court of Appeals of Virginia was, by constitutional provision, vested with finality in the exercise of this legislative function. The Supreme Court of the United States held, "It seems to us only a just recognition of the solicitude with which their rights have been guarded, that they (the railroads) should make sure that the state in its final legislative action would not respect what they think their rights to be, before resorting to the courts of the United States."¹¹⁶ True, it may be said that, as the Supreme Court of North Carolina can set aside the rate fixed by the Commission as unreasonable, and the like, it, in effect, has virtually the same powers as the Supreme Court of Appeals of Virginia. To this, it is answered that when the North Carolina Court does direct the Commission's order to be set aside, such is strictly a judicial determination and does not come within the rule announced in the *Prentis Case*. Moreover, granted that it did, there is nothing in the *Prentis Case* to support the conclusion that the reasonableness of the Commission's order "can only be determined by the Supreme Court of the United States upon writ of error." As Justice Holmes remarks, "If the rate should be affirmed by the Supreme Court of Appeals (of Virginia) and the railroads still should regard it as confiscatory, it will be understood from what we have said that they will be at liberty then to renew their *application to the Circuit Court*, without fear of being met by a plea of *res judicata*." This would seem to be imperative, in view of section 1101 of Consolidated Statutes,¹¹⁷ in order to avoid the possibility of irreparable injury in a particular case.

6. *Conclusiveness of Findings by the Governor.* The Railroad Commission Act of 1891 provided that if either of the Commissioners whose election was provided for in the act should be the holder of "any stock or bonds, or be the agent or attorney or the employee of any such company, or have any interest in any way in any such company," etc., it should be the duty of the Governor to suspend him

¹¹³ (1908) 211 U. S. 210.

¹¹⁴ *Commission v. Railroad* (1909) 151 N. C. 447, 452, 66 S. E. 427.

¹¹⁵ See notes 52, and 53, *supra*.

¹¹⁶ 211 U. S. 210, 230.

¹¹⁷ "Any freight or passenger rates fixed by the Commission, when approved or confirmed by the judgment of the superior court shall be and remain the established rates . . . until the same shall be changed . . . by judgment of the supreme court."

from office until the next meeting of the General Assembly.¹¹⁸ After an investigation, the Governor suspended Commissioner Wilson in 1897, for disqualifications arising under the above provisions. In *quo warranto*, brought by the newly appointed Commissioner to determine the title to the office, it was held that "the power of suspension rests in the hands of the Governor, which, when exercised in an orderly manner, is not reviewable by the courts. Whether the action of the Governor was justified by the facts, which he alone can find, is not for us to say."¹¹⁹ . . . There was absolutely nothing to go to the jury unless the court went behind the action of the Governor, which we think could not be reviewed by the court. The suspension by the Governor is not the final determination of the defendant's rights, which must ultimately be passed upon by the Legislature, sitting somewhat in the nature of a Court of Impeachment."¹²⁰

7. *Power of the Supreme Court to Enter Judgment.* In two instances, the Supreme Court has exercised its power to enter final judgment in cases on appeal to it. Such is, indeed, a commendable practice where the questions involved are matters of public interest. In the *Railroad Connection Case*,¹²¹ the court said, "In this matter there has already been a year's delay. The inconvenience to the public continues each day. The act of the Legislature expedites the hearing of these causes by giving them precedence of all other civil cases. Judgment will therefore be entered here reversing the judgment of the Superior Court, and affirming in all particulars and declaring valid the order of the Corporation Commission." The same practice was followed in the *Industrial Siding Case*.¹²²

8. *The Effect of Subsisting Contracts.* To what extent may the Commission's power to regulate and control public-service corporations be restricted by subsisting contracts. In an early case,¹²³ in affirming an order of the Commission in requiring a telegraph company to refund certain excess charges and to desist from further violations of the rates prescribed by the Commission, held that the telegraph company could not subtract itself from obedience to the rates prescribed by the authority of the state, through the Commission, by a contract giving one customer, the railroad, preference in business, and then setting up the plea that its entire facilities were required to accomplish that business. It would seem, then, that these corporations, vested as they are with a public interest, must make their contracts in subservience to the police power of the state. And this is even more acutely brought out in *Commission v. Railroad*,¹²⁴ where the Commission held that the contract should prevail in the absence of a *controlling public interest*. Justice Brown, delivering the opinion of the court, said, "We think this conclusion is well founded and supported by authority. It is undoubtedly true, as contended

¹¹⁸ Laws of N. C. 1891, chap. 320, sec. 1. Same: C. S. 1027, except extended to all companies within the jurisdiction of the Act.

¹¹⁹ *Caldwell v. Wilson* (1897) 121 N. C. 425, 472, 28 S. E. 554.

¹²⁰ *Ibid.*, p. 465.

¹²¹ 137 N. C. 1, 21.

¹²² 140 N. C. 239.

¹²³ *Leavell v. Telegraph Co.* (1895) 116 N. C. 211, 21 S. E. 391.

¹²⁴ (1917) 173 N. C. 413, 92 S. E. 150.

by petitioners, that public-service corporations cannot by contracting among themselves, deprive the state of its right to exercise its police power in the interest of public safety. If the contract does not adequately protect the public, then the police power may be used to the full extent necessary to require the contracting parties, notwithstanding the contract, to conform to every requirement necessary for the public safety. But, under the guise of the exercise of the police power of the state, the courts cannot deprive a citizen of property or contract rights that have no tendency to injure the public health, morals, safety, or general welfare."

In *In re Utilities Company*,¹²⁵ the predecessor of the petitioning company in its charter from the city had contracted to charge a five cent rate. So, the question arose, was the Commission restricted by this contract or could it authorize the petitioner to increase its fares. The Commission authorized the increased rate, and in affirming this decision, the Supreme Court held, "we prefer to rest our decision on the ground taken by his Honor in the court below, that whatever may have been the rights of the city under and by virtue of the alleged contract, they were taken and held subject to the orders of the Corporation Commission, made in the reasonable exercise of the police power of the state conferred upon that body by the General Assembly," subject of course, to review by the courts.

IV. SUMMARY

A. General Attitude of the Courts

It is quite evident from an analysis of the cases which have been reviewed by the courts on appeal from the Corporation Commission that there has been a complete change of front in the general attitude toward this new tribunal. The early attitude was one of anxious solicitude, the cases bespeaking an abiding apprehension lest the "radical change" adopted by the state toward public-service companies should prove to be premature. In the first case on appeal to the Supreme Court,¹²⁶ that court placed a strict construction upon the act. Section 4 of the Railroad Commission Act provided that "it shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm," etc. In accordance with its powers to make necessary rules and regulations to carry out the provisions of the act, the Commission adopted the following regulation: "No railroad company shall (by reason of any contract with any express company), decline or refuse to act as a common carrier to transport any articles proper to be transported by the train for which it is offered." The Commission held that "the refusal of the defendants to grant the plaintiff facilities for conducting an express business was a violation" of this regulation. The Supreme Court, however, announced the rather unexpected doctrine that the section of the act quoted above was merely declaratory of the common law, and did not change or enlarge the

¹²⁵ (1919) 179 N. C. 151, 101 S. E. 619.

¹²⁶ *Express Co. v. Railroad* (1892) 111 N. C. 463, 16 S. E. 393.

duties imposed upon the defendant by it; hence, the order of the Commission was not warranted by the act, nor was there a violation of the regulation of the Commission adopted in accordance therewith.

In the next case,¹²⁷ after enumerating the sections of the act creating the powers and duties of the Commission as to making rules and regulations and enforcing the same, the Supreme Court remarked, "It will be observed that all these sections are highly penal in their nature, and intelligent minds will at once concede that while it is our duty to interpret the whole law in a fair and even liberal spirit in order to reach its true intent, we are likewise required by all the principles of construction not to extend this interpretation beyond the plain and evident meaning of the words employed, in that sense which will ascertain the policy and object of the Legislature." And then the court proceeds to place an ultra-strict interpretation upon the act to the effect that as the complaint, charging the defendant telegraph company with specific instances of unnecessary delay in transmitting and delivering messages, did not allege a violation of the rules and regulations of the Commission, it did not state a cause of action. In other words, the court dealt with this new type of tribunal on strict analogy—and in a technical matter of pleading—with judicial tribunals.

In the third case on appeal,¹²⁸ the court manifested a similar attitude toward the Commission. The Commission, in order to protect persons living in Elizabeth City and Edenton from paying interstate charges, via Virginia towns, on messages between points in North Carolina, directed the defendant telegraph company to accept commercial business at the offices which it operated in conjunction with various railroad offices. The court held that this order was beyond the statutory powers of the Commission and refused to sustain it, preferring to leave the party complaining to a civil action, after the tender of a message, to test the defendant's duty.

But, what I am prone to call the "mature attitude" of the courts toward the Commission begins with *Commission v. Railroad*,¹²⁹ decided in 1900. In that case, under its rate-making power, the Commission fixed the maximum freight rates for shipment of fertilizers; providing expressly that the rates could be 20% higher on less than car-load shipments. It then fixed the minimum car-load at ten tons. The defendant claimed that the Commission possessed no power to regulate freight charges except such as were conferred upon it by the act, and that as no such power was thus conferred, the circular prescribing that the minimum car-load should be ten tons was *ultra vires*. But the court held, quite properly, that the Commission simply meant that the specified rate should apply to shipments of ten tons, or over, and such was obviously within its powers.

Then came the *Railroad Connection Case*.¹³⁰ With regard to connections, the act provided that carriers should afford "all reasonable, proper and equal facilities

¹²⁷ *Mayo v. Telegraph Co.* (1893) 112 N. C. 343, 16 S. E. 1006.

¹²⁸ *Commission v. Telegraph Co.* (1893) 113 N. C. 213, 18 S. E. 389.

¹²⁹ 127 N. C. 283, 37 S. E. 266.

¹³⁰ (1904) 137 N. C. 1, 49 S. E. 191.

for the interchange of traffic between their respective lines . . . and connecting lines shall be required to make as close connection as practicable for the convenience of the traveling public." The defendant railroad contended that this provision had reference only to the *place* of interchange—not to the *time* of interchange, and that the last requirement meant simply a physical connection. The answer of the court was a final judgment, entered by it, directing the defendant to make the proposed connection.¹³¹ And the liberality of the view thus adopted is accentuated by the fact that there was a pre-existing statute¹³² which gave to the railroads themselves the right to "regulate the time and manner in which passengers and property shall be transported." But, as the court observes, by the Commission act, "the state made a radical change in its attitude toward railroads," and so it was held that the act of 1891 modified the above-mentioned statute "certainly to the extent that the right formerly conferred upon the railroad companies . . . was made subject to the power of the Commission to require connections to be made, wherever public convenience should require this to be done, and the order was reasonable and just."

In a case just one year later—the *Track Scales Case*¹³³—the court took a similar attitude. The railroad claimed that the Commission had no power to require that such accommodations be rendered to the public. The court admits that "track scales" are not specifically mentioned in the act, but it affirms the authority of the Commission to require that such facilities be furnished from two provisions in the act: section 17, which provides that "all railroad companies in this state shall on demand issue duplicate freight receipts to shippers, in which shall be stated the class or classes of freight shipped and the freight charges over the roads giving the receipt," thus entitling the shipper to demand that the shipment be weighed at the time it is made; and section two, sub-section 12, of the Corporation Commission Act, which provides that the Commission may require "the erection of depot accommodations commensurate with such business and revenue." The court in emphasizing this latter section said, "There was no intention to give a schedule of the thousands of appliances used in handling the business of common carriers, nor to enumerate the countless dealings between them and their patrons, which such Commission should supervise. The clearly declared purpose was to put the control and supervision of the whole matter in the hands of an impartial Commission," etc.

To complete this change of front, the following language was employed in *Dewey v. Railroad*,¹³⁴ relative to the statute authorizing the Commission to require the establishment of union depots.¹³⁵ "The statute in its principal purpose may be considered as *remedial* in its nature, and as to that feature will receive a *liberal* construction." The same language would be applicable in the constructions now

¹³¹ Affirmed by the U. S. Supreme Court, 206 U. S. 1.

¹³² Code of 1883, sec. 1957; Revisal of 1905, sec. 2567; dropped from Consolidated Statutes.

¹³³ (1905) 139 N. C. 126, 51 S. E. 793.

¹³⁴ (1906) 142 N. C. 392, 55 S. E. 292.

¹³⁵ Consolidated Statutes, sec. 1042.

placed by the court on the sections relating to rate-making, connections, track scales, sidings, and the like. It is quite apparent that the court tends now to interpret the powers of the Commission in a liberal manner. As Justice Hoke remarks in a concurring opinion to *Commission v. Railroad*,¹⁸⁶ "The Corporation Commission has been created and organized chiefly as an administrative agency of the state and charged, among other important duties, with that of looking after and imposing such reasonable rules and regulations on the public-service corporations of the state as may be promotive of the public interests, and their action should not be disturbed unless it is made to appear that, in a given case, it is clearly unreasonable and unjust."

B. Statistics¹⁸⁷

¹⁸⁶ (1915) 170 N. C. 560, 87 S. E. 785.

¹⁸⁷ 1. CHRONOLOGICAL TABLE OF CASES

1. *Atlantic Express Co. v. Wilmington and Weldon Railroad Co.* (1892) 111 N. C. 463, 16 S. E. 393.
2. *Mayo v. Western Union Telegraph Co.* (1893) 112 N. C. 343, 16 S. E. 1006.
3. *The Railroad Commissioners v. Western Union Telegraph Co.* (1893) 113 N. C. 213, 18 S. E. 389.
4. *Leavell v. Western Union Telegraph Co.* (1895) 116 N. C. 211, 21 S. E. 391.
5. *Board of Railroad Commissioners and Pate et al v. Wilmington and Weldon Railroad Co.* (1898) 122 N. C. 877, 29 S. E. 334.
6. *Corporation Commission v. Seaboard Air Line System* (1900) 127 N. C. 283, 37 S. E. 266.
7. *Corporation Commission v. Southern Railroad Co.* (1904) 135 N. C. 81, 47 S. E. 229.
8. *Corporation Commission v. Atlantic Coast Line Railroad Co.* (1904) 137 N. C. 1, 49 S. E. 191.
9. *Corporation Commission v. Atlantic Coast Line Railroad Co.* (1905) 139 N. C. 126, 51 S. E. 793.
10. *Corporation Commission v. Seaboard Air Line Railroad Co.* (1905) 140 N. C. 239, 52 S. E. 941.
11. *Corporation Commission and Hardware Co. v. Southern Railroad Co.* (1908) 147 N. C. 483, 61 S. E. 271.
12. *Corporation Commission and Morganton Merchants Association v. Southern Railroad Co.* (1909) 151 N. C. 447, 66 S. E. 427.
13. *Corporation Commission and Penn Tobacco Co. v. Southern Railroad Co.* (1910) 153 N. C. 559, 69 S. E. 621.
14. *Corporation Commission v. Morrison and Sons Co.* (1911) 155 N. C. 53, 70 S. E. 1079.
15. *Corporation Commission v. Seaboard Air Line Railroad Co.* (1912) 161 N. C. 270, 76 S. E. 554.
16. *Corporation Commission Upon the Complaint of Redfern and Others v. Winston-Salem Railroad Co.* (1915) 170 N. C. 560, 87 S. E. 785.
17. *Corporation Commission and Laurinburg and Southern Railroad Co. v. Seaboard Air Line Railroad Co.* (1917) 173 N. C. 413, 92 S. E. 150.
18. *In re the Southern Utilities Co. petitioner and the City of Charlotte* (1919) 179 N. C. 151, 101 S. E. 619.

2. ANALYSIS OF CASES: HOLDINGS

Total number of cases on appeal	18	
Affirmed by superior and supreme courts	8	
Affirmed by the supreme court directly	2	
Affirmed by supreme court after reversal by superior court	4	
Affirmed by superior court; modified and affirmed by supreme court	1	
Total affirmances	15	
Reversed by superior and supreme courts:		
Total reversals	3	
Grand total	18	18

3. ANALYSIS OF CASES: SUBJECT-MATTER

Rates	4
Procedure	3
Removal to federal courts	2
Industrial sidings	2
Furnishing facilities	1
Railroad connections	1
Track scales	1
Union depots	1
Railroad switch	1
Assessments	1
Recovering penalty	1
Total	18

C. Conclusions

1. The North Carolina Corporation Commission, a typical administrative tribunal, was conceived in response to the needs of the time. The purpose was two-fold: to individualize each particular case, however minute or seemingly unimportant, in order that it might be disposed of on its own peculiar merits, rather than in accordance with a stereotyped rule of law; and to effect this disposition with "reasonable dispatch and without deviation." The "causa causans" was the changed social and economic needs with respect to which our traditional judicial machinery was weighed in the balance and found wanting. A little over three decades have proved it to be a wise bit of social engineering.

2. Despite the guiding effort to "get results," a conscious effort was made to properly balance all the interests vitally involved in the project. To avoid the possibility of arbitrary or discriminatory administrative action, ample opportunity was afforded for judicial review of all orders and decisions of the Commission by way of appeal.

4. ANALYSIS OF CASES: MISCELLANEOUS

* Appealed to the Supreme Court of the United States	1
** Brought in federal courts to restrain the enforcement of an order by the Commission	5

202 U. S. 543 (1907).
 Editor's Note—The editor desires to call attention to three cases decided by the North Carolina Supreme Court since Mr. Nichols wrote his article.

The first case, *Corporation Commission v. Manufacturing Co.* (1923) 185 N. C. 17, 116 S. E. 178, involved an increase of rates on electric power. The Southern Power Company petitioned the Corporation Commission for an increase in rates on electric power supplied to customers within the state. Notice was served on all customers having contracts with the Southern Power Co., a large number of whom (about eighty) appeared and objected, and thirty or forty of these filed answers. Numerous hearings were held during a period of seven months before the Corporation Commission made its order increasing the rates. About twenty of the customers, principally cotton mills, appealed to the Superior Court, where the jury failed to agree upon the issue of whether the rates were unreasonable and unjust. A juror was withdrawn and a mistrial had, and the issue is still undetermined. During the trial, motions were made to dismiss the appeal for lack of jurisdiction and to set aside the order of the Corporation Commission, but the court overruled these motions, and the defendants excepted.

The Supreme Court dismissed the appeal as fragmentary, there having been no final judgment in the Superior Court, but, since the case was one of importance and an opinion was desirable for the further guidance of the parties, the court expressed its opinion on the merits. The power of the Corporation Commission, in making rates for public service corporations, was fully sustained. Neither was the exercise of this rate-making power an interference with interstate commerce, because the rates applied only to the sale of power in North Carolina, regardless of where the power was created, and because Congress had not acted in the matter. The court discussed methods of valuation and approved that used by the Corporation Commission in fixing the rates. Consolidated Statutes, sec. 1067, which provides that the rates fixed by the Corporation Commission are presumed to be just and reasonable until the court upon review shall find otherwise, was sustained.

It is interesting to note that the Corporation Commission has recently granted another increase of rates to the Southern Power Company.

In the second case, known as the *Selma Station Case*, *Corporation Commission v. R. R.* (1923) 185 N. C. 435, 117 S. E. 563, it appeared that, upon petition of the citizens of Selma, the Corporation Commission made an order, after proper hearings, that the Atlantic Coast Line and the Southern Railway Company build a union passenger station at Selma. This order was made in 1914, but, upon the request of the railroads, the Corporation Commission suspended the effect of its order for several years, because of the conditions growing out of the World War. In 1922, the Commission ordered the railroad companies to proceed with the compliance of the suspended order, and mandamus proceedings were brought to compel the enforcement of the final order of the Commission. It was held by the Supreme Court that the railroads had lost their right of appeal because they had not excepted to the order of the Commission within the time allowed, that the original order was a final order, and that the order in 1922 simply required the railroads to comply with the previous order. The power of the Corporation Commission to order the building of a union station in such a case as this was sustained, and it was held not to be an interference with interstate commerce or the Transportation Act of 1920.

The decision in the third case, *Corporation Commission v. R. R.* (1924) 187 N. C. 423, was handed down on March 19, 1924. The Montgomery Lumber Company is a hauler of materials, notably granite, and comes under the jurisdiction of the Corporation Commission as a carrier of materials. The granite cutters demanded the fixing of a joint rate over the rails of the Lumber Company with the regular railroads. The Corporation Commission ordered the establishment of joint rates between the railroads and the Lumber Company, and this order was affirmed by the Supreme Court, which again upheld the power of the Corporation Commission in making rates for public service companies.

These three cases should be considered in connection with Mr. Nichol's discussion, and it is submitted that they are a further confirmation of the conclusions reached in his article.

* The Railroad Connection Case, 206 U. S. 1 (1907).

** One appealed to the Supreme Court of the United States: *Southern Railroad Co. v. Ice and Coal Co.*

3. It is indeed noteworthy that the courts of the state have manifested a common-sense attitude toward this new type of governmental machinery—a synthesis of the various powers of government into one body. Palpably, the decision might have been otherwise in view of the constitutional provision re separation of powers, but the attitude adopted is, of course, entirely consonant with the more enlightened conception that the doctrine of separation of powers is after all only a practical policy of government.

4. There is but one criterion by which to test the efficacy of an innovation of this kind, to-wit, how does it function as a practical proposition; do its results justify its continued existence? By this test, the administrative machinery under consideration seems by and large satisfactory. Nevertheless, some criticisms of the machinery itself, as well as the decisions of the courts relative thereto, are patent.

5. Jurisdiction. Inter-city motor bus lines should be placed under the control of the Commission. It is not to be disputed that these carriers come within the class of public utilities. During the last decade, they have become a very important method of travel in the state, and proper supervision over them seems eminently expedient.

6. Appeal—Restriction of the right of appeal—hence, of judicial review—to: (1) defendant, where the order is adverse to him, and (2) petitioners, where they have a *sufficient proprietary interest*, seems impractical and not to be desired. Either party to the proceeding should be entitled to appeal from the order or decision of the commission so as to have a judicial review of the question whether or not that tribunal acted within its constitutional powers, or that the order was supported by sufficient evidence. And for this purpose, it seems but proper that the petitioners should be regarded as a party to the proceeding.

7. Trial “de novo” in the Superior Court—A complete new trial on appeal, after the fashion of the old appeal in equity, should be discontinued. It seems, however, this would necessitate a constitutional amendment in view of the right of a party, in the absence of consent, to have all questions of fact determined by jury. Yet, the cases on review demonstrate the fact that a judicial review of questions of law, including questions whether findings of fact are based on adequate evidence, is entirely commensurate with the desired security and protection. In theory and in practice, a “de novo” trial proves to be a needless repetition, delay and expense. Findings of fact by the Commission should be final. This would have a four-fold salutary effect:

(i) It would obviate the intricate and delicate query as to the weight to be given the findings of fact by the Commission at the trial in the Superior Court.

(ii) It would avoid the as-yet-unsolved difficulty whether the matter of the reasonableness of the Commission’s order or decision is a question of fact for the jury or of law for the court.

(iii) It would avoid the delay and expense of a complete re-trial, together with the sacrifice of the efficiency and increased accuracy of the informal administrative procedure.

(iv) The order or decision of the Commission would, then, serve as a direct basis for an action to recover a penalty for the violation of the Commission's rules and orders.

8. The dicta in the decisions of the Supreme Court and the statements in the reports of the Commission to the effect that relief cannot be had in the federal courts by way of injunction until all appeal provided in the state courts is exhausted is untenable. The doctrine laid down in the *Prentis Case* has no application in this respect under the North Carolina Commission Act.

9. An analysis of the cases which have been decided on appeal from the Commission by the North Carolina Supreme Court reveals a complete change of front in its attitude toward this new administrative tribunal. That court has reversed the decision of the Commission in but three of the eighteen cases, each of which turned on the grounds that the proposed order was beyond its statutory powers. And the most interesting thing to note is the fact that two of these reversals were the first two cases to be appealed and the court beyond a doubt applied a strict statutory construction. There has been, then, but one reversal since the year 1893, during which period sixteen cases were appealed. A resume of these cases shows an increasingly liberal policy by the courts in construing the powers of the Commission.