BOARD OF STREET AND WATER COMMISSIONERS
Office of the General Superintendent of Works.

No. 191 Newark, N. J. Mar. 10 - 1917.

Application of Wm. L. Reinhardt of

61 N. 3d St. Street, City of Newark N J.

for consent to operate 1 auto bus over the following streets: Bank St. to City Line via Broad & Orange Sts. and return

Owners Name Wm L. Reinhardt Age 24

Residence 61 N. 3d St. Business Address

State license (Car) A-7000 Issued Feb 23-17.

Driver Arthur Yarnold Residence 84 N. 3d St.

Owner

Yarnold Age 21 State Permit No. 3057-17 Issued June -17

Owner " 24 " " 3644-17 " " 17

Type car Standard Bonded to carry 12 M'f'g's. No. 1144

Passenger capacity 12 Based on length of body feet

inches Seating capacity

Policy No. 58381 Name Leon. Leo. Co.

Address Phila, Pa Expires June 1-17

Premium $53 13 Approved by Law Department

Applicants signature Wm L. Reinhardt

Application approved

By C. M. Shipman

Witness Mar. 10-1917

Robt S Wagner.

Newark, N. J., February 7, 1918.

Application No. 322

TO:

Mr. Thomas L. Raymond,
Director of Streets and Public Improvements,
City Hall, Newark, New Jersey

In accordance with the provisions of Chapter 136, Laws of 1916, I hereby apply for consent to operate an auto-bus over the following streets of the City of Newark:

From Bank Street to City Line, via Broad and Orange Streets and return.

Applicant's Name William D. Reinhardt, 61 North Third Street, Newark, N.J.

State License 16623 Issued January 1, 1918.

Type of Car Stewart Bonded to Carry 18

Manufacturer's No 866

Policy No. 138581 - Georgia Casualty Company, February 7, 1918.
Expires May 7, 1918.

Applicant Wm. D. Reinhardt

Approved by:

Joseph Crawford
Traffic Supervisor

Granted by:

Harrison Brandegee
Director of Streets and Public Improvements

Form 150 Reg.

DUPLICATE *Newark, N. J.,* May 13, 1919 19

Consent is hereby granted to WM. D. REINHARDT,

of 61 No. 3rd Street, City of Newark, N. J. to operate Auto Bus No. 322

State License No. 40320 on the following streets:

From BANK & BROAD STREETS, TO FOURTEENTH AND ORANGE STREETS, VIA.

BROAD & ORANGE STREETS, RETURNING OVER SAME ROUTE.

PASSENGER LIMIT

24

FARE 5 CENTS

DEPARTMENT OF STREETS AND PUBLIC IMPROVEMENTS

THOMAS L. RAYMOND, Director

Form 152—Reg.

KNOW ALL MEN BY THESE PRESENTS that I,

Wm. E. Reinhardt,
61 – 3rd St.
Newark, N. J.

the owner of an auto-bus, as defined in Chapter 136 of the Laws of 1916, do nominate, constitute and appoint the Comptroller of the City of Newark my true and lawful attorney for the purpose of acknowledging service for me and in my name of any process out of any court of competent jurisdiction to be served against me by virtue of the indemnity granted under a certain policy of insurance, and filed with the said Comptroller of the City of Newark, in accordance with the provisions of Section 2, of said Chapter 136 of the Laws of 1916.

Policy # 63637
Commonwealth Cas. Co.

Witness:
Sylvester

.....William E. Reinhardt
.....61 Ha 3rd St.
.....Newark N.J.

Newark, N. J. Oct 23 1919

Form 152—Reg.

KNOW ALL MEN BY THESE PRESENTS that I,

William D. Reinhardt
61 North 3rd St.
Newark, New Jersey

the owner of an auto-bus, as defined in Chapter 136 of the Laws of 1916, do nominate, constitute and appoint the Comptroller of the City of Newark my true and lawful attorney for the purpose of acknowledging service for me and in my name of any process out of any court of competent jurisdiction to be served against me by virtue of the indemnity granted under a certain policy of insurance, and filed with the said Comptroller of the City of Newark, in accordance with the provisions of Section 2, of said Chapter 136 of the Laws of 1916.

Pol. 15072
Indemnity Co. of

Witness:

L. Gaehler

Wm. D. Reinhardt
61 N. 3rd St.
City

Newark, N. J. Jan. 7, 1920.

297

STATE AGENCY INC.

GENERAL AGENTS
AND
MANAGERS

JERSEY CITY
NEW JERSEY

PHONE: MONTGOMERY 26

No. 18072

AUTOMOBILE POLICY

INTERSTATE CASUALTY COMPANY

BIRMINGHAM, ALABAMA

ISSUED TO

William L. Reinhardt,

61 N. 3rd St.,

6/1 - 9/1

Newark, N. J.

9-22-19 4M. THE GROFF-FULTON CO., PRINTERS, CHICAGO, ILL.

OFFICERS

J. T. STOKELY . . . President and Treasurer
W. H. DALE . . . Vice-President
D. B. LIGHTNER . . . Secretary
J. W. SPARKMAN . . . Asst. Secretary
J. T. STOKELY . . . General Counsel

HOME OFFICE
BIRMINGHAM, ALABAMA

CENTRAL OFFICE
INSURANCE EXCHANGE BUILDING
CHICAGO, ILLINOIS

WESTERN OFFICES
334 S. MAIN ST., SALT LAKE CITY, UTAH
ALASKA COMMERCIAL BLDG., SAN FRANCISCO
CITIZENS NATIONAL BANK BUILDING, LOS ANGELES
BARNETT BLDG., ALBUQUERQUE, NEW MEXICO

FOR VALUE RECEIVED the interest of the Assured in this Policy is hereby assigned to.....

.....*subject to the consent of*

INTERSTATE CASUALTY COMPANY.

.....

(Signature of Assured)

Birmingham, Alabama, ...19.....

INTERSTATE CASUALTY COMPANY hereby consents that the interest of the Assured in this policy be assigned to .....

.....

Secretary

.....19.....

INTERSTATE CASUALTY COMPANY

BIRMINGHAM, ALABAMA

In Consideration *of the representations of the assured hereinafter set forth and of* ****************Sixty-Two and 50/100************* *Dollars,* ($ 62.50) *premium,* INTERSTATE CASUALTY COMPANY, *(called the Company),*

Does Hereby Insure

William L. Reinhardt,

of 61 N. 3rd St., Newark, *County of* Essex,

State of New Jersey. *(hereinafter called the Assured)*

AGAINST LOSS FROM THE LIABILITY IMPOSED BY LAW UPON THE ASSURED for damages on account of bodily injuries, or death at any time resulting therefrom, accidentally suffered by any person or persons not employed by the Assured, caused by or resulting from the maintenance or use of any automobile described and enumerated herein, including the loading and unloading of goods carried therein, provided such bodily injuries or death are suffered as the result of accidents occurring within the period of Three months, beginning on the First day of June 19 20, at noon, and ending on the First day of September, 19 20 at noon, standard time, address of Assured, as given in this Policy.

GENERAL AGREEMENTS

A. The liability of the Company on account of an accident, resulting in injuries to, or in the death of, one person, is limited to ***************Five-Thousand*********************Dollars ($ 5,000.), and, subject to the same limit for each person, the Company's total liability for any one accident resulting in injuries to, or in the death of, several persons, is limited to*******************

B. This Policy does not cover loss as aforesaid for injuries or death caused by any of the automobiles hereby insured if same be driven or manipulated by any person under sixteen years of age, or while being driven in any race or speed contest.

C. This Policy may be cancelled by the Company or the Assured at any time by either party giving to the other five days' previous notice thereof in writing, stating when the cancellation shall be effective. If cancelled by the Company, the Company shall be entitled to the earned premium pro rata. If cancelled by the Assured, the Company shall be entitled to the customary short rate premium. The Company's check for unearned premium, if any, mailed to the address of the Assured as given herein shall be a sufficient tender.

D. Upon the occurrence of an accident covered by this Policy, the Assured shall give immediate notice thereof in writing to the Company's duly authorized agent at the place where this Policy is countersigned, or to the Company's Home Office in Birmingham, Alabama; and in like manner the Assured shall also give immediate notice in writing of any claim which shall be made on account thereof. If thereafter any suit be brought against the Assured to enforce a claim duly reported as aforesaid, the Assured shall deliver to the Company every summons, final process, or other papers relating thereto as soon as served, and thereupon the Company will, at its own cost, defend the suit in the name and on behalf of the Assured, and pay any final judgment recovered against the Assured in such suit, up to the limit of insurance herein expressed; but the Company shall have entire charge and control of such defense.

E. The Assured shall not settle any claim or suit save at his own cost, without the consent of the Company previously given in writing; nor incur any expense in connection with an accident except the cost of such surgical relief as is imperative at the time of the accident, which cost shall be a charge

ENDORSEMENT

This Policy is written to comply with the provisions of an Act entitled "An Act Concerning Automobile Buses, commonly called Jitneys, and their Operation in Cities", approved March 7th, 1916 and known as Chapter 136 of Laws of 1916, State of New Jersey, and as a condition predecent to Insurance any of the provisions of within Policy which are in conflict with said above recited Act shall be null and void.

In pursuance of the provisions of said above recited Act this Policy shall cover the payment of any final judgment recovered against the Assured by any person in an action for damages on account of the ownership, maintenance and use of the Automobile Bus or Buses herein specified and insured, or any fault in respect to them or either of them, such payment to be for the benefit of every person suffering loss, damage or injury as described in this Policy and in said Act.

It is further agreed by the Company that the Fiscal Officer of the City of Newark State of New Jersey, issuing licenses to Assured under this Policy, may, in place and stead of the Assured, give notices to the Company of Accidents, Claims and Suits as required by Condition "D" of within Policy, and the Company agrees to give such Fiscal Officer five days' notice of cancellation of this Policy prior to the date at which said cancellation shall become effective.

Attached to and forms part of Automobile Liability

Policy No. 18072, of INTERSTATE CASUALTY COMPANY, of Birmingham, Alabama, and is subject to all the terms, conditions and agreements thereof as therein contained.

Dated at Jersey City, N. J. this 28th day of May 19 20

INTERSTATE CASUALTY COMPANY.

R. B. Lightsey Secretary.

Countersigned at Jersey City, N. J. By

Authorized and Commissioned Agent.

B. This Policy does not cover loss as aforesaid for injuries or death caused by any of the automobiles hereby insured if same be driven or manipulated by any person under sixteen years of age, or while being driven in any race or speed contest.

C. This Policy may be cancelled by the Company or the Assured at any time by either party giving to the other five days' previous notice thereof in writing, stating when the cancellation shall be effective. If cancelled by the Company, the Company shall be entitled to the earned premium pro rata. If cancelled by the Assured, the Company shall be entitled to the customary short rate premium. The Company's check for unearned premium, if any, mailed to the address of the Assured as given herein shall be a sufficient tender.

D. Upon the occurrence of an accident covered by this Policy, the Assured shall give immediate notice thereof in writing to the Company's duly authorized agent at the place where this Policy is countersigned, or to the Company's Home Office in Birmingham, Alabama; and in like manner the Assured shall also give immediate notice in writing of any claim which shall be made on account thereof. If thereafter any suit be brought against the Assured to enforce a claim duly reported as aforesaid, the Assured shall deliver to the Company every summons, final process, or other papers relating thereto as soon as served, and thereupon the Company will, at its own cost, defend the suit in the name and on behalf of the Assured, and pay any final judgment recovered against the Assured in such suit, up to the limit of insurance herein expressed; but the Company shall have entire charge and control of such defense.

E. The Assured shall not settle any claim or suit save at his own cost, without the consent of the Company previously given in writing; nor incur any expense in connection with an accident except the cost of such surgical relief as is imperative at the time of the accident, which cost shall be a charge n the Company. The Assured shall, whenever requested by the Company, aid in procuring infor- ion, evidence, and the attendance of witnesses, whether employes or others, and also in effecting lements, conducting a defense to any suit, and in prosecuting an appeal from any judgment.

F. The Assured has not and will not, by contract or otherwise, voluntarily assume any liability for ıages to others without the consent of the Company previously given in writing.

G. Whenever a loss is paid under this Policy the Assured shall subrogate to the Company all ms and rights against any person or persons in respect to such loss, and shall execute and deliver to Company all papers required to secure said claims and rights.

H. Should the Assured have other valid and collectible insurance against an accident covered oy, the Assured shall not be entitled to receive from the Company a larger proportion of the loss n the amount hereby insured bears to the whole amount of such insurance against such accident, ried by the Assured.

I. This Policy shall be void if assigned without the consent of the Company endorsed hereon and ned by its President or Secretary. If the business of the Assured is placed in the hands of a Receiver ignee or Trustee, whether by the voluntary act of the Assured or otherwise, this Policy shall there- n immediately terminate, except as to those accidents and claims occurring prior thereto and reported he Company as before provided.

J. No change or waiver of this Policy or any of its terms, conditions or representations shall be id unless endorsed hereon and signed by the President and Secretary of the Company. Notice to knowledge by an agent or any other person shall not be held to waive any of the terms, conditions or resentations herein.

SCHEDULE OF WARRANTIES

1. Name of Assured William D. Reinhardt,

2. Address of Assured 61 W. 3rd St., Newark, N.J.
(Street, Town, County and State)

3. Trade or business Jitney Driver.

4. The number of automobiles owned by Assured is Not stated.

5. The number of chauffeurs employed by Assured is "

6. State kind of work for which automobiles are used As stated in item #3.
(Business or Pleasure)

7. State place where automobiles are kept Newark, N.J.
(Street and Number)

8. Full description of automobile owned by Assured and to be insured is as follows:

	Maker, Model and Type of Automobile	Motive and Horse Power	Motor No.	Car No.	Liability Premium	Property Damage Premium	Collision Premium
1	1918 Concord		BM-1388	A	62 50	Not stated under	No
2							
3							
4							
5							
6							
	OTHER AUTOMOBILES OF THE ASSURED ARE NOT COVERED BY THIS POLICY.				62 50		

Aggregate Premium, $ 62.50

9. No automobile is to be rented or used to carry passengers for hire except as follows:

As stated in item #3.

10. The above mentioned automobiles will be operated only by persons over sixteen years of age yes.

In Witness Whereof, INTERSTATE CASUALTY COMPANY has caused these presents to be signed by its President and Secretary, but the same shall not be binding unless countersigned by a duly authorized and commissioned agent of the Company.

W. B. Leightner,
SECRETARY

L. L. Bailey
PRESIDENT

Countersigned at Jersey City, N.J. this Twenty-Eighth day of May 19 20

STATE
Authorized and Commissioned Agent.

Form W-A

Short Rate Cancellation Table

FOR THE TERM OF ONE YEAR

		Per cent. of Annual Prem.
1 day		2
2 days		4
3 "		5
4 "		6
5 "		7
6 "		8
7 "		9
8 "		9
9 "		10
10 "		10
11 "		11
12 "		11
13 "		12
14 "		13
15 "		13
16 "		14
17 "		15
18 "		16
19 "		16
20 "		17
25 "		19
30 "		20
35 "		23
40 "		25
45 "		27
50 "		28
55 "		29
60 "		30
65 "		33
70 "		36
75 "		37
80 "		38
85 "		39
90 "	or three months	40
105 "		46
120 "	or four months	50
135 "		56
150 "	or five months	60
165 "		66
180 "	or six months	70
195 "		73
210 "	or seven months	75
225 "		78
240 "	or eight months	80
255 "		83
270 "	or nine months	85
285 "		88
300 "	or ten months	90
315 "		93
330 "	or eleven months	95
360 "	or twelve months	100

When Policy is written for shorter period than one year, cancellation is figured on basis of annual premium charged.

322

JITNEY LIABILITY POLICY

No. AB 63637

Commonwealth Casualty Company

ISSUED TO

Wm. D. Reinhardt,

61 -3rd St.,

Newark, N J.

PREMIUM

$ 6 .75

Expires Jan. 23rd, 1920

READ YOUR POLICY CAREFULLY

~~4/23~~ - 4/23 - 7/23

NOTICE

DO NOT fail to notify the Home Office of the Company at Philadelphia, Penna., or its duly authorized agent, of EVERY ACCIDENT, HOWEVER SLIGHT, IMMEDIATELY upon its occurrence.

If accident is fatal or involves SERIOUS INJURY, TELEGRAPH or TELEPHONE at Company's expense, giving date of inquest if one is to be held.

DO NOT DELAY sending in notice because unable to give all the information desired; send a completed notice later.

OFFICERS

ISAAC N. STEVENS.....Presiden
W. G. BOBB, M.D. ..Vice-Presiden
E. S. COOK .....Secretar
CHARLES T. MEGEE....Treasure
JOHN B. COOKE...Mgr. of Financ
E. W. COOK .....Business Manage

DIRECTORS

I. N. Stevens — W. G. Bobb, M.D
E. S. Cook — Charles T. Megee
H. S. Glazier — C. William Freed
E. W. Cook — Henry C. Stewart
John B. Cooke

CAPITAL, $250,000.00

Incorporated under the Laws of th State of Pennsylvania and fully ap proved by the Insurance Departmen of your State.

Over $1,250,000.00 Paid to Policy holders

JITNEY LIABILITY POLICY

Commonwealth Casualty Company

PHILADELPHIA, PENNA.

No. AB 63637 **Limit, $5,000**

HEREIN CALLED THE COMPANY

63637

In consideration of the statements made and the conditions herein named and of the payment of a premium of SIXTY-THREE & 75/100---------- Dollars,

HEREBY AGREES TO INDEMNIFY WM. D. REINHARDT (INDIVIUAL)
(State Individual, Copartnership or Corporation)

who resides at 61-3rd St., Newark, N.J

and who proposes to operate a jitney or jitneys in Newark, N.J. and Vicinity

for the term of three months, from the 23rd, day of October, 19 18 at noon, to the 23rd, day of January, 1930 at noon, AGAINST LOSS FROM THE LIABILITY IMPOSED BY LAW UPON THE ASSURED for damages on account of bodily injury or death suffered by any person or persons as the result of an accident occurring while this policy is in force by reason of the ownership, maintenance or use or any fault in respect thereto of the motor vehicle or vehicles used for carrying passengers described hereunder; AND TO DEFEND in the name and on behalf of the Assured any legal proceedings brought against the Assured to enforce a claim covered by this policy, whether groundless or not, for damages on account of such bodily injuries or death suffered or alleged to have been suffered as described above during the policy period, unless the Company shall elect to effect settlement thereof.

Number and Description of Motor Vehicles Insured

Descriptive Trade Name	Factory Number of Engine or Motor	Kind of Power	Year Built	Type of Body	Seating Capacity
Car No. 1. Concord	#68772	Gas.	1918	17 passengers Bus	
Car No. 2.					
Car No. 3.					
Car No. 4.					

The Company's liability for loss from an accident resulting in bodily injuries to or in the death of any one or more persons is limited to FIVE THOUSAND DOLLARS.

The expenses incurred by the Company in defending any suit or legal proceeding, including the interest on any verdict and any costs taxed against the Assured, and any expenses necessarily incurred and paid in money by the Assured for such immediate surgical aid as may be imperative at the time of any accident, irrespective of the limit of liability expressed above, will be paid by the Company.

This insurance is subject to the following conditions and provisions:

NOTICE

1. The Assured shall give the Company immediate written notice of any accident causing loss covered by this policy, with the fullest information obtainable. The Assured shall give like notice of claims for damages on account of such accidents. If any suit is brought against the Assured to recover such damages, the Assured shall immediately forward to the Company every summons or other process served upon him.

CLAIMS AND SUITS

2. The Company shall have the exclusive right to contest or settle any of said claims or suits, and the Assured shall not incur any expense (except for such immediate surgical aid as may be imperative at the time of the accident) or settle any claim or suit without the written authority of the Company. Except as requested by the Company the Assured shall not interfere in any way respecting any negotiations for the settlement of any claim or suit or in the conduct of any legal proceedings. The Assured shall at all times render to the Company all possible co-operation and assistance. The Assured shall not voluntarily admit any liability for an accident, and no loss arising from a liability which has been voluntarily assumed by the Assured shall be covered hereunder.

NOT COVERED

3. This policy does not cover loss on account of injuries or death suffered by any person or persons caused by any automobile (A) while being used or operated for any purpose or in any manner other than as a jitney, as defined in Chapter 136, laws of New Jersey, 1916; (B) while being used or operated outside the limits of the state of New Jersey; (C) while being used or operated in any city, township, borough or municipality in the state of New Jersey until the assured has obtained the consent of such city, township, borough or municipality to operate therein as a jitney.

WORKMAN'S COMPENSATION

4. The Company shall not be liable for accidents occurring to employees of the assured when engaged in operating or caring for the insured automobiles. Nor shall the Company be liable for any liability assumed by or imposed upon the Assured to pay Workmen's Compensation.

CANCELLATION

5. This policy may be cancelled at any time by either of the parties hereto upon written notice to the other stating when thereafter cancellation shall be effective and the date of termination by cancellation shall then be the end of the policy period. If cancelled by the Company, it shall receive a pro rata premium. If cancelled by the Assured, the Company shall be entitled to receive a premium computed according to the annual short-rate table printed hereon.

JUDGMENT AND ACTIONS

6. In consideration of the premium paid hereon, the Company covenants and agrees to satisfy and discharge all final judgments recovered through due process of the law by any person or persons against the herein-named Assured on account of accidents insured by this policy, subject to the limit of liability of $5,000 for any one accident for the motor vehicles insured hereunder. No action shall be brought or maintained against the Company under or by virtue of this policy unless it be brought to enforce the payment by the Company of a final judgment rendered after trial of a suit against the Assured for damages, and within two years after the date of such final judgment.

SUBROGATION

7. In case of payment of loss under this policy the Company shall be subrogated to the amount of such payment to all rights of the Assured against any person, firm or corporation as respects such loss, and the Assured shall do everything which may be necessary to secure to the Company such rights.

OTHER INSURANCE

8. If the Assured carry a policy, valid or otherwise, of another insurer against a loss covered by this policy, the Assured shall not be entitled to recover from the Company a larger proportion of the entire loss than the amount otherwise payable under this policy bears to the total amount of insurance applicable to the said loss.

INSPECTION

9. Any of the Company's authorized inspectors shall have the right and opportunity to inspect at all reasonable times during the policy period any of the automobiles covered by this policy.

TIME LIMITS

10. Should any time limitation of this policy with respect to giving notice or instituting suit conflict with the law controlling this contract, the minimum period permitted by such law shall be considered as substituted for such limitation.

ALTERATIONS

11. This policy shall constitute the entire contract between the Company and the Assured, and no assignment of this policy, or of any claim thereunder, nor any change, waiver or extension of its terms shall be valid or binding upon the Company unless endorsed hereon, and signed by the officers of the Company and countersigned by their agent; nor shall notice to any agent, or knowledge possessed by any agent or other person, be held to effect a waiver or change of any part of this policy.

AUTHORIZED AGENTS

12. No person shall be deemed an agent of the Company unless such person is authorized in writing as such agent by an officer of the Company.

The authority of the General Agents or Special Agents of this Company, including the Agent issuing or countersigning this Policy, is limited to securing applications for Automobile and Teams Liability Insurance, and to the execution or countersigning of the same, where written authority is given therefor, and for the collection of premiums upon such executed policies.

The authority of all attorneys in fact for this Company is limited to the acts to be performed as set forth in the Power of Attorney appointing such Attorney-in-Fact. This Section relates to and limits the authority and power of every agent and other representative of this Company in the manner set forth in connection with the issuance of this policy.

Notwithstanding anything herein to the contrary, the Company hereby covenants and agrees, in the event of its giving the Assured hereunder notice of the cancellation of this policy for any reason whatsoever, to give the Chief Fiscal Officer of the city, township or municipality five days' written notice of its intention to effect such cancellation; and the Company further covenants and agrees that service of any process out of a court of competent jurisdiction upon such Chief Fiscal Officer shall be served upon this Company.

(This space is intended for the attachment of such endorsements as may be executed as provided in the policy, and when so executed and attached they are to be construed as a part of the policy.)

In Witness Whereof, the COMMONWEALTH CASUALTY COMPANY OF PHILADELPHIA, PENNSYLVANIA, has caused these presents to be signed by its President and its Secretary this 21st, day of October, 1919; but the same shall not be binding upon the Company until Countersigned by a duly authorized Agent.

D. H. Stevens
President.

E. S. Cook
Secretary.

Countersigned at Newark, N.J. on the 21st, day of October 1919

Agent

JITNEY
RENEWAL RECEIPT
No.

EXTENSION ENDORSEMENT

Commonwealth Casualty Company

PHILADELPHIA, PENNA.

In consideration of the payment of Sixty----------Dollars

made by William Reinhardt,

operating Jitney in Newark, N.J. and vicinity,

and assured under Jitney Policy No. A. B. 63637 is hereby extended for a further period of three

Months from this 23rd day of April 1920 to the 23rd day of July

1920, subject to all the terms and conditions of said Jitney Policy, which has been issued in compliance with an act, as defined in Chapter 136, Laws of New Jersey 1916.

In Witness Whereof, the COMMONWEALTH CASUALTY COMPANY, OF PHILADELPHIA, PENNSYLVANIA, has caused these presents to be signed by its President and its Secretary this 23rd day of April, 1920, but the same shall not be binding upon the Company until Countersigned by a duly authorized Agent.

R. H. Stevens
President

E. S. Cook
Secretary.

Countersigned at Newark, N.J. on the 23rd day of April 1920

E. V. Hauser
Agent.

JITNEY
RENEWAL RECEIPT
No.

EXTENSION ENDORSEMENT

Commonwealth Casualty Company

PHILADELPHIA, PENNA.

In consideration of the payment of Sixty---------- Dollars

made by Wm. D. Reinhardt,

operating Jitney in Newark, N. J.

and assured under Jitney Policy No. A. B. 63637 is hereby extended for a further period of three

Months from this 23rd day of January 1920 to the 23rd day of April

1920, subject to all the terms and conditions of said Jitney Policy, which has been issued in compliance with an act, as defined in Chapter 136, Laws of New Jersey 1916.

In Witness Whereof, the COMMONWEALTH CASUALTY COMPANY, OF PHILADELPHIA, PENNSYLVANIA, has caused these presents to be signed by its President and its Secretary this 23rd day of January, 1920, but the same shall not be binding upon the Company until Countersigned by a duly authorized Agent.

R. H. Stevens
President

E. S. Cook
Secretary.

Countersigned at Newark, N. J. on the 23rd day of January 1920

[illegible]
Agent.

TELEPHONE, 1461-1462 MARKET

NEWARK, N. J., January 24th, 20 191

W D Reinhardt,

COMMONWEALTH CASUALTY CO.

HOME OFFICE, PHILADELPHIA, PENNA.

NEW JERSEY STATE OFFICE
KINNEY BUILDING, NEWARK, N. J.

LIABILITY DEPARTMENT

Date	Policy No.	Form of Policy	Name of Assured	Premium
Jan 23rd,	AB-83837 Re-9329	Jitney	W.D. Reinhardt	60 00

PAID
JAN 24 1919
COMMONWEALTH CASUALTY CO.

TELEPHONE, 1461-1462 MARKET

NEWARK, N. J., October 23rd 191 9

Wm. D. Reinhardt

COMMONWEALTH CASUALTY CO.

HOME OFFICE, PHILADELPHIA, PENNA.

NEW JERSEY STATE OFFICE
KINNEY BUILDING, NEWARK, N. J.

LIABILITY DEPARTMENT

Date	Policy No.	Form of Policy	Name of Assured	Premium
Oct. 23rd	B-83837	Jitney	Wm. D. Reinhardt	3 75

PAID
OCT 21 1919
COMMONWEALTH CASUALTY CO.

Newark, N. J., April 22, 1918.

Application No. 390

TO:

Mr. Thomas L. Raymond,
Director of Streets and Public Improvements,
City Hall, Newark, New Jersey

In accordance with the provisions of Chapter 136, Laws of 1916, I hereby apply for consent to operate an auto-bus over the following streets of the City of Newark:

Hudson and Manhattan Tubes, Hector Street, Broad Street, Clinton Avenue, Elizabeth Avenue to Court House, Elizabeth, N.J. and return.

Applicant's Name Isador Barnett, 192 Chadwick Avenue, Newark, N.J.

State License 3256 Issued April 20, 1918.

Type of Car Larrabee-Deyo ~~Bonded to Carry~~

Manufacturer's No 21419 Consent for 19 passengers only.

Policy No. 51994 - Commonwealth Casualty Co., April 22, 1918.

Expires July 22, 1918.

Applicant Isador Barnett

Approved by:

Joseph Crawford
Traffic Supervisor

Granted by:

Harrison Blanchegne.
Deputy Director of Streets and Public Improvements

To the Director of Streets and Public Improvements
of the City of Newark, N. J.

The undersigned having applied by Application No. 390 for consent to operate an auto-bus in the City of Newark and having filed a policy with the ~~Comptroller~~ Director of Finance of the City of Newark in form provided for in Chapter 136 of the Laws of 1916, hereby agrees, in consideration of the issuance to 390 of the consent applied for, as follows:

1. That 390 will pay to the City of Newark at the times and in the manner provided for in said Chapter 136 of the Laws of 1916, five per cent. (5%) of the gross receipts from the carrying of passengers by said auto-bus.

2. That such auto-bus will be operated as an auto-bus, as defined in said Chapter 136 of the Laws of 1916, only upon the street or streets for which consent is given.

3. That he will not carry at any time passengers in excess of the number mentioned in said application No. 390.

4. That said auto-bus will be operated only by a person satisfactory to the Director of Streets and Public Improvements of the City of Newark, as to responsibility and ability to operate such auto-bus at points of congested traffic in the city.

5. That he and his servants or agents operating such auto-bus will comply with the regulations now in force or hereafter to be adopted concerning the operation of auto-buses in the streets of the City of Newark.

It is further agreed that, for failure to perform any of the terms of this agreement or to comply with said regulations, such consent may be revoked at the option of the Director of Streets and Public Improvements.

April 20, 1916.
Witness:
Joseph Crawford

Isador Bauer Owner.
No. 19 Chadwick Ave Street.
Newark N. J.

Agent

KNOW ALL MEN BY THESE PRESENTS that I,

Isador Barnett

the owner of an auto-bus, as defined in Chapter 136 of the Laws of 1916, do nominate, constitute and appoint the Director of Revenue and Finance of the City of Newark my true and lawful attorney for the purpose of acknowledging service for me and in my name of any process out of any court of competent jurisdiction to be served against me by virtue of the indemnity granted under a certain policy of insurance, and filed with the said Director of Revenue and Finance of the City of Newark, in accordance with the provisions of Section 2, of said Chapter 136 of the Laws of 1916.

State Mutual Policy No. 411

Subscribed to before me

E. V. Carmel

NOTARY PUBLIC FOR NEW JERSEY
COMMISSION EXPIRES JUNE 13TH, 1924

Isador Barnett

Form 150 Rev.

DUPLICATE

Newark, N. J., May 14, 19 20.

Consent is hereby granted to ISADORE BARNETT,

of 192 Chadwick Avenue Street, City of Newark, New Jersey to operate Auto Bus No. 390

State License No. 159361 on the following streets:

From H. & M. TUBES TO COURT HOUSE, ELIZABETH, VIA. PARK PL., RECTOR, BROAD STREETS, FRELINGHUYSEN AVENUE AND NORTH BROAD STREET, ELIZABETH, RETURNING OVER SAME ROUTE.

PASSENGER LIMIT

35

FARE 10 CENTS

DEPARTMENT OF STREETS AND PUBLIC IMPROVEMENTS

THOMAS L. RAYMOND, Director

DUPLICATE

NO. 14

CITY OF ELIZABETH, NEW JERSEY

CONSENT IS HEREBY GRANTED TO ISADORE BARNETT

OF 192 Chadwick Avenue, CITY OF NEWARK, N. J.

TO OPERATE AN AUTO BUS NO. 51573 (MFG.) STATE

LICENSE NO. 159361 ON THE FOLLOWING STREETS

ROUTE NO. 3- BROAD STREET, NEWARK AVENUE TO THE CITY LINE.-

NO. OF PASSENGERS EIGHTEEN

TYPE OF CAR CONCORD

FARE FIVE-CENTS

BOARD OF PUBLIC WORKS John J. Kinsella CLERK

THIS LICENSE EXPIRES

December 31, 1920.

Resident

Know all Men by these Presents, That I, Isadore Barnett, the owner of an auto-bus, as defined in Chapter 136 of the Laws of 1916, do nominate, constitute and appoint the Comptroller of the City of Elizabeth my lawful and true attorney for the purpose of acknowledging service for me and in my name for any process out of any Court of competent jurisdiction to be served against me by virture of the indemnity granted under a certain policy of insurance, ~~numbered~~ ~~issued by the~~ and filed with the said Comptroller of the City of Elizabeth in accordance with the provisions of Section 3, of said Chapter 136 of the Laws of 1916.

DATED Apr. 22. 1918

Isador Barnett

WITNESS:

Grace R. Shanley

State Mutual Insurance Liability Company

CHARTERED BY THE STATE. LICENSED BY THE STATE AND UNDER STATE SUPERVISION

45 CLINTON STREET

NEWARK. NEW JERSEY

September 15th, 1920.

Mr. J. Crawford,
City Hall,
Newark, N.J.

Dear Sir:-

Re: Policy #411 I. Barnet t

Kindly take notice that automobile policy above mentioned is hereby cancelled pursuant to terms and provisions in said Policy contained, such cancellation to take effect on the 20th day of September, 1920. at 12 o'clock noon, Standard Time, at the place where said Policy was countersigned.

Yours very truly,

STATE MUTUAL LIABILITY INS. CO.

Authorized for the purpose

MCN/mk

CANCELLATION RECEIPT.

$ _____

In consideration of the sum of _____ *Dollars,*

to _____ *paid by* **The State Mutual Liability Insurance Company,** *this Policy is hereby acknowledged canceled, and surrendered to the said Company.*

Dated _____

_____

Signature of the Insured.

Jitney Public Liability Policy

As required by Chapter 136 of the Laws of 1916, State of New Jersey

No. 411 390

275

State Mutual Liability Insurance Company

Newark, New Jersey

ISSUED TO

Isadore Barnett,

192 Chadwick Avenue,

Newark, New Jersey.

Larrabee-Doyo #17155

Amount $5000. Premium $ 180.

Attaches October 22, 19 19

Expires October 22, 19 20

READ YOUR POLICY CAREFULLY

Notice is hereby given that the annual meeting of policy holders is held at the head office of the Company, in the City of Newark, at 10 o'clock in the forenoon, on the first Monday in July of each and every year, except when the 1st Monday falls on a holiday, the meeting shall be held on the following day.

TAKE NOTICE.

DON'T fail to notify the Home Office of the Company, at Newark, N. J., of EVERY ACCIDENT, HOWEVER SLIGHT, IMMEDIATELY upon occurrence.

If accident is fatal or involves SERIOUS INJURY, TELEGRAPH or TELEPHONE at the Company's expense, giving date of inquest, if one is to be held.

DO NOT DELAY sending in notice, even though full information is not available. Send completed notice later.

Officers

WILLIAM C. WEBB, President
ALEXANDER McLEOD, Vice President
CLARENCE W. GROSJEAN, Secretary
JOSEPH KOEHLER, Treasurer

Directors

BENJAMIN KASS
WILLIAM S. FENN
CHARLES MAAS
FREDERICK STEFNAGLE
JOHN TEUFEL
ALBERT SPLAN
WILLIAM C. WEBB
CLARENCE W. GROSJEAN
GEORGE A. TAETZSCH
DAVID PETERS
WM. J. BANKER, JR.

Jitney Public Liability Policy

As required by Chapter 136 of the Laws of 1916, State of New Jersey

$5000.00 No. 411

State Mutual Insurance Liability Company

HOME OFFICE: NEWARK, NEW JERSEY

(Hereinafter Called the Company)

In Consideration of the Premium for this Policy as expressed in Statement 7, and of the other statements which are set forth in the Schedule of Statements herein made, and which the Assured warrants to be true by the acceptance of this Policy, and also subject to the conditions of this Policy as hereinafter set forth:

DOES HEREBY AGREE

(A) TO INDEMNIFY the assured named and described in Statement No. 1 of the Schedule of Statements forming part hereof, to the limit of liability hereinafter expressed in Condition 9,against Loss by reason of the liability imposed by Chapter 136 of the Laws of 1916, State of New Jersey, upon the Assured for damages on account of bodily injuries, including death at any time resulting therefrom, accidentally suffered or alleged to have been suffered, while this Policy is in force, by any person or persons, except employes of the Assured while engaged in operating, riding in or on, or caring for automobile(s) covered hereby;

(B) TO DEFEND in the name and on behalf of the Assured any suits, even if groundless, brought against the Assured to recover damages on account of such happenings as are provided for by the terms of the preceding paragraph;

(C) TO PAY, irrespective of the limit of liability expressed in Condition 9 (Limit) hereof, all costs taxed against the Assured in any legal proceeding defended by the Company, all interest accruing after entry of judgment upon such part thereof as shall not be in excess of said liability and the expense incurred by the Assured for such immediate medical or surgical relief as is imperative at the time of the accident, together with all the expense incurred by the Company growing out of the investigation of such an accident, the adjustment of any claim or the defense of any suit resulting therefrom;

This policy is made and accepted subject to the foregoing stipulations and conditions and to the stipulations and conditions printed on the second and third pages hereof, which are hereby made a part of this policy, together with such other provisions, stipulations and conditions as may be endorsed hereon or added hereto as herein provided.

IN WITNESS WHEREOF, THE STATE MUTUAL LIABILITY INSURANCE COMPANY has caused this policy to be signed by its President and Secretary, but the same shall not be binding unless countersigned by a duly authorized agent of the Company.

C. W. Grosjean
Secretary.

William Webb.
President.

Countersigned at **NEWARK, N. J.**

this 26th day of September, 19 19

New Jersey Indemnity Company

By _____
President.

Authorized Agent for the purpose.

SUBJECT TO THE FOLLOWING CONDITIONS:

1. **Exclusions.** This policy does not cover Injuries and/or Death, or Loss, Damage and/or Expense:

(a) Assumed by or imposed upon the Assured by any compensation agreement, plan or law.

(b) Caused while any automobile described herein is employed for purposes other than stated in Statement 4 of the said Schedule of Statements.

(c) Which may be attributed to or arise from the act of any person or persons acting or claiming to act under authority from any country or people in a state of war, revolution or internal commotion or which shall arise from any consequences of hostilities, civil commotions, riots or warlike operations, even if by lawless or unauthorized person or persons, whether before or after declaration of war.

2. **Reporting Accidents, Claims and Suits.** The Assured, upon the occurrence of an accident, shall give immediate written notice thereof to the Company's Home Office, at Newark, New Jersey, or its Agent duly authorized by law to receive the same, with the fullest information obtainable. He shall give like notice with full particulars of any claim made on account of such accident. If, thereafter, any suit is brought against the Assured he shall immediately forward to the Company every summons or other process served upon him. The Assured, when requested by the Company, shall aid in affecting settlements, securing evidence, the attendance of witnesses and in prosecuting appeals. The Assured shall not voluntarily assume any liability, settle any claim or incur any expense, except at his own cost, or interfere in any negotiation for settlement or legal proceeding without the consent of the Company previously given in writing. The Company reserves the right to settle any such claim or suit brought against the Assured. Notice of occurrence of an accident, claim of injury or legal suit when served upon the Company by the Fiscal Officer of the City wherein the Insured is licensed, as specified in the Policy, shall be deemed and taken to be a notice as required to be given by the Insured under the terms of this Contract, provided, however, that the failure to give the notice required by any provision of this policy by either the insured or the fiscal officer of the City wherein the Insured is licensed, shall not operate to relieve the Company from liability hereunder, to pay any final judgment obtained against the Insured within the limits or coverage of this policy as set forth herein.

3. **Recovery.** Notwithstanding anything herein contained to the contrary, this Company will pay any final judgment recovered by any persons on account of the ownership, maintenance and use of the Automobile described herein, or any fault in respect thereto, in accordance with the conditions of liability as described in this Policy, and it is further understood that this policy shall be for the benefit of every person or persons suffering loss, damage or injury, as described in this policy, or as described in the terms of an Act entitled "An Act concerning auto buses, commonly called 'jitneys,' and their operation in cities," approved March 17, 1916, and known as Chapter 136 of the laws of 1916, State of New Jersey.

4. **Special Statutes.** If the limitation of time for notice of accident or for any legal proceeding herein contained is at variance with any specific statutory provision in relation thereto, in force in the State specified in Statement 2 (Address of Assured), the shortest time permitted or allowed by such specific statutory provision shall supersede any such condition in this Contract inconsistent therewith.

5. **Alterations in Policy.** No erasure or change appearing in this Policy as originally printed, and no alterations, change or waiver, of any of its terms, provisions, statements or conditions shall be valid unless made by written endorsement attached hereto and signed by the President, or a Vice-President, and countersigned by a duly authorized Agent of the Company. Nor shall notice to or knowledge of any Officer of the Company or of any Agent or other persons received or acquired before or after the date of this Policy be held to effect a waiver, change or alteration of any part of this Contract.

6. **Agent Defined.** No person shall be deemed an Agent of the Company for any purpose whatever, unless he be authorized, in writing, for such purpose by the President, a Vice-President or General Manager of the Company.

7. **Concurrent Insurance.** If the Assured carries a Policy of any other insurer covering concurrently a claim covered by this Policy, he shall not recover from the Company a larger proportion of any such claim than the sum hereby insured bears to the whole amount of such valid and collectible concurrent insurance.

8. **Subrogation of Rights.** Upon payment of any Loss, Damage, Claim and/or Expense under this Policy, the Company shall be subrogated to the extent of such payment, to all rights of recovery of Assured against others for such Loss, Damage, Claim and/or Expense, and the Assured shall render all possible co-operation and execute all papers requested by the Company, to secure such rights.

9. **Limit.** Regardless of the number of Assured involved, the Company's liability for Loss from an accident resulting in bodily injuries to or in the death of any person or persons is limited to FIVE THOUSAND DOLLARS ($5,000.00).

10. **Statements.** The Statements numbered 1 to 8, inclusive, in the Schedule of Statements hereinafter contained are warranted by the Assured to be true except such as are declared to be matters of estimate only. This Policy is issued in consideration of such warranties, and the provisions of the Policy respecting its premium and the payment of the premium stated in such Schedule of Statements.

11. **Contingent Liability.** This policy is issued by virtue of the Insurance Laws of the State of New Jersey, and the contingent mutual liability of the Assured hereunder, for the payment of losses and expenses not provided for by the Company's available cash funds, is and shall be be such additional sum, not less than an amount equal to and in addition to the premium hereon, as shall be found necessary by the Company's Board of Directors for the payment of the losses and expenses aforesaid.

SCHEDULE OF STATEMENTS.

1. Applicant's name is ..Isadore Barnett,.....
(To avoid error print name here.)

2. Applicant's address is No. 192 Chadwick Avenue,.....City or Town. Newark, New Jersey.

3. The applicant is.....Individual.....Occupation....Bus. owner.....
(Individual, Partnership, Corporation or Estate) (Business or Trade)

4. Description. Name...Larrabee-Deyo Factory No. 17155...License No. [illegible] Used for. Jitney..

5. The automobile is used and will continue to be used during the currency of this insurance, in the immediate vicinity of....Newark...and Elizabeth,.....and the seating capacity is.....Twenty-One.....adults, with.....Jitney.....body.

6. The policy period is for twelve months beginning on the..22nd....day of..Oct.....19.19..., at noon, and ending on the...22nd....day of..Oct.....19.20.., at noon.

7. As consideration for such policy I hereby agree to pay to the State Mutual Liability Insurance Company upon demand, the sum of .....One..Hundred..Eighty.....Dollars as premium thereon.
100

8. It is agreed that wherever in this application the words "I," "me," "my," "his," "myself" or other words are used to express the singular number, if the application be executed by a partnership, firm, or corporation, such words shall be read as "we," "us," "their," "its," "ourselves" and so on, in like manner in the plural number, or, as any pronoun applicable to the language used.

(This space is intended for the attachment of such statements, conditions, provisions, or agreements by way of endorsement as may be executed as provided in the Policy and, when so executed and attached, they are to be considered as a part of the Policy.)

AUTOMOBILE—TRANSFER OF INSURANCE

Dated Jan. 24 1920

In consideration of _____ (Additional or Return) Premium of _____ Dollars ($ _____)

the Insurance upon this policy is hereby transferred from this date to cover the Automobile described as follows:

Number of Automobiles	Make	Model or Type	Style of Body	Year Built	Engine No.	Horse Power	Kind of Power
one	Lansden Dayo	C-4	Bus	1919	18595	27	Gas
	seating capacity 27						

and ceases to cover as written.

Subject, however, to all conditions, agreements and limitations of the Policy, except as herein specifically provided.

Attached to and forming part of Policy No. 411 of the STATE MUTUAL LIABILITY INSURANCE COMPANY

issued to Isadore Barnett

Not valid unless countersigned by a duly authorized representative of the Company.

Dated at _____ 19

Countersigned by New Jersey Indemnity Co.

E. M. Carroll President

C. W. Grosjean Secretary

E. M. Carroll President

AUTOMOBILE—TRANSFER OF INSURANCE

Dated May 14, 1920

In consideration of _____ (Additional or Return) Premium of _____ Dollars ($ _____)

the Insurance upon this policy is hereby transferred from this date to cover the Automobile described as follows:

Number of Automobiles	Make	Model or Type	Style of Body	Year Built	Engine No.	Horse Power	Kind of Power
one	Concord	10	Bus	1918	51573		Gas
	Seating Capacity 18						

and ceases to cover as written.

Subject, however, to all conditions, agreements and limitations of the Policy, except as herein specifically provided.

Attached to and forming part of Policy No. 411 of the STATE MUTUAL LIABILITY INSURANCE COMPANY

issued to I. Barnett, 192 Chadwick Avenue, Newark, N. J.

Not valid unless countersigned by a duly authorized representative of the Company.

Dated at May 14, 1920

Countersigned by New Jersey Indemnity Co.

E. M. Carroll President

C. W. Grosjean Secretary

E. M. Carroll President

756 Broad Street, Newark, N. J., October 27, 1919

Isadore Barnett,

192 Chadwick Ave., Newark, N. J.

To NEW JERSEY INDEMNITY COMPANY, Dr.
General Agents
STATE MUTUAL LIABILITY INSURANCE COMPANY

To monthly premium "Jitney" Liability Indemnity Bond No. 411 $ 19.00

Received Payment, NEW JERSEY INDEMNITY COMPANY,
General Agents

NOTICE—Prompt payment must be made, otherwise bond will be cancelled

By E. M. Carroll

Do not mail money—use checks, drafts, express or post office money orders

Accident

BUS No 14

Jitney Public Liability Policy

As required by Chapter 136 of the Laws of 1916, State of New Jersey

No. 411

State Mutual Liability Insurance Company

Newark, New Jersey

ISSUED TO

Isadore Barnett

192 Chadwick Ave.,

Newark, N. J.

General Number - Type 17155

Amount $5000. Premium $ 100.

Attaches October 22n 19 19

Expires October 22nd 19 20.

Duplicate.

READ YOUR POLICY CAREFULLY

Notice is hereby given that the annual meeting of policy holders is held at the head office of the Company, in the City of Newark, at 10 o'clock in the forenoon, on the first Monday in July of each and every year, except when the 1st Monday falls on a holiday, the meeting shall be held on the following day.

TAKE NOTICE.

DON'T fail to notify the Home Office of the Company, at Newark, N. J., of EVERY ACCIDENT, HOWEVER SLIGHT, IMMEDIATELY upon occurrence.

If accident is fatal or involves SERIOUS INJURY, TELEGRAPH or TELEPHONE at the Company's expense, giving date of inquest, if one is to be held.

DO NOT DELAY sending in notice, even though full information is not available. Send completed notice later.

BUS No. 14

CANCELLATION RECEIPT.

$.....

In consideration of the sum of ..... *Dollars,*

to ..... *paid by* **The State Mutual Liability Insurance Company,** *this Policy is hereby acknowledged canceled, and surrendered to the said Company.*

Dated .....

.....

Signature of the Insured.

Officers

WILLIAM C. WEBB, President
ALEXANDER McLEOD, Vice President
CLARENCE W. GROSJEAN, Secretary
JOSEPH KOEHLER, Treasurer

Directors

BENJAMIN KASS
WILLIAM S. FENN
CHARLES MAAS
FREDERICK STEFNAGLE
JOHN TEUFEL
ALBERT SPLAN
WILLIAM C. WEBB
CLARENCE W. GROSJEAN
GEORGE A. TAETZSCH
DAVID PETERS
WM. J. BANKER, JR.

Jitney Public Liability Policy

As required by Chapter 136 of the Laws of 1916, State of New Jersey

$5000.00 No. 411

State Mutual Insurance Liability Company

HOME OFFICE: NEWARK, NEW JERSEY

(Hereinafter Called the Company)

In Consideration of the Premium for this Policy as expressed in Statement 7, and of the other statements which are set forth in the Schedule of Statements herein made, and which the Assured warrants to be true by the acceptance of this Policy, and also subject to the conditions of this Policy as hereinafter set forth:

DOES HEREBY AGREE

(A) TO INDEMNIFY the assured named and described in Statement No. 1 of the Schedule of Statements forming part hereof, to the limit of liability hereinafter expressed in Condition 9, against Loss by reason of the liability imposed by Chapter 136 of the Laws of 1916, State of New Jersey, upon the Assured for damages on account of bodily injuries, including death at any time resulting therefrom, accidentally suffered or alleged to have been suffered, while this Policy is in force, by any person or persons, except employes of the Assured while engaged in operating, riding in or on, or caring for automobile(s) covered hereby;

(B) TO DEFEND in the name and on behalf of the Assured any suits, even if groundless, brought against the Assured to recover damages on account of such happenings as are provided for by the terms of the preceding paragraph;

(C) TO PAY, irrespective of the limit of liability expressed in Condition 9 (Limit) hereof, all costs taxed against the Assured in any legal proceeding defended by the Company, all interest accruing after entry of judgment upon such part thereof as shall not be in excess of said liability and the expense incurred by the Assured for such immediate medical or surgical relief as is imperative at the time of the accident, together with all the expense incurred by the Company growing out of the investigation of such an accident, the adjustment of any claim or the defense of any suit resulting therefrom;

This policy is made and accepted subject to the foregoing stipulations and conditions and to the stipulations and conditions printed on the second and third pages hereof, which are hereby made a part of this policy, together with such other provisions, stipulations and conditions as may be endorsed hereon or added hereto as herein provided.

IN WITNESS WHEREOF, THE STATE MUTUAL LIABILITY INSURANCE COMPANY has caused this policy to be signed by its President and Secretary, but the same shall not be binding unless countersigned by a duly authorized agent of the Company.

C. W. Grosjean
Secretary.

William Webb.
President.

Countersigned at **NEWARK, N. J.**

this [illegible] day of [illegible] 19[illegible]

New Jersey Indemnity Company

By [illegible]
President.

Authorized Agent for the purpose.

SUBJECT TO THE FOLLOWING CONDITIONS:

1. **Exclusions.** This policy does not cover Injuries and/or Death, or Loss, Damage and/or Expense:

(a) Assumed by or imposed upon the Assured by any compensation agreement, plan or law.

(b) Caused while any automobile described herein is employed for purposes other than stated in Statement 4 of the said Schedule of Statements.

(c) Which may be attributed to or arise from the act of any person or persons acting or claiming to act under authority from any country or people in a state of war, revolution or internal commotion or which shall arise from any consequences of hostilities, civil commotions, riots or warlike operations, even if by lawless or unauthorized person or persons, whether before or after declaration of war.

2. **Reporting Accidents, Claims and Suits.** The Assured, upon the occurrence of an accident, shall give immediate written notice thereof to the Company's Home Office, at Newark, New Jersey, or its Agent duly authorized by law to receive the same, with the fullest information obtainable. He shall give like notice with full particulars of any claim made on account of such accident. If, thereafter, any suit is brought against the Assured he shall immediately forward to the Company every summons or other process served upon him. The Assured, when requested by the Company, shall aid in affecting settlements, securing evidence, the attendance of witnesses and in prosecuting appeals. The Assured shall not voluntarily assume any liability, settle any claim or incur any expense, except at his own cost, or interfere in any negotiation for settlement or legal proceeding without the consent of the Company previously given in writing. The Company reserves the right to settle any such claim or suit brought against the Assured. Notice of occurrence of an accident, claim of injury or legal suit when served upon the Company by the Fiscal Officer of the City wherein the Insured is licensed, as specified in the Policy, shall be deemed and taken to be a notice as required to be given by the Insured under the terms of this Contract, provided, however, that the failure to give the notice required by any provision of this policy by either the insured or the fiscal officer of the City wherein the Insured is licensed, shall not operate to relieve the Company from liability hereunder, to pay any final judgment obtained against the Insured within the limits or coverage of this policy as set forth herein.

3. **Recovery.** Notwithstanding anything herein contained to the contrary, this Company will pay any final judgment recovered by any persons on account of the ownership, maintenance and use of the Automobile described herein, or any fault in respect thereto, in accordance with the conditions of liability as described in this Policy, and it is further understood that this policy shall be for the benefit of every person or persons suffering loss, damage or injury, as described in this policy, or as described in the terms of an Act entitled "An Act concerning auto buses, commonly called 'jitneys,' and their operation in cities," approved March 17, 1916, and known as Chapter 136 of the laws of 1916, State of New Jersey.

4. **Special Statutes.** If the limitation of time for notice of accident or for any legal proceeding herein contained is at variance with any specific statutory provision in relation thereto, in force in the State specified in Statement 2 (Address of Assured), the shortest time permitted or allowed by such specific statutory provision shall supersede any such condition in this Contract inconsistent therewith.

5. **Alterations in Policy.** No erasure or change appearing in this Policy as originally printed, and no alterations, change or waiver, of any of its terms, provisions, statements or conditions shall be valid unless made by written endorsement attached hereto and signed by the President, or a Vice-President, and countersigned by a duly authorized Agent of the Company. Nor shall notice to or knowledge of any Officer of the Company or of any Agent or other persons received or acquired before or after the date of this Policy be held to effect a waiver, change or alteration of any part of this Contract.

6. **Agent Defined.** No person shall be deemed an Agent of the Company for any purpose whatever, unless he be authorized, in writing, for such purpose by the President, a Vice-President or General Manager of the Company.

7. **Concurrent Insurance.** If the Assured carries a Policy of any other insurer covering concurrently a claim covered by this Policy, he shall not recover from the Company a larger proportion of any such claim than the sum hereby insured bears to the whole amount of such valid and collectible concurrent insurance.

8. **Subrogation of Rights.** Upon payment of any Loss, Damage, Claim and/or Expense under this Policy, the Company shall be subrogated to the extent of such payment, to all rights of recovery of Assured against others for such Loss, Damage, Claim and/or Expense, and the Assured shall render all possible co-operation and execute all papers requested by the Company, to secure such rights.

9. **Limit.** Regardless of the number of Assured involved, the Company's liability for Loss from an accident resulting in bodily injuries to or in the death of any person or persons is limited to FIVE THOUSAND DOLLARS ($5,000.00).

10. **Statements.** The Statements numbered 1 to 8, inclusive, in the Schedule of Statements hereinafter contained are warranted by the Assured to be true except such as are declared to be matters of estimate only. This Policy is issued in consideration of such warranties, and the provisions of the Policy respecting its premium and the payment of the premium stated in such Schedule of Statements.

11. **Contingent Liability.** This policy is issued by virtue of the Insurance Laws of the State of New Jersey, and the contingent mutual liability of the Assured hereunder, for the payment of losses and expenses not provided for by the Company's available cash funds, is and shall be be such additional sum, not less than an amount equal to and in addition to the premium hereon, as shall be found necessary by the Company's Board of Directors for the payment of the losses and expenses aforesaid.

SCHEDULE OF STATEMENTS.

1. Applicant's name is .....
(To avoid error print name here.)

2. Applicant's address is No. ..... City or Town .....

3. The applicant is ..... Occupation .....
(Individual, Partnership, Corporation or Estate) (Business or Trade)

4. Description. Name ..... Factory No. ..... License No. ..... Used for .....

5. The automobile is used and will continue to be used during the currency of this insurance, in the immediate vicinity of ..... and the seating capacity is ..... adults, with ..... body.

6. The policy period is for twelve months beginning on the ..... day of ..... 19.. , at noon, and ending on the ..... day of ..... 19.. , at noon.

7. As consideration for such policy I hereby agree to pay to the State Mutual Liability Insurance Company upon demand, the sum of ..... Dollars as premium thereon.

8. It is agreed that wherever in this application the words "I," "me," "my," "his," "myself" or other words are used to express the singular number, if the application be executed by a partnership, firm, or corporation, such words shall be read as "we," "us," "their," "its," "ourselves" and so on, in like manner in the plural number, or, as any pronoun applicable to the language used.

(This space is intended for the attachment of such statements, conditions, provisions, or agreements by way of endorsement as may be executed as provided in the Policy and, when so executed and attached, they are to be considered as a part of the Policy.)

#14

AUTOMOBILE—TRANSFER OF INSURANCE

Dated May 14, 1920

In consideration of ——— (Additional or Return) Premium of ——— Dollars ($ ———)

the Insurance upon this policy is hereby transferred from this date to cover the Automobile described as follows:

Number of Automobiles	Make	Model or Type	Style of Body	Year Built	Engine No.	Horse Power	Kind of Power
one	Concord	10½	Bus	1918	51573		Gas
		Seating Capacity 18					

and ceases to cover as written.

Subject, however, to all conditions, agreements and limitations of the Policy, except as herein specifically provided.

Attached to and forming part of Policy No. 411 of the STATE MUTUAL LIABILITY INSURANCE COMPANY

Issued to I. Barnett, 192 Chadwick Avenue, Newark, N. J.

Not valid unless countersigned by a duly authorized representative of the Company.

Dated at May 14, 1920

Countersigned by New Jersey Indemnity Co.

E. McCarroll President

C. W. Grosjean Secretary

E. McCarroll President

License Plates 159361

#14

AUTOMOBILE—TRANSFER OF INSURANCE

Dated Jan 24 1920

In consideration of ——— (Additional or Return) Premium of

none Dollars ($)

the Insurance upon this policy is hereby transferred from this date to cover the Automobile described as follows:

Number of Automobiles	Make	Model or Type	Style of Body	Year Built	Engine No.	Horse Power	Kind of Power
one	Jonaba Fleyo	C-4	Bus	1919	15599	27	Gas
	Seating capacity 22						

and ceases to cover as written.

Subject, however, to all conditions, agreements and limitations of the Policy, except as herein specifically provided.

Attached to and forming part of Policy No. 411 of the STATE MUTUAL LIABILITY INSURANCE COMPANY

Issued to Isador Barnett

Not valid unless countersigned by a duly authorized representative of the Company.

Dated at 19

Countersigned by New Jersey Indemnity Co.

E. McCarroll President

C. W. Grosjean Secretary

E. McCarroll President

INDEX.

PAGE

Public Service Railway Company vs. *William D. Reinhardt.*

Bill for Injunction 1
Notice of Motion to Strike Out 6
Vice-Chancellor's Memorandum on Motion to Strike Out 10
Order 14
Answer 15
Opinion of Vice-Chancellor 25
Final Decree 32
Notice of Appeal 33
Petition of Appeal 34
Answer to Petition of Appeal 35

Public Service Railway Company vs. *Isadore Barnett.*

Bill for Injunction 36
Answer 41
Opinion of Vice-Chancellor 51
Final Decree 52
Notice of Appeal 53
Petition of Appeal 54
Answer to Petition of Appeal 55

Public Service Railway Company vs. *William J. Banker, Jr.*

Bill for Injunction 56
Answer 61
Final Decree 71
Notice of Appeal 72
Petition of Appeal 73
Answer to Petition of Appeal 74

TESTIMONY.

Matthew R. Boylan, direct examination 77
Clifford B. Kay, direct examination 78
John F. Kenah, direct examination 83
cross " 87
Dennis F. Collins, direct examination 88
cross " 88
(recalled) further direct " 93
John J. McGrath, direct examination 89
William J. Egan, direct examination 89
Joseph Crawford, direct examination 90
Alexander Archibald, direct examination 92
Exhibit Reinhardt Case 113
Exhibit Barnett Case 118, 121

BILL FOR INJUNCTION.

Filed.

In Chancery of New Jersey

PUBLIC SERVICE RAILWAY COMPANY, *Complainant,* *and* WILLIAM D. REINHARDT, *Defendant.*	*On Bill, &c.* *Bill for Injunction.*

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

The complainant, Public Service Railway Company, a corporation of the State of New Jersey, having its principal office at No. 80 Park place, Newark, New Jersey, respectfully shows:

1. Complainant is incorporated under and by virtue of an act of the legislature of the State of New Jersey entitled "An Act to authorize the formation of traction companies for the construction and operation of street railways, or railroads operated as street railways, and to regulate the same," approved March 14, 1893, and filed its certificate of incorporation in the office of the Secretary of State at Trenton on August 20, 1907, to which certificate or a certified copy thereof complainant for greater certainty begs leave to refer.

2. Complainant is the owner and lessee of about 900 miles of street railway tracks in 142 of the municipalities of this State, including interurban lines, in the Counties of Bergen, Passaic, Hudson, Essex, Somerset, Union, Middlesex, Mercer, Burlington, Camden and Gloucester, and is now operating said system of street railways in the exercise of its franchises conferred by said act of the legislature for that purpose.

3. Complainant pays out more than $12,000,000 annually in wages to its operators and employees; $5,200,000 annually in fixed charges for interest on its outstanding obligations and rentals for leased property, and upwards of $1,761,000 annually

for taxes, municipal, state and national, on its tangible property and income, including 5% of its gross receipts for carrying passengers (less certain small deductions), which percentage of gross receipts is imposed as a tax or license fee for the exercise of complainant's franchises, and is distributed among the various municipalities in which its system of street railways is operated, under the provisions of Chapter 290 of the Laws of 1906, and the supplements thereto and amendments thereof.

4. Many of the ordinances granting consent by said municipalities to the location and construction of complainant's street railway tracks, poles and appurtenances, and many of the agreements between said municipalities and the owners of the street railway tracks which complainant is now operating provide for the paving and keeping in repair of the pavement of streets and portions of streets occupied by said street railway at the cost of complainant, amounting to many hundred thousand dollars annually.

5. The business of complainant represents an investment of more than $150,000,000, upon which it is not earning a fair return, in large part on account of the unlawful competition and interference with its business by the defendant, hereinafter named, and others operating similar auto busses or jitneys in said municipalities.

6. Under and in pursuance of its said franchises and rights conferred by law, complainant is now engaged, and for more than twelve years last past has been engaged, in the transportation of passengers for hire in and between the said 142 municipalities in this State, and is entitled to carry on its business under said authority, without the interruption, interference or unlawful competition of the defendant hereinafter mentioned.

7. Complainant's street railway tracks have been laid and its street railway cars are operated, and for twelve years and more last past said tracks have been laid and its cars operated, under the conditions and franchises aforesaid, on and along Broad street from Bank street to Orange street, and on Orange street from Broad street to Fourteenth street, in the City of Newark, in the County of Essex, being one of the said 142 municipalities, and the consent ordinances and provisions such as are referred to in the fourth paragraph hereof are in force in the City of Newark and require the complainant to pave and

maintain pavement on said streets, which complainant heretofore has done and is now doing, and William D. Reinhardt, the defendant herein, now is and for several months last past has been operating an auto bus, commonly called jitney, engaged in the business of carrying passengers for hire which he holds out and announces to operate or run, and is in fact operated or run by said defendant in direct competition with complainant over the said parts of Broad street and Orange street, in the City of Newark above named, by the following route, that is to say: from Broad and Bank streets, Newark, to the corner of Orange and Fourteenth streets, Newark, by way of Broad street and Orange street, and returning along Orange street and Broad street to West Park street, and thence through West Park street, Halsey street and Bank street, to the place of beginning. On part of said route, that is to say, on Broad street and Orange street, part of the system of street railways of complainant has been laid and is now operated by complainant in its business, and said defendant indiscriminately accepts and discharges such persons as may offer themselves for transportation along said streets and highways and the parts thereof on which the railway tracks of complainant are laid and on which its cars are operated; that the said defendant continually uses the complainant's railway and tracks in and on those streets, by driving his auto bus or jitney upon and along the same, and thereby impedes the progress of complainant's street cars, and greatly and unnecessarily annoys, vexes, hinders and obstructs the complainant in the lawful use of its railway property and exercise of its franchises, and in the lawful performance of its duties as a carrier for hire.

8. In the year 1916 the legislature of this State passed an act entitled, "An Act concerning auto busses, commonly called jitneys, and their operation in cities," being Chapter 136 of the laws of that year. Said act provides that no auto bus as therein and above defined shall be operated wholly or partly along any street in any city until the owner or owners thereof shall obtain the consent of the board or body having control of public streets in such city for the operation of such auto bus and the use of any such street or streets, and that no such consent shall become effective and no such operation shall be permitted until the owner of such auto bus in any city shall have filed with the

chief fiscal officer of the city in which such auto bus shall be licensed and operated an insurance policy of a company duly authorized to transact business under the insurance laws of the State of New Jersey, in the sum of $5,000, against loss from the liability imposed by law upon the auto bus owner for damages on account of bodily injury or death suffered by any person or persons as a result of an accident occurring by reason of the ownership, maintenance or use of such auto bus upon the public streets of such city; and that such consent shall continue effective and such operation be permitted only so long as such insurance shall remain in force; and that concurrently with the filing of such policy the owner of such auto bus shall execute and deliver to such fiscal officer a power of attorney wherein and whereby said auto owner shall nominate, constitute and appoint such fiscal officer his true and lawful attorney for the purpose of acknowledging service of any process out of a court of competent jurisdiction to be served against insured by virtue of the indemnity granted under the insurance policy filed, and shall have otherwise complied with the provisions of said act. Defendant at times pretends that he has obtained the consent of the board or body having control of public streets in the said City of Newark for the operation of his said auto bus or jitney and the use of the said street or streets of said city for that purpose, and has filed such policy of insurance and power of attorney required by said act, and that he has otherwise complied with the provisions thereof. But the complainant charges that the contrary of said pretences is the truth, and that said defendant has not obtained such consent, as required by said act, and that if defendant has obtained the consent of the said board or body having control of public streets in the said city, such consent is not in the form or of the character prescribed by law or contemplated by said act, and is altogether nugatory and void; and that the use and operation of said auto bus or jitney in the streets of said city is illegal, improper and a nuisance; that it constitutes an unlawful competition with complainant; that it unlawfully interferes with the operation of complainant's cars and the collection of its fares, and is a detriment to the complainant's business, diminishes its revenues, and is a hindrance to the performance and discharge of its public obligations, and is otherwise contrary to equity and good conscience.

9. Complainant further alleges that the damages resulting to it from the continuance of such unlawful acts of defendant are immeasurable in extent and irreparable in character, and that complainant can only have adequate relief in the premises in this honorable court, where such matters are properly cognizable.

Complainant therefore prays:

1. That William D. Reinhardt, defendant in this suit, may answer this bill of complaint and each statement herein contained, but without oath, which is hereby waived.

2. That defendant, his servants, agents and employees be enjoined and restrained from further continuing the operation of said jitney or auto bus in competition with complainant in the streets of the City of Newark, or in any other city in this State.

3. That complainant may have such other and further relief as may be equitable and just.

4. That a writ or writs of subpoena may issue commanding said defendant to answer this bill and abide by such decree as this court may make in the premises.

FRANK BERGEN,
Solicitor for and of Counsel with Complainant.

NOTICE OF MOTION TO STRIKE OUT.

IN CHANCERY OF NEW JERSEY.

PUBLIC SERVICE RAILWAY COMPANY, *Complainant,* and WILLIAM D. REINHARDT, *Defendant.*	*On Bill, &c.* *Notice of Motion to Strike Out.*

TAKE NOTICE that I shall apply to the Chancellor, at the Chancery Chambers, in the City of Jersey City, on the 19th day of July, 1920, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, to strike out the bill of complaint filed in the above-entitled matter upon the following grounds:

1. The allegations of the said bill are indefinite and uncertain and it cannot be determined therefrom whether complainant claims to be entitled to the exclusive right of operating conveyances for hire and reward over the public street mentioned in said bill, and that the act of defendant charged in the bill is illegal competition or whether complainant claims that the acts of defendant charged in the bill amount to an illegal and improper method of pursuing a legal right to the injury of the complainant.

2. The bill is indefinite and uncertain in that it does not set forth the particular ordinances and franchises under and by virtue of which complainant claims the right to operate its street railway cars upon the street referred to in the bill and under and by virtue of which complainant charges it is subject to certain obligations set forth in the bill.

3. The bill is uncertain and indefinite in that it does not set forth any specific acts performed by defendant which unnecessarily annoy, vex, hinder or obstruct the complainant in the lawful use of its railway property and exercise of its franchises and in the lawful performance of its duty as a carrier for hire.

4. From the prayer of the bill and the bill as a whole it appears that the purpose of the suit is to perpetuate a claimed right to the exclusive privilege of operating conveyances for hire

and reward over public streets and equity will not aid in such an attempt because

a. No such exclusive privilege as claimed exists.

b. Equity will not assist in the perpetuation of a monopoly.

5. The bill does not set forth a cause of action cognizable in equity.

6. There is no equity in the bill.

7. It does not appear from the bill that the complainant has complied with the provisions of the ordinances and franchises which it claims have conferred upon it rights to operate conveyances for hire and reward over the public street over which it is charged defendant is operating a jitney or auto bus.

And take further notice that if the bill as a whole be not stricken out I shall then object to and move to strike out the following portions of the bill, to wit:

1. The allegations in paragraph 3 with respect to the amount of wages paid to operators and employees; the amount paid annually in fixed charges for interest and outstanding obligations and rentals; the amount paid annually for taxes and the distribution of such, and I shall object to each one specifically upon the ground that such statements are immaterial and irrelevant to the issue.

2. The statements of paragraph 4 upon the ground that they are indefinite and uncertain and are conclusions both of law and of fact and that they are also immaterial and irrelevant to the issue.

3. The statements of paragraph 5 upon the ground that it is immaterial and irrelevant to the issue what investment the complainant's business represents or whether or not it is making a fair return on the investment and upon the further ground that said allegations are indefinite and uncertain and represent conclusions both of law and fact.

4. The statements of paragraph 6 upon the ground that said statements are uncertain and that said statements are irrelevant and immaterial to the issue and that they represent conclusions of law and fact.

5. So much of the contents of paragraph 7 as alleges that defendant uses the complainant's railway tracks by driving his auto bus or jitney upon or along the same, and thereby impedes

the progress of complainant's street cars, and greatly and unnecessarily annoys, vexes, hinders and obstructs the complainant in the lawful use of its railway property and exercise of its franchises, and in the lawful performance of its duties as a carrier for hire upon the ground that the said allegations are immaterial and irrelevant to the issue, that they represent conclusions of fact and of law and that it is the duty of a pleader to set forth specific acts.

6. The contents of paragraph 8 in so far as the statements in said paragraph refer to an act of the legislature entitled "An Act concerning auto busses, commonly called jitneys, and their operation in cities," being Chapter 136 of the laws of 1916, upon the ground that such allegations and statements are irrelevant and immaterial to the issue and that if, in fact, there are violations of such law, and if, in fact, defendant is operating without complying with said law no right of complainant remediable in equity is offended thereby.

Also so much of the paragraph as purports to allege that defendant has violated said act upon the ground that the allegations are indefinite and uncertain and represent conclusions of law and fact.

Also so much of the statements as allege that the acts of defendant constitute unlawful competition with complainant, and unlawfully interferes with the operation of complainant's cars and the collection of its fares, and is a detriment to complainant's business, and diminishes its revenues and is a hindrance to the performance and discharge of its public obligations upon the ground that such allegations are conclusions of law and fact and so much of the allegations as charge that the conduct of defendant amounts to a nuisance upon the ground that such allegation is a conclusion of law and fact, and upon the further ground that if the bill charges a nuisance the nuisance charged is a public nuisance and said complainant as a private individual has no power or authority to proceed against the defendant therefor.

7. So much of the prayer of the bill as seeks an injunction against the further continuation of the operation of the jitney or auto bus of defendant in competition with complainant without regard to the manner in which said jitney or auto bus is operated.

Notice of Motion to Strike Out.

And at such time and place if the bill be not stricken out I shall ask for a bill of particulars requiring complainant to specifically set forth:

1. Whether it claims the exclusive right to operate conveyances for hire and reward over the public street over which it is charged defendant operates a jitney or auto bus.

2. If it does not claim such exclusive privilege then just what right or privilege it does claim.

3. If it does not claim such exclusive privilege then that it set forth and specify each and every ordinance, resolution or franchise which it claims confers such exclusive privilege.

4. That it set forth and specify each and every resolution, ordinance and franchise which it claims confers any right upon it with respect to the operation of conveyances for hire or reward over the street over which it is claimed defendant operates a jitney or auto bus.

5. That it specify and set forth whether it has, in fact, complied with all of the terms and conditions of such ordinances, resolutions or franchises as it claims has conferred any right or authority upon it to operate conveyances for hire and reward over the public street over which it is charged defendant operates a jitney or auto bus.

6. That it set forth and specify whether at the time of the filing of the bill and whether it is at the present time complying with each and every provision of such resolutions, ordinances or franchises as it claims confers upon it authority to operate conveyances for hire and reward over the public street over which the defendant is charged to be operating a jitney or auto bus, and if it was not or is not complying with each and every of the provisions of such ordinances, resolutions and franchises then what provisions it is not complying with and by what right or authority it was and is not so complying.

Respectfully,

MERRITT LANE,
Solicitor for Defendant.

VICE-CHANCELLOR'S MEMORANDUM ON MOTION TO STRIKE OUT.

IN CHANCERY OF NEW JERSEY.

PUBLIC SERVICE RAILWAY COMPANY,
Complainant,

and

WILLIAM D. REINHARDT,
Defendant.

Submitted September 16, 1920; decided September 20, 1920.

Hon. Frank Bergen, solicitor of complainant.

Hon Merritt Lane, solicitor of defendant.

GRIFFIN, *V.-C.*

The complainant, a street railway company, incorporated under the laws of this State, filed its bill against the defendant, setting forth that it is the owner and lessee of about nine hundred miles of street railway tracks in one hundred and forty-two municipalities of this State, and pays annually more than twelve million dollars wages to operators and employees, five million two hundred thousand dollars annually in fixed charges for interest and rentals, upwards of one million seven hundred and sixty-one thousand dollars annually for taxes, municipal, state and national, on its tangible property and income, including five per cent. of its gross receipts, which is imposed as a tax or license fee for the exercise of its franchises, which is distributed among various municipalities; that the business of the complainant represents an investment of more than one hundred and fifty million dollars, on which it is not earning a fair return, principally on account of the unlawful competition and interference with its business of the defendant and others; that for more than twelve years last past its tracks have been laid and cars operated under the conditions of its franchises on Montgomery and other streets in the City of Jersey City; that it is bound to pave and maintain pavement on the said streets in Jersey City, which it has done and is now doing; that the defendant

now is, and for several months last past has been operating an auto bus, commonly called a jitney, engaged in the business of carrying passengers for hire, and so holds himself out, and is, in fact, operating, in direct competition with the complainant, on streets part of the system of the street railway of the complainant; "and said defendant indiscriminately accepts and discharges such persons as may offer themselves for transportation along said streets and highways and the parts thereof on which the railway tracks of the complainant are laid and on which its cars are operated; that the said defendant continually uses the complainant's railway and tracks in and on those streets by driving his auto bus or jitney upon and along the same, and thereby impedes the progress of complainant's street cars, and greatly and unnecessarily annoys, vexes, hinders and obstructs the complainant in the lawful use of its railway property and exercise of its franchises, and in the lawful performance of its duties as a carrier for hire."

The bill also alleges that the defendant has not complied with the Act of 1916, Chap. 136, commonly known as the Kates Act.

The pertinent prayers are (1) "that the defendant, his servants, etc., be enjoined and restrained from further continuing the operation of such jitney or auto bus in competition with the complainant in the streets of the City of Jersey City, or in any other city in this State"; (2) "that it may have such other and further relief as may be equitable and just."

The defendant now moves, on notice, to strike out the bill in its entirety, and several of the paragraphs separately.

At the present time I do not apprehend that the paragraphs 2, 3, 4 and 5, which deal with the number of miles of street railway, the amount paid for wages, taxes and other fixed charges, as well as the amount of capital invested, are essential, material or necessary to be proven, as the right of the complainant to maintain its bill, if at all, exists, whether it has a million or a hundred millions invested. But this, at the present time, I do not deem necessary to decide. The principal question to be determined is whether the defendant is operating his jitney bus is such manner as to infringe the rights of the complainant to its damage; and in passing upon this question it must be considered, first, that this notice of motion to strike out is in the nature of a demurrer to the bill; and, second, that under Rule 67 of this court demurrers were abolished and there was sub-

stituted in their stead the notice of motion to strike out the bill on the ground that it discloses no cause of action, and discretion is lodged in the Chancellor or Vice-Chancellor hearing the motion to order the application to stand over until final hearing. The purpose of this rule was to prevent suitors from being harrassed and put to great expense by prolonging litigation through the filing of demurrers, the hearings and appeals from decrees thereon, when if the decree was reversed, the cause might be brought to final hearing a long time after the bill was filed, when witnesses may have died or their attendance could not be procured, and thus the delay might amount to a denial of justice. Under this new practice, by laying the motion over until final hearing, the cause may be speedily and cheaply heard and decided, and the whole controversy settled by one appeal. If, however, by perusing the bill, it is quite plain that it discloses no cause of action, the Court should order the bill stricken out.

From a reading of the foregoing excerpts from the bill, which, on this motion, are admitted to be true, it appears that the defendant is engaged in a competing business with the complainant on streets in the City of Jersey City where the cars of the complainant are operated and its tracks are laid, and that the defendant continually uses the complainant's railway and tracks in and on those streets, driving his jitney upon and along the same, and that he thereby impedes the progress of the complainant's street cars, and greatly and unnecessarily annoys and vexes, hinders and obstructs the complainant in the lawful use of its railway property and in the exercise of its franchises, and in the lawful performance of its duty as a carrier for hire.

In *Camden Horse Railroad Company* v. *Citizens Coach Company*, 31 N. J. Eq. (4 Stew.) 525, the bill filed by the complainant (the railroad company) alleged, among other things, that the Coach Company was engaged in the carrying of passengers and property in and about Camden for compensation, and that it had continually, since its organization, made use of the railroad of the complainant in the pursuit of its business by driving its coaches upon and along the railroad track, to the obstruction and hindrance of the use of the railroad by its owner, the complainant; and prayed that the Coach Company be enjoined. The Chancellor said, in conclusion, "The defendant will not be restrained from using the tracks, but it will be enjoined from using them in competition with the complainant in the business

of carrying passengers and property thereon, and from obstructing or hindering the complainant in the use of the tracks." On appeal (*Citizens Coach Company* v. *Camden Horse R. R. Co.*, 33 N. J. Eq. (6 Stew.) 267), the decree of the Chancellor was affirmed, Mr. Justice Magie, who spoke for the Court of Errors and Appeals, saying at the foot of his opinion that any possible right which the Coach Company might have to the incidental use of the rails, in the use of the street, had been preserved by the decree and injunction; and as no appeal had been taken by the complainant, it was thought unnecessary to consider the question presented by that limitation. In the opinion of Mr. Justice Magie, at page 282, is the following paragraph: "The conclusion then is that the Horse Railroad Company, the complainant below, acquired by the grant contained in its charter a franchise and property in its tracks, when laid, which is exclusive of the use thereof by other persons or companies in competition with it in the business of carrying passengers for hire." The opinion also dealt with the rights of the general public using the road not in competition with the street railroad company, distinguishing the difference between the use which the general public might make of the tracks and that made by a competing carrier.

There was a feature, however, in the above case which is not alleged in the bill here, namely, it was proven that the Coach Company had constructed its coaches to fit the rails of the railroad company, and its employees were directed to use the same, probably because the road was paved with cobblestones so that the steel track afforded easier riding to passengers and less wear and tear to the horses and vehicles. Whether such conduct creates a situation so different from the present that the case is not applicable may readily be considered at final hearing when the evidence is in.

In view of this decision and the importance of the questions involved, the Court should exercise its discretion to order the motion to stand over until final hearing.

I have not deemed it necessary to deal with the arguments of counsel on the portion of the bill which charges the failure of the defendant to comply with the Kates Act because the evidence to prove or disprove this allegation must be brief, resolving the determination of the question purely to one of law, which

may be determined with the other important questions here involved.

In passing on these questions I have dealt meagerly with them in order not to prejudice or affect the rights of either party on final hearing, contenting myself merely with pointing out reasons why the Court should exercise the discretion given by the rules.

ORDER.

IN CHANCERY OF NEW JERSEY.

PUBLIC SERVICE RAILWAY COMPANY, *Complainant,* *and* WILLIAM D. REINHARDT, *Defendant.*	*On Bill, &c.* *Order.*

This matter coming on to be heard before the Court upon notice of motion by the defendant to strike out the bill, in the presence of Merritt Lane, solicitor for and of counsel with the defendant, and Frank Bergen, solicitor for and of counsel with the complainant, and counsel having been heard thereon, and the Court being of the opinion that the application should stand over until final hearing of this cause and the defendant should answer the bill of complaint;

It is on this 21st day of September, 1920, on motion of Frank Bergen, solicitor for complainant, ORDERED that the application of the defendant in this cause stand over until the hearing of this cause, and that the defendant shall answer the bill of complaint within five days from the date of this order.

Respectfully advised, E. R. WALKER, *C.*

JOHN GRIFFIN,
Vice-Chancellor.

Answer.

ANSWER.

Filed.

IN CHANCERY OF NEW JERSEY.

PUBLIC SERVICE RAILWAY COMPANY, *Complainant,* and WILLIAM D. REINHARDT, *Defendant.*	*On Bill, &c.* *Answer.*

Defendant, residing in the City of Newark, County of Essex, and State of New Jersey, protesting that he ought not be required to answer the bill of complaint before action by the Court upon the motion heretofore made by defendant to strike out the bill and to require complainant to make the bill more certain, and for other relief, and that to require the defendant to answer the bill as framed is unjust, inequitable and illegal, and representing to the Court that by reason of the manifest uncertainty of the bill it is impossible for defendant to full, complete and adequate answer make thereto, and reserving to himself the objections taken to the bill on the motion to strike and for other relief as by rule he is entitled, nevertheless, for answer to such parts of the bill of complaint as he is advised it is necessary or material for him to make answer unto, as by order of this Court he is required, says:

1. He admits the contents of paragraph 1 of the bill.

2. He has no knowledge of the contents of paragraph 2 of the bill and therefore denies the same.

He expressly denies that complainant is operating its system of street railways in the exercise of its franchise conferred by the act of the legislature, but says that, on the contrary, the said complainant, if it is operating its system of street railways, operates by virtue of certain licenses conferred upon it by various municipalities throughout the State as well as by permission, in some cases, of the legislature.

3. He denies the contents of paragraph 3 of the bill except that he says that he admits that the complainant pays a sum of

money in wages, another sum of money in fixed charges and another sum of money for taxes.

4. Answering the fourth paragraph, defendant admits that many of the ordinances granting consent by said municipalities to the location and construction of complainant's street railways, tracks, poles and appurtenances, and many of the agreements between said municipalities and the owners of the street railway tracks which complainant is now operating, provide for the paving and keeping in repair of the pavement of streets and portions of streets occupied by said street railway at the cost of complainant, but as to the actual expense incurred by complainant in and about its performance of the conditions of said ordinances defendant has no knowledge.

5. Defendant specifically denies each and every allegation of the contents of paragraph 5.

He specifically denies that complainant is not making a fair return upon such capital investment as it is entitled to make a fair return upon.

He specifically denies that the failure of complainant to make a fair return upon a proper capital investment, if there be such failure, is due to any competition or interference, unlawful or otherwise, with its business by defendant and others operating similar auto busses or "jitneys" so-called in the various municipalities.

Under the statute of the State of New Jersey the regulation of public utilities, such as complainant, is confided to the Board of Public Utility Commissioners. Under the statutes and the law such Board has the power and authority to fix and determine the rate of fares to be charged by complainant, and others similarly situated. Under the said laws, as construed by the courts, complainant is entitled to a fair return upon its proper invested capital.

Said complainant has applied from time to time to the Board of Public Utility Commissioners to fix and determine the rates of fare to be charged by it. Said Board of Public Utility Commissioners has held long and extensive hearings, at which said hearings complainant has appeared and been represented. After such hearings the said Board of Public Utility Commissioners fixed and determined the amount of fare which should be charged by said complainant in order to permit it to make a fair return,

within the meaning of the statutes, upon its proper invested capital, since which time and now said complainant has been and is charging its patrons the rate of fare so fixed and determined by said Board of Public Utility Commissioners. If the said complainant be not making a fair return upon its proper invested capital it is the fault of its management or of the Board of Public Utility Commissioners or of the law, and not in anywise the fault of defendant.

6. Answering the sixth paragraph of the bill defendant admits that complainant is now and has been engaged for more than twelve years last past in the transportation of passengers for hire and reward in and between certain municipalities, whether 142 in number defendant has no knowledge, but denies that it is entitled to carry on its business without the competition of defendant as such competition is now carried on, if competition it may be called, and further says that this Court cannot determine whether the said competition so-called carried on by said defendant is lawful or otherwise at the suit of complainant.

7. Answering the seventh paragraph defendant says that he admits that complainant's street railway tracks have been laid over the streets mentioned in said seventh paragraph, but as to whether the said consent ordinances and provisions thereof require complainant to pave and maintain pavement on said streets defendant has no knowledge. If said consent ordinances do require said complainant to so pave and maintain pavement on said streets defendant says that the said complainant has not complied with the provisions of said ordinances and has not paved and maintained pavement on said streets as such ordinances and provisions thereof require.

Defendant admits that he now is and for several months last past has been operating an auto bus commonly called a jitney, engaged in the business of carrying passengers for hire, which defendant holds out and announces to operate and run, and which said bus is in fact operated and run by said defendant.

He further admits that he indiscriminately accepts and discharges such persons as may offer themselves for transportation along said streets and highways and the parts thereof on which the railway tracks of complainant are laid and on which its cars are operated. He denies, however, that such jitney bus

is, in fact, operated or run by him in direct competition with complainant over the said streets or for the purpose of competing with said complainant, but he admits that some of his passengers would undoubtedly be forced to use the cars of the Public Service Railway Company for a portion of the distance covered by defendant if he, the said defendant, did not operate said bus, and in the sense that Public Service Railway Company would, in fact, carry for a portion of the distance some of the passengers carried by defendant, if said defendant did not operate, there is competition between the said defendant and the said complainant.

He specifically denies that he continually uses the complainant's railway tracks in and on those streets by driving his auto bus or jitney upon and along the same and thereby impedes the progress of complainant's street cars and he specifically denies that he greatly and unnecessarily annoys, vexes, hinders and obstructs the complainant in the lawful use of its railway property and exercise of its franchises, and in the lawful performance of its duties as a carrier for hire.

Further answering the said paragraph defendant says that whatever incidental use he makes of said complainant's tracks in and about the operation of his auto bus is such a use as that under the law he is entitled to make.

8. Answering the eighth paragraph of the bill defendant admits that the legislature of the State of New Jersey in 1916 passed the act referred to in said paragraph, and that provisions of said act are substantially as set forth in said paragraph, but defendant refers to said act for more certainty. If the allegations of said paragraph may be taken as charging that defendant derives his right to the use of the public streets through and by virtue of said act defendant denies such charge of inference, and on the contrary says that he is entitled, as every other citizen, and was entitled before the passage of said act, to use the public streets for the operation of his auto bus for the carriage of passengers for hire and reward, and the public were entitled to have him use the said streets for the purpose of carrying passengers for hire and reward, and there was no need, in order that said defendant might lawfully use the said street of any express legislative or municipal permission; that the right of defendant and the public is guaranteed by the constitution

of the State of New Jersey and of the United States, and that while the legislature may have power to regulate the use of said streets and the right of defendant, it has no power to prohibit defendant from using said streets for the purposes aforesaid, and for it to prohibit the use of said street by the defendant for the purposes aforesaid, would be to deprive the defendant and the members of the public generally of the right to carry on a lawful business, and of the right of enjoying or acquiring, possessing and protecting property and of pursuing and obtaining safety and happiness, and would be in violation of the provisions of the fourteenth amendment of the Constitution of the United States, in that it would deprive defendant of his property without due process of law, and in that it would deny defendant the equal protection of the law. The act of 1916, the so-called jitney act, was passed by the legislature for the purpose of protecting the public generally and specifically those who used the busses of defendant and other similarly operating, but not for purposes of protecting the complainant in anywise. Whether defendant has or has not complied with provisions of said act is no concern of complainant, and complainant cannot in this proceeding seek to take advantage of any alleged failure of defendant to comply with the provisions of said act.

Defendant denies that he at times pretends that he has obtained the consent of the board or body having control of public streets for the operation of his said auto bus or jitney and the use of said street or streets of said city for that purpose, and has filed said policy of insurance and power of attorney required by said act, and that he has otherwise complied with the provisions thereof. On the contrary, protesting, however, that it is entirely immaterial and that complainant cannot take advantage of any alleged failure of defendant to comply with the provisions of said act, he says, that he has in all respects and has always stated that he has in all respects complied with the provisions of said act and has obtained the consent of the board or body having control of the public streets for the operation of his said auto bus or jitney and for the use of said street or streets for that purpose, and has filed the policy of insurance and power of attorney required by said act.

He denies the allegations of said paragraph that he has not obtained the consent as required by the act, and he denies that

if he has obtained the consent such consent is not in the form or of the character prescribed by law or contemplated by said act, and is altogether nugatory and void.

Defendant protests that the allegations of said paragraph are uncertain. If complainant intends to charge that the consent which defendant has obtained and which has been granted to said defendant by the municipalities is not in accordance with the provisions of said act and that certain formalities should have been observed by defendant which were not by him observed, defendant says that since the adoption of said act in 1916 all of the jitneys in the State of New Jersey, numbering more than a thousand, have been operating in all of the municipalities of the State after having obtained consents similar to that obtained by defendant and have filed bonds similar to that filed by defendant and have filed powers of attorney similar to that filed by defendant, and have otherwise complied with the said act in the same manner in which defendant has complied with said act; that said act has been construed by the various municipal authorities of the State of New Jersey, and by the State authorities, and by those operating jitney busses within the State of New Jersey, as requiring and only requiring such a consent and such a power of attorney and such a bond as has been obtained and furnished by defendant. Defendant claims and insists that he has complied with the provisions of said act aforesaid, and that if it is necessary before defendant operate, that defendant should comply with the provisions of said act, then defendant says that he has so complied with it.

Defendant further says that this court cannot and will not determine, at the suit of the complainant, whether the consent which defendant has, in fact, obtained and under which he is, in fact, operating, is such a consent as is referred to in the said act aforesaid or not. This court is without power to determine in this proceeding the validity of the said license furnished, if such it may be called, to this defendant in this suit brought by complainant alleging itself to be a competitor.

Defendant further answering the eighth paragraph denies that the use and operation of such bus or jitney in the streets is illegal, improper and a nuisance; denies that it constitutes an unlawful competition with complainant; denies that it unlawfully interferes with the operation of complainant's cars and the collection of its fares, and is a detriment to complainant's

business, diminished its revenues and is a hindrance to the performance and discharge of its public obligations, and is otherwise contrary to equity and good conscience.

9. Defendant denies the contents of the ninth paragraph of the bill.

10. Further answering the bill, defendant says that complainant is not exercising in the operation of its business any technical franchise other perhaps than the franchise of being a corporation. It is and has been for many years last past engaged in the business of transporting passengers for hire and reward, and is subject to all the liabilities and obligations of a common carrier. In furtherance of its business and for the more convenient carrying on thereof it obtained from time to time from the State of New Jersey and from the various municipalities of the said State, among others the City of Newark, certain privileges in the public streets, to wit, the privilege of laying upon the public streets iron rails over which said iron rails it was privileged to propel cars engaged in the transportation of passengers for hire and reward. In view of the investment attached to the laying of the said rails, the right of the said complainant so obtained was a license coupled with an interest. By the granting of said privilege it did not obtain the exclusive right to carry passengers for hire and reward over the public streets over which its rails were laid, nor did it obtain the right to exclude from such public streets persons engaged in a competing business who might not have a similar license or an express permission of the State or one of its agents. In most instances, neither said complainant nor its predecessors paid any consideration for the privilege granted as aforesaid, save only that in some instances it agreed, as consideration for the granting of such privilege, that it would not charge more than a certain rate of fare and that it would keep the pavement between the rails and for a certain distance on each side thereof paved. In consideration of the granting of said privilege, however, complainant or its predecessors agreed, if not expressly, then by implication and operation of law, to maintain an efficient and adequate service so that the public desiring to be transported might be transported at reasonable rates of fare and with such safety as might be reasonably obtained and with such comfort as might be reasonable;

said complainant and its predecessors were bound by operation of law to furnish the passenger desiring transportation a seat, except under extraordinary circumstances. In order to enforce the liability of said complainant to furnish efficient and adequate service various municipalities of the State have passed ordinances requiring that the said complainant, when using the public streets for the purpose of carrying passengers for hire and reward upon the rails laid therein, should be prepared to furnish each person desiring transportation and willing to pay a fare a seat.

It became and was the duty of the said complainant and its predecessors to operate its business and manage the same as that it could perform the duties imposed upon it by the statutes and the ordinances and the common law.

2. Defendant says that the complainant and its predecessors did not perform the duties imposed upon it by law. He says that complainant and its predecessors so manipulated their business and so "watered" their stock and made such improper investments, as that, in order to attempt to pay a return upon an apparent invested capital which was, as defendant claims, not in fact invested, complainant and its predecessors adopted the policy of cutting down operating expenses as far as possible by operating as few cars as possible, and by crowding as many people as it was possible to crowd into such cars as were operated. Further to reduce expenses so that returns might be paid upon an apparent invested capital which was not, in fact, invested, complainant and its predecessors gave up extending the system so that large territories were developed which had no street car transportation facilities. Further, in order to pay returns upon said apparent invested capital, not in fact invested, complainant operated its street cars at slow rates of speed. Further, the complainant ceased observing the provisions of its contracts with the various municipalities to charge a certain rate of fare and charged rates of fare greatly in excess of the agreed rates, and defendant charges that said complainant is now charging fares in excess of the amount which it is required to charge by the contracts into which it entered at the time it obtained the consents to the exercise by it of the said privilege of laying rails in the public streets.

Answer.

3. Defendant says that by reason of the foregoing, some years prior to 1916 the situation had become such as that the complainant was not, in accordance with its contract and common law obligations, furnishing an adequate and efficient service and was not transporting passengers over the public streets with reasonable safety and reasonable comfort and at reasonable rates. Large territories were without means of communication with the centers of population by street car service. Complainant's system, so far as furnishing adequate and efficient service was concerned, had broken down. Thereupon, and in order to supply the public necessities, defendant and others similarly situated commenced the running of jitney or auto busses over the public streets for the carriage of passengers for hire and reward, and defendant says that in driving and operating his said auto bus he is performing a public service and is supplying a public need, and which said public need was caused by the failure of the said complainant and its predecessors to properly function. For this court now to restrain the operation of defendant would be not only to deprive defendant of his right to make a livelihood, and of his property without due process of law, but would also be to deprive the public of means of communication to which it is of right entitled.

4. Defendant further says that while defendant runs upon some of the streets upon which complainant operates its street railway lines he does not run solely upon said streets. Moreover he runs at a greatly increased speed than does complainant. The public is entitled to be moved from place to place at such reasonable speed as modern invention will permit. To prevent defendant from operating his said auto bus would force the public to the comparatively slow moving street cars of complainant, whereas they might be moved by the comparatively swift moving bus of defendant and those similarly operating.

5. Defendant further answering, says that while defendant operates over some of the streets over which the said complainant operates he also operates over other streets and in a territory in which the complainant does not operate, either himself or in conjunction and connection with other operators of jitney busses. To deprive defendant of the right of operating would be to deprive the public of transportation facilities in territory not reached by complainant.

6. Defendant further answering, says that many millions of people are carried in auto busses similar to those operated by defendant in a year. If the said auto busses were not operated, it is undoubtedly true that some of the persons who are now being carried by said auto busses would be carried by the complainant, but defendant says that it is impossible for complainant to properly and adequately care for any considerable proportion of the persons who are now carried by defendant and others similarly situated and represents to this court that it should not compel the public to return to the condition which existed before defendant and others commenced operating jitney busses when daily the members of the public in returning to and from their respective employments were obliged to travel in street cars packed as closely as it were possible to pack persons together within a confined space.

Defendant prays that the bill may be dismissed with costs.

GEORGE F. SEYMOUR, JR.,
Solicitor for and of Counsel with Defendant.

The complainant joins issue upon the answer of the defendant filed herein.

OPINION OF VICE-CHANCELLOR.

Filed.

IN CHANCERY OF NEW JERSEY.

PUBLIC SERVICE RAILWAY COMPANY, *Complainant,*

and

WILLIAM D. REINHARDT, *Defendant.*

Opinion.

Submitted January 5, 1921; decided February 9, 1921.

Frank Bergen, L. D. Howard Gilmour, E. Ambler Armstrong and Robert H. McCarter, Esqs., for the complainant.

Merritt Lane, Esq., for defendant.

Jerome D. Congleton, Esq., for the City of Newark.

GRIFFIN, *V.-C.*

The complainant, a street railway company, incorporated under the act entitled "An Act to authorize the formation of traction companies for the construction and operation of street railways or railroads operated as street railways, and to regulate the same," approved March 14, 1893 (P. L., 302; 4 Comp. Stat., p. 5021), lawfully laid its tracks and appurtenances in streets in the City of Newark, and is operating its cars on and over the same, carrying passengers for hire, and has expended sums of money running into millions in the construction and equipment of its road in order to enable it to carry on its business as a common carrier; and likewise expends large sums of money annually as necessary maintenance and operation charges.

By the bill the defendant is charged with being engaged in competition, as a carrier of passengers for hire, in streets where complainant's tracks are laid, running his auto-busses, called "jitneys," on and over the tracks of the complainant, impeding and obstructing the passage of its cars, thus stating a case within the rule in the case of *The Camden Horse Railroad Company* v. *Citizens' Coach Company,* 31 N. J. Eq., 525, affirmed

sub nom. Citizens' Coach Company v. *Camden Horse Railroad Company,* 32 *id.,* 267.

On the hearing the complainant made no point of the use made by the defendant of its tracks, basing its right to relief on the sole ground that the defendant is illegally operating his jitneys in the streets of the City of Newark in which complainant's cars are operated, to its great loss and damage; and that this illegality gives it a right to an injunction.

That the complainant is suffering a loss by this competition is quite apparent, when it appears that the jitneys in the City of Newark carry about four million passengers a month, and their owners pay to the City of Newark one hundred and sixty thousand dollars annually as a five per cent. tax on gross receipts.

The proposition thus presented is divisible into two questions: First, has the defendant a lawful right to carry on the business of a common carrier of passengers for hire in any of the streets of the City of Newark? Complainant contends for the negative, on the ground that the defendant has not the consent required under the so-called Kates Act (P. L., 1916, p. 283). A consent has been granted by the City of Newark, but complainant contends that this consent is illegal, null and void because it was not granted in the manner provided as well by the Kates Act as by the Limited Franchise Act (P. L., 1906, p. 50). *Public Service Railway Co.* v. *General Omnibus Co.,* 93 N. J. L., 344.

The defendant, on the contrary, asserts that his consent obtained from the city is valid, even though it was not granted in the manner directed by the Limited Franchise Act, and also asserts that even if the consent was not lawfully granted the complainant has no standing to maintain its present bill.

In the view I take of this case, it is unnecessary to determine the validity of the consent, because the case may be decided on the second division of the proposition, namely, 2. If defendant is without such right, may complainant maintain its bill to restrain the defendant from operating over streets in which its tracks are laid on the ground that the competition is unlawful, and complainant is suffering an irreparable injury therefrom?

The right of defendant to operate his jitneys in the streets of the City of Newark in the manner declared permissible in

Camden Horse Railroad Co. v. *Citizens' Coach Company, supra,* could not be questioned were it not for the Kates Act, *supra.* Turning to the Kates Act to ascertain for whose benefit the law was passed, it appears that the first section defines an auto-bus to be an automobile or motor-bus, commonly called a jitney, engaged in the business of carrying passengers for hire, etc. Section 2 provides (1) that no motor-bus shall be operated in any street of any city (a) without the consent of the city; (b) that no such consent shall become effective, and no such operation shall be permitted until the owner of the auto-bus shall file with the chief fiscal officer of the city a policy of insurance in five thousand dollars; (c) that with the filing of said policy the owner was required to file with the same officer a power of attorney appointing the officer his attorney for the purpose of acknowledging service of process; (d) that the consent may be revoked after a hearing, if it appears that the owner has failed to keep in force the insurance and power of attorney, or to comply with the terms and conditions imposed in the grant of consent, or with any law of the State of New Jersey. Section 3 provides (a) that on or before the tenth of each month the owner shall file, under oath, a statement of his gross receipts, and, at the same time, pay to the city five per cent. of such gross receipts "as a monthly or franchise tax for revenue for the use of the city." Provision is also made for the sum to be paid where the auto-bus operates partly within and partly outside of the city, based on mileage. (b) That the sum so paid shall be in lieu of all other franchise taxes and municipal license fees. Under section 5 it is made a misdemeanor to operate an auto-bus without complying with the act.

It is quite clear that this act was passed for the protection of the public, and for revenue. *West* v. *Asbury Park,* 89 N. J. L., 402. And it nowhere appears that it was enacted in any manner for the benefit of street railway companies. This leads to the question whether, if the consent be invalid, may the complainant, for its own advantage, assert this invalidity?

In 1863 the case of the *Delaware and Raritan Canal and Camden and Amboy Railroad and Transportation Company* v. *The Camden and Atlantic Railroad and Raritan and Delaware Bay Railroad Company* was decided, 16 N. J. Eq., 321, affirmed on appeal, 18 N. J. Eq., 546. In that case the complainants were

possessed of a grant from the State which gave to them the exclusive franchise of carrying passengers and merchandise across the State between the cities of New York and Philadelphia, free from competition, unless with their consent. One of the defendants, the Camden and Atlantic Railroad Company, had a charter to construct a road from the City of Camden, through Camden and Atlantic Counties, a distance of about sixty miles, to the ocean at Absecom Inlet, in the County of Atlantic. The defendant, the Raritan and Delaware Bay Railroad Company, was authorized to construct a railroad from some suitable point on Raritan Bay east of the village of Keyport, through the counties of Monmouth, Ocean, Burlington and Cape May to Cape Island, on the Atlantic Ocean. These railroads crossed at a point where, if consolidated, it would be quite impossible, by reason of the distance to be traversed, for them to compete with the complainant. Accordingly, without a grant from the State, the line of one of the railroads was deflected from the right of way, making a connection at a point nearer to Camden, thus so shortening the distance from Camden to New York that it might profitably enter into competition with the complainants. Chancellor Green enjoined the defendants, placing his grounds principally upon the exclusive franchise above referred to. The case was removed to the Court of Errors and Appeals, where, in the opinion, Chief Justice Beasley said that the result would be the same even if the grant was not exclusive as against the State; that no one can erect a railroad without the State's grant, and if anyone does so, it is a nuisance and an infringement of the legal rights of those having the exclusive franchise as against every one but the State.

In the case of *Jersey City Gaslight Company* v. *Dwight,* 29 N. J. Eq., 242 (248), the bill was filed to restrain the defendants (who were really the Consumers' Gas Company, a corporation organized under the Gas Act) from competing with the complainant, complaining that the Consumers' Gas Company were not and never were a corporation because the statutory conditions had not been complied with. In that case Vice-Chancellor Van Fleet said: "The business of manufacturing and selling illuminating gas is not a prerogative of government; like the manufacture and sale of any other ordinary article of traffic, it is open to all, and may be carried on by any person without legislative authority. Any one of the defendants, in point of

right and privilege, is the equal of the complainants in this respect. They are invested with no exclusive privilege or monopoly to make and sell gas. But the defendants also claim the right to use the public streets of Jersey City for the purpose of placing pipes therein through which they may furnish gas to their customers. This is a right which sovereign power alone can confer. The rule must be considered settled that no person can acquire a right to make a special or exceptional use of a public highway, not common to all the citizens of the State, except by the grant from the sovereign power." And, finding that the defendants had attempted to acquire corporate life and power by a feigned compliance with the law, ordered an injunction against their placing gas pipes, etc., in the public streets of Jersey City.

While the same learned Vice-Chancellor, in the case of *Elizabethtown Gas Company* v. *Green,* 46 N. J. Eq., 118, concluded that this latter case was disapproved of in *National Docks R. R. Co.* v. *Central R. R. of N. J.,* 5 Stew. Eq., 755, the disapproval was not as to the above excerpts.

In *Elizabethtown Gas Company* v. *Green, supra,* the complainant, by a special statute, was created a body corporate for the purpose of selling gas to the City of Elizabeth, with power of opening the streets and laying its pipes therein. It established its works and was supplying gas to the City of Elizabeth, when, in 1870, the legislature created The Metropolitan Gas Light Company of Elizabeth. The Elizabethtown Company there asserted that the Metropolitan Company had no right, in any capacity, to the franchises they were exercising, and that their claim to them was false, fraudulent, and without warrant of law; and that the legislative grant was only to take effect after the stockholders had paid thirty thousand dollars, and, as the truth was that that sum had never been paid, the grant never acquired vitality, and that, as a consequence, the Metropolitan Company stood precisely in the same condition as it would if no attempt had been made to make a grant to it. On this latter contention Vice-Chancellor Van Fleet said (p. 129): "It is not necessary, in my judgment, to decide whether this argument construes the grant made to the Metropolitan Company correctly or not, for if it be conceded that it does, still it is certain beyond all dispute that until it is made clearly to appear that the condition in question was imposed in favor

of the complainant, or for its benefit, so that it has a clear right to demand its observance, the complainant's position with respect to the condition is that simply of a stranger, and hence it stands without the least pretense of right to complain of its breach. It is only the parties to a grant made subject to conditions, or those in whose benefit or for whose benefit the conditions are imposed, that have a right to ask that they shall be performed, or seek protection against their breach, or redress for their violation. The complainant is not mentioned in the charter of the Metropolitan Company. The charter contains no word or sentence which, by the most lax construction, would support even a conjecture that the condition under consideration was imposed for the benefit or protection of the complainant." He then points out that the purpose of the grant to the Metropolitan Company was the benefit to be conferred upon the people of Elizabeth, and that the condition imposed was to protect the creditors of the company. This case was affirmed in the Court of Errors and Appeals by a divided court, on the opinion of Vice-Chancellor Van Fleet (49 N. J. Eq., 329).

These latter cases seem to be dispositive of the question. The right of the people to use the public highways of the State freely and without hindrance, subject only to proper police regulations, unless the legislature should otherwise ordain, is unquestioned; and in the exercise of this right the people are not exercising a franchise. Thus, persons complying with the Kates Act do not acquire a franchise to use the public highways. The act is prohibitive in that it takes away rights formerly possessed; and permissive and regulative in that it authorizes the use upon complying with the terms of the act. The plain purpose of the act was primarily not to license, but to regulate and control the operations of these vehicles in the crowded streets of cities for the public benefit and safety, and for revenue. *West* v. *Asbury Park, supra.* It was not passed for the benefit of street railroads. *Elizabethtown Gaslight Co.* v. *Green, supra; Jersey City Gas Light Co.* v. *Dwight, supra.* The franchise of the complainant is as to its tracks and ways, and gives it the exclusive use thereof as against competing carriers, in the manner indicated in *Camden Horse Railroad Co.* v. *Citizens' Coach Company, supra.* It has no grant outside of the tracks and ways; and therefore, when it seeks to enjoin competing carriers

from using a highway in a manner declared lawful under *Camden Horse Railroad Company* v. *Citizens' Coach Company, supra,* I feel bound, following *Elizabethtown Gas Light Co.* v. *Green* and *Jersey City Gas Light Co.* v. *Dwight, supra,* to hold that it has no standing in this court to ask for injunctive relief.

This conclusion is reached regardless of whether the defendant is operating his auto-busses without having the consent required under the Kates Act, and is guilty of a misdemeanor.

A decree will be advised dismissing the bill.

Public Service Railway Company vs. William D. Reinhardt.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

PUBLIC SERVICE RAILWAY COMPANY, *Complainant,* *vs.* WILLIAM D. REINHARDT, *Defendant.*	*On Bill, &c.* *Final Decree.*

The above cause coming on to be heard before the Chancellor, in the presence of Frank Bergen, L. D. Howard Gilmour, E. Ambler Armstrong and Robert H. McCarter, of counsel with complainant, and Merritt Lane, of counsel with defendant, and the Court having heard and considered the proofs offered by the respective parties, and the argument of counsel, and being of the opinion that the complainant is not entitled to the relief prayed in its bill of complaint.

It is, on this 14th day of February, 1921, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED AND DECREED, and the said Chancellor doth, by virtue of the power and authority of this court, hereby ORDER, ADJUDGE AND DECREE that the complainant's bill be dismissed, with costs to the respondent against complainant, in which said costs shall be included a counsel fee of five hundred dollars.

Respectfully advised,

E. R. WALKER,
C.

JOHN GRIFFIN,
V.-C.

Notice of Appeal.

NOTICE OF APPEAL.

Filed February 15, 1921.

IN CHANCERY OF NEW JERSEY.

PUBLIC SERVICE RAILWAY COMPANY, *Complainant,* *vs.* WILLIAM D. REINHARDT, *Defendant.*	*On Bill, &c.* *Notice of Appeal.*

The complainant hereby appeals from the final decree bearing date the 14th day of February, 1921, and from the whole and every part thereof, made in this court in the above-stated cause, to the Court of Errors and Appeals.

Dated February 14th, 1921.

FRANK BERGEN,
Solicitor for and of Counsel with Complainant.

I conceive there is good cause for appeal in the above-stated cause.

FRANK BERGEN,
Of Counsel with Complainant.

Service of the above notice is hereby acknowledged February 14, 1921.

GEORGE F. SEYMOUR, JR.,
Solicitor of Defendant.

PETITION OF APPEAL.

Filed February 16, 1921.

New Jersey Court of Errors and Appeals

PUBLIC SERVICE RAILWAY COMPANY, *Complainant-Appellant,* *vs.* WILLIAM D. REINHARDT, *Defendant-Respondent.*	*On Bill, &c.* *Petition of Appeal.*

To the Honorable the Court of Errors and Appeals of the State of New Jersey:

The petition of Public Service Railway Company, the appellant in the above-stated cause, respectfully shows:

That your petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the 14th day of February, 1921, wherein the said petitioner, Public Service Railway Company, was complainant, and William D. Reinhardt was defendant, in this respect, to wit: the said decree adjudged that the bill of complaint be dismissed, with costs to the defendant against complainant, in which said costs should be included a counsel fee of five hundred dollars.

And your petitioner humbly appeals from the said decree which decrees as aforesaid, upon the ground that the same is erroneous and the relief sought and prayed for by your petitioner in and by its bill of complaint should have been granted.

Your petitioner therefore prays that the said decree of the said Chancellor may in the particulars aforesaid be reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

FRANK BERGEN,
Solicitor for and of Counsel with Petitioner-Appellant.

ANSWER TO PETITION OF APPEAL.

Filed February 16, 1921.

NEW JERSEY COURT OF ERRORS AND APPEALS.

PUBLIC SERVICE RAILWAY COMPANY, *Complainant-Appellant,* *vs.* WILLIAM D. REINHARDT, *Defendant-Respondent.*	*On Bill, &c.* *Answer to Petition of Appeal.*

The answer of William D. Reinhardt, the above-named respondent, to the petition of appeal of the above-named appellant:

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless, says and admits that a decree was, on the 14th day of February, 1921, last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

GEORGE F. SEYMOUR, JR.,
Solicitor for and of Counsel with Respondent.

Public Service Railway Company vs. Isadore Barnett.

BILL FOR INJUNCTION.

Filed.

IN CHANCERY OF NEW JERSEY.

PUBLIC SERVICE RAILWAY COMPANY, *Complainant,* *and* ISADORE BARNETT, *Defendant.*	*Bill for Injunction.*

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey.

The complainant, Public Service Railway Company, a corporation of the State of New Jersey, having its principal office at No. 80 Park place, Newark, New Jersey, respectfully shows:

1. Complainant is incorporated under and by virtue of an act of the legislature of the State of New Jersey, entitled "An Act to authorize the formation of traction companies for the construction and operation of street railways, or railroads operated as street railways, and to regulate the same," approved March 14, 1893, and filed its certificate of incorporation in the office of the Secretary of State at Trenton on August 20, 1907, to which certificate or a certified copy thereof complainant for greater certainty begs leave to refer.

2. Complainant is the owner and lessee of about 900 miles of street railway tracks in 142 of the municipalities of this State, including interurban lines, in the counties of Bergen, Passaic, Hudson, Essex, Somerset, Union, Middlesex, Mercer, Burlington, Camden and Gloucester, and is now operating said system of street railways in the exercise of its franchises conferred by said act of the legislature for that purpose.

3. Complainant pays out more than $12,000,000 annually in wages to its operators and employees; $5,200,000 annually in fixed charges for interest on its outstanding obligations and rentals for leased property; and upwards of $1,761,000 annually for taxes, municipal, State and national, on its tangible property

and income, including 5 per cent. of its gross receipts for carrying passengers (less certain small deductions), which percentage of gross receipts is imposed as a tax or license fee for the exercise of complainant's franchises, and is distributed among the various municipalities in which its system of street railways is operated, under the provisions of chapter 290 of the laws of 1906, and the supplements thereto and amendments thereof.

4. Many of the ordinances granting consent by said municipalities to the location and construction of complainant's street railway tracks, poles and appurtenances, and many of the agreements between said municipalities and the owners of the street railway tracks which complainant is now operating provide for the paving and keeping in repair of the pavement of streets and portions of streets occupied by said street railway, at the cost of complainant, amounting to many hundred thousand dollars annually.

5. The business of complainant represents an investment of more than $150,000,000, upon which it is not earning a fair return, in large part on account of the unlawful competition and interference with its business by the defendant, hereinafter named, and others operating similar auto-busses or jitneys in said municipalities.

6. Under and in pursuance of its said franchises and rights conferred by law, complainant is now engaged, and for more than twelve years last past has been engaged, in the transportation of passengers for hire in and between the said 142 municipalities of this State, and is entitled to carry on its business under said authority, without the interruption, interference or unlawful competition of the defendant hereinafter mentioned.

7. Complainant's street railway tracks have been laid and its street railway cars are operated, and for twelve years and more last past said tracks have been laid and its cars operated, under the conditions and franchises aforesaid, on and along Newark avenue, North Broad street and Broad street, in the City of Elizabeth, in the County of Union, and Broad street and Frelinghuysen avenue, in the City of Newark, in the County of Essex, being two of the said 142 municipalities, and the consent ordinances and provisions such as are referred to in the fourth paragraph hereof are in force in the cities of Elizabeth and Newark and require the complainant to pave and maintain

pavement on said streets and avenues, which complainant heretofore has done and is now doing, and Isadore Barnett, the defendant herein, now is and for several months last past has been operating an auto-bus, commonly called jitney, engaged in the business of carrying passengers for hire which he holds out and announces to operate or run, and is in fact operated or run by said defendant in direct competition with complainant over the said streets in the cities of Elizabeth and Newark above named, and on said streets part of the system of street railways of complainant has been laid and is now operated by complainant in its business, and said defendant indiscriminately accepts and discharges such persons as may offer themselves for transportation along said streets and highways and the parts thereof on which the railway tracks of complainant are laid and on which its cars are operated; that the said defendant continually uses the complainant's railway and tracks in and on those streets by driving his auto-bus or jitney upon and along the same, and thereby impedes the progress of complainant's street cars, and greatly and unnecessarily annoys, vexes, hinders and obstructs the complainant in the lawful use of its railway property and exercise of its franchises, and in the lawful performance of its duties as a carrier for hire.

8. In the year 1916 the legislature of this State passed an act entitled "An Act concerning auto-busses, commonly called jitneys, and their operation in cities," being chapter 136 of the laws of that year. Said act provides that no auto-bus as therein and above defined shall be operated wholly or partly along any street in any city until the owner or owners thereof shall obtain the consent of the board or body having control of public streets in such city for the operation of such auto-bus and the use of any such street or streets, and that no such consent shall become effective and no such operation shall be permitted until the owner of such auto-bus in any city shall have filed with the chief fiscal officer of the city in which such auto-bus shall be licensed and operated an insurance policy of a company duly authorized to transact business under the insurance laws of the State of New Jersey, in the sum of $5,000, against loss from the liability imposed by law upon the auto-bus owner for damages on account of bodily injury or death suffered by any person or persons as a result of an accident occurring by reason of the

ownership, maintenance or use of such auto-bus upon the public streets of such city; and that such consent shall continue effective and such operation be permitted only so long as such insurance shall remain in force; and that concurrently with the filing of such policy the owner of such auto-bus shall execute and deliver to such fiscal officer a power of attorney wherein and whereby said auto-bus owner shall nominate, constitute and appoint such fiscal officer his true and lawful attorney for the purpose of acknowledging service of any process out of a court of competent jurisdiction to be served against insured by virtue of the indemnity granted under the insurance policy filed, and shall have otherwise complied with the provisions of said act. Defendant has not filed nor attempted to file, as required by said act, any insurance policy and power of attorney, or either of them, in the City of Elizabeth. Defendant at times pretends that he has obtained the consent of the boards or bodies having control of public streets in the said cities of Elizabeth and Newark for the operation of his said auto-bus or jitney and the use of the said street or streets of said cities for that purpose, and has filed such policies of insurance and powers of attorney required by said act, and that he has otherwise complied with the provisions thereof. But the complainant charges that the contrary of said pretenses is the truth, and that said defendant has not obtained such consent, as required by said act, and that if defendant has obtained the consent of the said boards or bodies having control of public streets in the said cities, such consent is not in the form or of the character prescribed by law or contemplated by said act, and is altogether nugatory and void; and that the use and operation of said auto-bus or jitney in the streets of said cities is illegal, improper and a nuisance; that it constitutes an unlawful competition with complainant; that it unlawfully interferes with the operation of complainant's cars and the collection of its fares, and is a detriment to the complainant's business, diminishes its revenues, and is a hindrance to the performance and discharge of its public obligations, and is otherwise contrary to equity and good conscience.

9. Complainant further alleges that the damages resulting to it from the continuance of such unlawful acts of defendant are immeasurable in extent and irreparable in character, and

that complainant can only have adequate relief in the premises in this honorable court, where such matters are properly cognizable.

Complainant therefore prays:

1. That Isadore Barnett, defendant in this suit, may answer this bill of complaint and each statement herein contained, but without oath, which is hereby waived.

2. That defendant, his servants, agents and employees be enjoined and restrained from further continuing the operation of said jitney or auto-bus in competition with complainant in the streets of the cities of Elizabeth and Newark, or in any other city in this State.

3. That complainant may have such other and further relief as may be equitable and just.

4. That a writ or writs of subpoena may issue commanding said defendant to answer this bill and abide by such decree as this court may make in the premises.

FRANK BERGEN.

Solicitor for and of Counsel with Complainant.

Motion to strike made and disposed of by opinion in Reinhardt case.

Answer.

ANSWER.

Filed.

IN CHANCERY OF NEW JERSEY.

PUBLIC SERVICE RAILWAY COMPANY, *Complainant,* and ISADORE BARNETT, *Defendant.*	*On Bill, &c. Answer.*

Defendant, residing in the City of Newark, County of Essex, and State of New Jersey, protesting that he ought not be required to answer the bill of complaint before action by the Court upon the motion heretofore made by defendant to strike out the bill and to require complainant to make the bill more certain, and for other relief, and that to require the defendant to answer the bill as framed is unjust, inequitable and illegal, and representing to the Court that by reason of the manifest uncertainty of the bill it is impossible for defendant to full, complete and adequate answer make thereto, and reserving to himself the objections taken to the bill on the motion to strike and for other relief as by rule he is entitled, nevertheless, for answer to such parts of the bill of complaint as he is advised it is necessary or material for him to make answer unto, as by order of this Court he is required, says:

1. He admits the contents of paragraph 1 of the bill.

2. He has no knowledge of the contents of paragraph 2 of the bill and therefore denies the same.

He expressly denies that complainant is operating its system of street railways in the exercise of its franchise conferred by the act of the legislature, but says that, on the contrary, the said complainant, if it is operating its system of street railways, operates by virtue of certain licenses conferred upon it by various municipalities throughout the State as well as by permission, in some cases, of the legislature.

3. He denies the contents of paragraph 3 of the bill except that he says that he admits that the complainant pays a sum of

money in wages, another sum of money in fixed charges and another sum of money for taxes.

4. Answering the fourth paragraph, defendant admits that many of the ordinances granting consent by said municipalities to the location and construction of complainant's street railways, tracks, poles and appurtenances, and many of the agreements between said municipalities and the owners of the street railway tracks which complainant is now operating, provide for the paving and keeping in repair of the pavement of streets and portions of streets occupied by said street railway at the cost of complainant, but as to the actual expense incurred by complainant in and about its performance of the conditions of said ordinances defendant has no knowledge.

5. Defendant specifically denies each and every allegation of the contents of paragraph 5.

He specifically denies that complainant is not making a fair return upon such capital investment as it is entitled to make a fair return upon.

He specifically denies that the failure of complainant to make a fair return upon a proper capital investment, if there be such failure, is due to any competition or interference, unlawful or otherwise, with its business by defendant and others operating similar auto busses or "jitneys" so-called in the various municipalities.

Under the statute of the State of New Jersey the regulation of public utilities, such as complainant, is confided to the Board of Public Utility Commissioners. Under the statutes and the law such Board has power and authority to fix and determine the rate of fares to be charged by complainant, and others similarly situated. Under the said laws, as construed by the courts, complainant is entitled to a fair return upon its proper invested capital.

Said complainant has applied from time to time to the Board of Public Utility Commissioners to fix and determine the rates of fare to be charged by it. Said Board of Public Utility Commissioners has held long and extensive hearings, at which said hearings complainant has appeared and been represented. After such hearings the said Board of Public Utility Commissioners fixed and determined the amount of fare which should be charged by said complainant in order to permit it to make a fair return,

within the meaning of the statutes, upon its proper invested capital, since which time and now said complainant has been and is charging its patrons the rate of fare so fixed and determined by said Board of Public Utility Commissioners. If the said complainant be not making a fair return upon its proper invested capital it is the fault of its management or of the Board of Public Utility Commissioners or of the law, and not in anywise the fault of defendant.

6. Answering the sixth paragraph of the bill defendant admits that complainant is now and has been engaged for more than twelve years last past in the transportation of passengers for hire and reward in and between certain municipalities, whether 142 in number defendant has no knowledge, but denies that it is entitled to carry on its business without the competition of defendant as such competition is now carried on, if competition it may be called, and further says that this court cannot determine whether the said competition so-called carried on by said defendant is lawful or otherwise at the suit of complainant.

7. Answering the seventh paragraph defendant says that he admits that complainant's street railway tracks have been laid over the streets mentioned in said seventh paragraph, but as to whether the said consent ordinances and provisions thereof require complainant to pave and maintain pavement on said streets defendant has no knowledge. If said consent ordinances do require said complainant to so pave and maintain pavement on said streets defendant says that the said complainant has not complied with the provisions of said ordinances and has not paved and maintained pavement on said streets as such ordinances and provisions thereof require.

Defendant admits that he now is and for several months last past has been operating an auto bus commonly called a jitney, engaged in the business of carrying passengers for hire, which defendant holds out and announces to operate and run, and which said bus is in fact operated and run by said defendant.

He further admits that he indiscriminately accepts and discharges such persons as may offer themselves for transportation along said streets and highways and the parts thereof on which the railway tracks of complainant are laid and on which

its cars are operated. He denies, however, that such jitney bus is, in fact, operated or run by him in direct competition with complainant over the said streets or for the purpose of competing with said complainant, but he admits that some of his passengers would undoubtedly be forced to use the cars of the Public Service Railway Company for a portion of the distance covered by defendant if he, the said defendant, did not operate said bus, and in the sense that the Public Service Railway Company would, in fact, carry for a portion of the distance some of the passengers carried by defendant, if said defendant did not operate, there is competition between the said defendant and the said complainant.

He specifically denies that he continually uses the complainant's railway tracks in and on those streets by driving his auto bus or jitney upon and along the same and thereby impedes the progress of complainant's street cars and he specifically denies that he greatly and unnecessarily annoys, vexes, hinders and obstructs the complainant in the lawful use of its railway property and exercise of its franchises, and in the lawful performance of its duties as a carrier for hire.

Further answering the said paragraph defendant says that whatever incidental use he makes of said complainant's tracks in and about the operation of his auto bus is such a use as that under the law he is entitled to make.

8. Answering the eighth paragraph of the bill defendant admits that the legislature of the State of New Jersey in 1916 passed the act referred to in said paragraph, and that provisions of said act are substantially as set forth in said paragraph, but defendant refers to said act for more certainty. If the allegations of said paragraph may be taken as charging that defendant derives his right to the use of the public streets through and by virtue of said act defendant denies such charge of inference, and on the contrary says that he is entitled, as every other citizen, and was entitled before the passage of said act, to use the public streets for the operation of his auto bus for the carriage of passengers for hire and reward, and the public were entitled to have him use the said streets for the purpose of carrying passengers for hire and reward, and there was no need, in order that said defendant might lawfully use the said street of any express legislative or municipal permission; that the right of defendant and the public is guaranteed by the constitution

of the State of New Jersey and of the United States, and that while the legislature may have power to regulate the use of said streets and the right of defendant, it has no power to prohibit defendant from using said streets for the purposes aforesaid, and for it to prohibit the use of said street by the defendant for the purposes aforesaid, would be to deprive the defendant and the members of the public generally of the right to carry on a lawful business, and of the right of enjoying or acquiring, possessing and protecting property and of pursuing and obtaining safety and happiness, and would be in violation of the provisions of the fourteenth amendment to the Constitution of the United States, in that it would deprive defendant of his property without due process of law, and in that it would deny defendant the equal protection of the law. The act of 1916, the so-called jitney act, was passed by the legislature for the purpose of protecting the public generally and specifically those who used the busses of defendant and others similarly operating, but not for purposes of protecting the complainant in any wise. Whether defendant has or has not complied with provisions of said act is no concern of complainant, and complainant cannot in this proceeding seek to take advantage of any alleged failure of defendant to comply with the provisions of said act.

Defendant denies that he at times pretends that he has obtained the consent of the board or body having control of public streets for the operation of his said auto bus or jitney and the has filed said policy of insurance and power of attorney required by said act, and that he has otherwise complied with the provisions thereof. On the contrary, protesting, however, that it is entirely immaterial and that complainant cannot take advantage of any alleged failure of defendant to comply with the provisions of said act, he says, that he has in all respects and has always stated that he has in all respects complied with the provisions of said act and has obtained the consent of the board or body having control of the public streets for the operation of his said auto bus or jitney and for the use of said street or streets for that purpose, and has filed the policy of insurance and power of attorney required by said act.

He denies the allegations of said paragraph that he has not obtained the consent as required by the act, and he denies that if he has obtained the consent such consent is not in the form

or of the character prescribed by law or contemplated by said act, and is altogether nugatory and void.

Defendant protests that the allegations of said paragraph are uncertain. If complainant intends to charge that the consent which defendant has obtained and which has been granted to said defendant by the municipalities is not in accordance with the provisions of said act and that certain formalities should have been observed by defendant which were not by him observed, defendant says that since the adoption of said act in 1916 all of the jitneys in the State of New Jersey, numbering more than a thousand, have been operating in all of the municipalities of the State after having obtained consents similar to that obtained by defendant and have filed bonds similar to that filed by defendant and have filed powers of attorney similar to that filed by defendant, and have otherwise complied with the said act in the same manner in which defendant has complied with said act; that said act has been construed by the various municipal authorities of the State of New Jersey, and by the State authorities, and by those operating jitney busses within the State of New Jersey, as requiring and only requiring such a consent and such a power of attorney and such a bond as has been obtained and furnished by defendant. Defendant claims and insists that he has complied with the provisions of said act aforesaid, and that if it is necessary before defendant operate, that defendant should comply with the provisions of said act, then defendant says that he has so complied with it.

Defendant further says that this court cannot and will not determine, at the suit of the complainant, whether the consent which defendant has, in fact, obtained and under which he is, in fact, operating, is such a consent as is referred to in the said act aforesaid or not. This court is without power to determine in this proceeding the validity of the said license furnished, if such it may be called, to this defendant in this suit brought by complainant alleging itself to be a competitor.

Defendant further answering the eighth paragraph denies that the use and operation of such bus or jitney in the streets is illegal, improper and a nuisance; denies that it constitutes an unlawful competition with complainant; denies that it unlawfully interferes with the operation of complainant's cars and the collection of its fares, and is a detriment to complainant's business, diminished its revenues and is a hindrance to the

performance and discharge of its public obligations, and is otherwise contrary to equity and good conscience.

9. Defendant denies the contents of the ninth paragraph of the bill.

10. Further answering the bill, defendant says that complainant is not exercising in the operation of its business any technical franchise other perhaps than the franchise of being a corporation. It is and has been for many years last past engaged in the business of transporting passengers for hire and reward, and is subject to all the liabilities and obligations of a common carrier. In furtherance of its business and for the more convenient carrying on thereof it obtained from time to time from the State of New Jersey and from the various municipalities of the said State, among others the Cities of Elizabeth and Newark, certain privileges in the public streets, to wit, the privilege of laying upon the public streets iron rails over which said iron rails it was privileged to propel cars engaged in the transportation of passengers for hire and reward. In view of the investment attached to the laying of the said rails, the right of the said complainant so obtained was a license coupled with an interest. By the granting of said privilege it did not obtain the exclusive right to carry passengers for hire and reward over the public streets over which its rails were laid, nor did it obtain the right to exclude from such public streets persons engaged in a competing business who might not have a similar license or an express permission of the State or one of its agents. In most instances, neither said complainant nor its predecessors paid any consideration for the privilege granted as aforesaid, save only that in some instances it agreed, as consideration for the granting of such privilege, that it would not charge more than a certain rate of fare and that it would keep the pavement between the rails and for a certain distance on each side thereof paved. In consideration of the granting of said privilege, however, complainant or its predecessors agreed, if not expressly, then by implication and operation of law, to maintain an efficient and adequate service so that the public desiring to be transported might be transported at reasonable rates of fare and with such safety as might be reasonably obtained and with such comfort as might be reasonable; said complainant and its predecessors were bound by operation

of law to furnish the passenger desiring transportation a seat, except under extraordinary circumstances. In order to enforce the liability of said complainant to furnish efficient and adequate service various municipalities of the State have passed ordinances requiring that the said complainant, when using the public streets for the purpose of carrying passengers for hire and reward upon the rails laid therein, should be prepared to furnish each person desiring transportation and willing to pay a fare a seat.

It became and was the duty of the said complainant and its predecessors to operate its business and manage the same as that it could perform the duties imposed upon it by the statutes and the ordinances and the common law.

2. Defendant says that the complainant and its predecessors did not perform the duties imposed upon it by law. He says that complainant and its predecessors so manipulated their business and so "watered" their stock and made such improper investments, as that, in order to attempt to pay a return upon an apparent invested capital which was, as defendant claims, not in fact invested, complainant and its predecessors adopted the policy of cutting down operating expenses as far as possible by operating as few cars as possible, and by crowding as many people as it was possible to crowd into such cars as were operated. Further to reduce expenses so that returns might be paid upon an apparent invested capital which was not, in fact, invested, complainant and its predecessors gave up extending the system so that large territories were developed which had no street car transportation facilities. Further, in order to pay returns upon said apparent invested capital, not in fact invested, complainant operated its street cars at slow rates of speed. Further, the complainant ceased observing the provisions of its contracts with the various municipalities to charge a certain rate of fare and charged rates of fare greatly in excess of the agreed rates, and defendant charges that said complainant is now charging fares in excess of the amount which it is required to charge by the contracts into which it entered at the time it obtained the consents to the exercise by it of the said privilege of laying rails in the public streets.

3. Defendant says that by reason of the foregoing, some years prior to 1916 the situation had become such as that the

complainant was not, in accordance with its contract and common law obligations, furnishing an adequate and efficient service and was not transporting passengers over the public streets with reasonable safety and reasonable comfort and at reasonable rates. Large territories were without means of communication with the centers of population by street car service. Complainant's system, so far as furnishing adequate and efficient service was concerned, had broken down. Thereupon, and in order to supply the public necessities, defendant and others similarly situated commenced the running of jitney or auto busses over the public streets for the carriage of passengers for hire and reward, and defendant says that in driving and operating his said auto bus he is performing a public service and is supplying a public need, and which said public need was caused by the failure of the said complainant and its predecessors to properly function. For this court now to restrain the operation of defendant would be not only to deprive defendant of his right to make a livelihood, and of his property without due process of law, but would also be to deprive the public of means of communication to which it is of right entitled.

4. Defendant further says that while defendant runs upon some of the streets upon which complainant operates its street railway lines he does not run solely upon said streets. Moreover he runs at a greatly increased speed than does complainant. The public is entitled to be moved from place to place at such reasonable speed as modern invention will permit. To prevent defendant from operating his said auto bus would force the public to the comparatively slow moving street cars of complainant, whereas they might be moved by the comparatively swift moving bus of defendant and those similarly operating.

5. Defendant further answering, says that while defendant operates over some of the streets over which the said complainant operates he also operates over other streets and in a territory in which the complainant does not operate, either himself or in conjunction and connection with other operators of jitney busses. To deprive defendant of the right of operating would be to deprive the public of transportation facilities in territory not reached by complainant.

6. Defendant further answering, says that many millions of people are carried in auto busses similar to those operated by

defendant in a year. If the said auto busses were not operated, it is undoubtedly true that some of the persons who are now being carried by said auto busses would be carried by the complainant, but defendant says that it is impossible for complainant to properly and adequately care for any considerable proportion of the persons who are now carried by defendant and others similarly situated and represents to this court that it should not compel the public to return to the condition which existed before defendant and others commenced operating jitney busses when daily the members of the public in returning to and from their respective employments were obliged to travel in street cars packed as closely as it were possible to pack persons together within a confined space.

Defendant prays that the bill may be dismissed with costs.

MERRITT LANE,
Solicitor for and of Counsel with Defendant.

The complainant joins issue upon the answer of the defendant filed herein.

OPINION OF VICE-CHANCELLOR.

Filed.

IN CHANCERY OF NEW JERSEY.

PUBLIC SERVICE RAILWAY COMPANY,
Complainant,

and

ISADORE BARNETT,
Defendant.

Opinion.

Submitted January 5, 1921; decided February 9, 1921.

Frank Bergen, L. D. Howard Gilmour, E. Ambler Armstrong and Robert H. McCarter, Esqs., for complainant.

Merritt Lane, Esq., for defendant.

GRIFFIN, *V.-C.*

The only difference between this case and *Public Service Railway Co.* v. *Reinhardt,* just decided, is that the defendant took out one policy of insurance of five thousand dollars covering the Cities of Elizabeth and Newark. This was condemned in *Fischer* v. *Pollitt* by the Supreme Court in an opinion filed by Mr. Justice Minturn, January 17, 1921 (not yet reported), in which he affirmed a conviction, under the Kates Act, for operating where the bond filed included liability occurring in two municipalities. This, however, as indicated in the Reinhardt case, complainant cannot take advantage of.

A decree will be advised dismissing the bill.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

PUBLIC SERVICE RAILWAY COMPANY, *Complainant,* *vs.* ISADORE BARNETT, *Defendant.*	*On Bill, &c.* *Final Decree.*

The above cause coming on to be heard before the Chancellor, in the presence of Frank Bergen, L. D. Howard Gilmour, E. Ambler Armstrong and Robert H. McCarter, of counsel with complainant, and Merritt Lane, of counsel with defendant, and the Court having heard and considered the proofs offered by the respective parties, and the argument of counsel, and being of the opinion that the complainant is not entitled to the relief prayed in its bill of complaint;

It is, on this 14th day of February, 1921, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED AND DECREED, and the said Chancellor doth, by virtue of the power and authority of this court, hereby ORDER, ADJUDGE AND DECREE that the complainant's bill be dismissed, with costs to the respondent against complainant, in which said costs shall be included a counsel fee of five hundred dollars.

Respectfully advised,

E. R. WALKER,
C.

JOHN GRIFFIN,
V.-C.

Notice of Appeal.

NOTICE OF APPEAL.

Filed February 15, 1921.

IN CHANCERY OF NEW JERSEY.

PUBLIC SERVICE RAILWAY COMPANY, *Complainant,* *vs.* ISADORE BARNETT, *Defendant.*	*On Bill, &c.* *Notice of Appeal.*

The complainant hereby appeals from the final decree bearing date the 14th day of February, 1921, and from the whole and every part thereof, made in this court in the above-stated cause, to the Court of Errors and Appeals.

Dated February 14th, 1921.

FRANK BERGEN,
Solicitor for and of Counsel with Complainant.

I conceive there is good cause for appeal in the above-stated cause.

FRANK BERGEN,
Of Counsel with Complainant.

Service of the above notice is hereby acknowledged February 14, 1921.

MERRITT LANE,
Solicitor of Defendant.

Public Service Railway Company vs. Isadore Barnett.

PETITION OF APPEAL.

Filed February 16, 1921.

NEW JERSEY COURT OF ERRORS AND APPEALS.

PUBLIC SERVICE RAILWAY COMPANY, *Complainant-Appellant,* *vs.* ISADORE BARNETT, *Defendant-Respondent.*	*On Bill, &c.* *Petition of Appeal.*

To the Honorable the Court of Errors and Appeals of the State of New Jersey:

The petition of Public Service Railway Company, the appellant in the above-stated cause, respectfully shows:

That your petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the 14th day of February, 1921, wherein the said petitioner, Public Service Railway Company, was complainant, and Isadore Barnett was defendant, in this respect, to wit: the said decree adjudged that the bill of complaint be dismissed, with costs to the defendant against complainant, in which said costs should be included a counsel fee of five hundred dollars.

And your petitioner humbly appeals from the said decree which decrees as aforesaid, upon the ground that the same is erroneous and the relief sought and prayed for by your petitioner in and by its bill of complaint should have been granted.

Your petitioner therefore prays that the said decree of the said Chancellor may in the particulars aforesaid be reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

FRANK BERGEN,
Solicitor for and of Counsel with Petitioner-Appellant.

ANSWER TO PETITION OF APPEAL.

Filed February 16, 1921.

NEW JERSEY COURT OF ERRORS AND APPEALS.

PUBLIC SERVICE RAILWAY COMPANY, *Complainant-Appellant,* *vs.* ISADORE BARNETT, *Defendant-Respondent.*	*On Bill, &c.* *Answer to Petition of Appeal.*

The answer of Isadore Barnett, the above-named respondent, to the petition of appeal of the above-named appellant:

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless, says and admits that a decree was, on the 14th day of February, 1921, last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

MERRITT LANE,
Solicitor for and of Counsel with Respondent.

Public Service Railway Company vs. William J. Banker, Jr.

BILL FOR INJUNCTION.

Filed

IN CHANCERY OF NEW JERSEY.

PUBLIC SERVICE RAILWAY COMPANY, *Complainant,* *and* WILLIAM J. BANKER, JR., *Defendant.*	*Bill for Injunction.*

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

The complainant, Public Service Railway Company, a corporation of the State of New Jersey, having its principal office at No. 80 Park place, Newark, New Jersey, respectfully shows:

1. Complainant is incorporated under and by virtue of an act of the legislature of the State of New Jersey entitled "An Act to authorize the formation of traction companies for the construction and operation of street railways, or railroads operated as street railways, and to regulate the same," approved March 14, 1893, and filed its certificate of incorporation in the office of the Secretary of State at Trenton on August 20, 1907, to which certificate or a certified copy thereof complainant for greater certainty begs leave to refer.

2. Complainant is the owner and lessee of about 900 miles of street railway tracks in 142 of the municipalities of this State, including interurban lines, in the counties of Bergen, Passaic, Hudson, Essex, Somerset, Union, Middlesex, Mercer, Burlington, Camden and Gloucester, and is now operating said system of street railways in the exercise of its franchises conferred by said act of the legislature for that purpose.

3. Complainant pays out more than $12,000,000 annually in wages to its operators and employees; $5,200,000 annually in fixed charges for interest on its outstanding obligations and rentals for leased property; and upwards of $1,761,000 annually for taxes, municipal, state and national on its tangible property

and income, including 5% of its gross receipts for carrying passengers (less certain small deductions), which percentage of gross receipts is imposed as a tax or license fee for the exercise of complainant's franchises, and is distributed among the various municipalities in which its system of street railways is operated, under the provisions of Chapter 290 of the Laws of 1906, and the supplements thereto and amendments thereof.

4. Many of the ordinances granting consent by said municipalities to the location and construction of complainant's street railway tracks, poles and appurtenances, and many of the agreements between said municipalities and the owners of the street railway tracks which complainant is now operating provide for the paving and keeping in repair of the pavement of streets and portions of streets occupied by said street railway, at the cost of complainant, amounting to many hundred thousand dollars annually.

5. The business of complainant represents an investment of more than $150,000,000, upon which it is not earning a fair return, in large part on account of the unlawful competition and interference with its business by the defendant, hereinafter named, and others operating similar auto busses or jitneys in said municipalities.

6. Under and in pursuance of its said franchises and rights conferred by law, complainant is now engaged, and for more than twelve years last past has been engaged in the transportation of passengers for hire in and between the said 142 municipalities in this State, and is entitled to carry on its business under said authority, without the interruption, interference or unlawful competition of the defendant hereinafter mentioned.

7. Complainant's street railway tracks have been laid and its street railway cars are operated, and for twelve years and more last past said tracks have been laid and its cars operated, under the conditions and franchises aforesaid, on and along Albany street, George street and Throop avenue, in the City of New Brunswick, and on Main street, Broadway and Bordentown avenue, in the City of South Amboy, all in the County of Middlesex, being two of the said 142 municipalities, and the consent ordinances and provisions such as are referred to in the fourth paragraph hereof are in force in the cities of New Brunswick and South Amboy and require the complainant to pave

and maintain pavement on said streets and avenues, which complainant heretofore has done and is now doing, and William J. Banker, Jr., the defendant herein, now is and for several months last past has been operating auto busses, commonly called jitneys, engaged in the business of carrying passengers for hire which he holds out and announces to operate or run, and are in fact operated or run by said defendant in direct competition with complainant over the said streets in the cities of New Brunswick and South Amboy above named, and on said streets part of the system of street railways of complainant has been laid and is now operated by complainant in its business and said defendant indiscriminately accepts and discharges such persons as may offer themselves for transportation along said streets and highways and the parts thereof on which the railway tracks of complainant are laid and on which its cars are operated; that the said defendant continually uses the complainant's railway and tracks in and on those streets, by driving his auto busses or jitneys upon and along the same, and thereby impedes the progress of complainant's street cars, and greatly and unnecessarily annoys, vexes, hinders and obstructs the complainant in the lawful use of its railway property and exercise of its franchises, and in the lawful performance of its duties as a carrier for hire.

8. In the year 1916 the legislature of this State passed an act entitled "An Act concerning auto busses, commonly called jitneys, and their operation in cities," being chapter 136 of the laws of that year. Said act provides that no auto bus as therein and above defined shall be operated wholly or partly along any street in any city until the owner or owners thereof shall obtain the consent of the board or body having control of public streets in such city for the operation of such auto bus and the use of any such street or streets, and that no such consent shall become effective and no such operation shall be permitted until the owner of such auto bus in any city shall have filed with the chief fiscal officer of the city in which such auto bus shall be licensed and operated an insurance policy of a company duly authorized to transact business under the insurance laws of the State of New Jersey, in the sum of $5,000, against loss from the liability imposed by law upon the auto bus owner for damages on account of bodily injury or death suffered by any person or per-

sons as a result of an accident occurring by reason of the ownership, maintenance or use of such auto bus upon the public streets of such city; and that such consent shall continue effective and such operation be permitted only so long as such insurance shall remain in force; and that concurrently with the filing of such policy the owner of such auto bus shall execute and deliver to such fiscal officer a power of attorney wherein and whereby said auto bus owner shall nominate, constitute and appoint such fiscal officer his true and lawful attorney for the purpose of acknowledging service of any process out of a court of competent jurisdiction to be served against insured by virtue of the indemnity granted under the insurance policy filed, and shall have otherwise complied with the provisions of said act. Defendant has not filed nor attempted to file, as required by said act, any insurance policy and power of attorney, or either of them, in the City of South Amboy. Defendant at times pretends that he has obtained the consent of the boards or bodies having control of public streets in the said cities of New Brunswick and South Amboy for the operation of his said auto busses or jitneys and the use of the said street or streets of said cities for that purpose, and has filed such policies of insurance and powers of attorney required by said act, and that he has otherwise complied with the provisions thereof. But the complainant charges that the contrary of said pretenses is the truth, and that said defendant has not obtained such consent, as required by said act, and that if defendant has obtained the consent of the said boards or bodies having control of public streets in the said cities, such consent is not in the form or of the character prescribed by law or contemplated by said act, and is altogether nugatory and void; and that the use and operation of said auto busses or jitneys in the streets of said cities is illegal, improper and a nuisance; that it constitutes an unlawful competition with complainant; that it unlawfully interferes with the operation of complainant's cars and the collection of its fares, and is a detriment to the complainant's business, diminishes its revenues, and is a hindrance to the performance and discharge of its public obligations, and is otherwise contrary to equity and good conscience.

9. Complainant further alleges that the damages resulting to it from the continuance of such unlawful acts of defendant are

immeasurable in extent and irreparable in character, and that complainant can only have adequate relief in the premises in this honorable court, where such matters are properly cognizable.

Complainant therefore prays:

1. That William J. Banker, Jr., defendant in this suit, may answer this bill of complaint and each statement herein contained, but without oath, which is hereby waived.

2. That defendant, his servants, agents and employees be enjoined and restrained from further continuing the operation of said jitney or auto busses in competition with complainant in the streets of the Cities of New Brunswick and South Amboy, or in any other city in this State.

3. That complainant may have such other and further relief as may be equitable and just.

4. That a writ or writs of subpoena may issue commanding said defendant to answer this bill and abide by such decree as this court may make in the premises.

FRANK BERGEN,
Solicitor for and of Counsel with Complainant.

Motion to strike made and disposed of by opinion in Reinhardt case.

Answer.

ANSWER.

Filed.

IN CHANCERY OF NEW JERSEY.

PUBLIC SERVICE RAILWAY COMPANY, *Complainant,* and WILLIAM J. BANKER, JR., *Defendant.*	*On Bill, &c. Answer.*

Defendant, residing in the city of New Brunswick, County of Middlesex, and State of New Jersey, protesting that he ought not be required to answer the bill of complaint before action by the Court upon the motion heretofore made by defendant to strike out the bill and to require complainant to make the bill more certain, and for other relief, and that to require the defendant to answer the bill as framed is unjust, inequitable and illegal, and representing to the Court that by reason of the manifest uncertainty of the bill it is impossible for defendant to full, complete and adequate answer make thereto, and reserving to himself the objections taken to the bill on the motion to strike and for other relief as by rule he is entitled, nevertheless, for answer to such parts of the bill of complaint as he is advised it is necessary or material for him to make answer unto, as by order of this Court he is required, says:

1. He admits the contents of paragraph 1 of the bill.

2. He has no knowledge of the contents of paragraph 2 of the bill and therefore denies the same.

He expressly denies that complainant is operating its system of street railways in the exercise of its franchise conferred by the act of the legislature, but says that, on the contrary, the said complainant, if it is operating its system of street railways, operates by virtue of certain licenses conferred upon it by various municipalities throughout the State as well as by permission, in some cases, of the legislature.

3. He denies the contents of paragraph 3 of the bill except that he says that he admits that the complainant pays a sum of

money in wages, another sum of money in fixed charges and another sum of money for taxes.

4. Answering the fourth paragraph, defendant admits that many of the ordinances granting consent by said municipalities to the location and construction of complainant's street railways, tracks, poles and appurtenances, and many of the agreements between said municipalities and the owners of the street railway tracks which complainant is now operating, provide for the paving and keeping in repair of the pavement of streets and portions of streets occupied by said street railway at the cost of complainant, but as to the actual expense incurred by complainant in and about its performance of the conditions of said ordinances defendant has no knowledge.

5. Defendant specifically denies each and every allegation of the contents of paragraph 5.

He specifically denies that complainant is not making a fair return upon such capital investment as it is entitled to make a fair return upon.

He specifically denies that the failure of complainant to make a fair return upon a proper capital investment, if there be such failure, is due to any competition or interference, unlawful or otherwise, with its business by defendant and others operating similar auto busses or "jitneys" so-called in the various municipalities.

Under the statute of the State of New Jersey the regulation of public utilities, such as complainant, is confided to the Board of Public Utility Commissioners. Under the statutes and the law such Board has the power and authority to fix and determine the rate of fares to be charged by complainant, and others similarly situated. Under the said laws, as construed by the courts, complainant is entitled to a fair return upon its proper invested capital.

Said complainant has applied from time to time to the Board of Public Utility Commissioners to fix and determine the rates of fare to be charged by it. Said Board of Public Utility Commissioners has held long and extensive hearings, at which said hearings complainant has appeared and been represented. After such hearings the said Board of Public Utility Commissioners fixed and determined the amount of fare which should be charged by said complainant in order to permit it to make a fair return,

within the meaning of the statutes, upon its proper invested capital, since which time and now said complainant has been and is charging its patrons the rate of fare so fixed and determined by said Board of Public Utility Commissioners. If the said complainant be not making a fair return upon its proper invested capital it is the fault of its management or of the Board of Public Utility Commissioners or of the law, and not in anywise the fault of defendant.

6. Answering the sixth paragraph of the bill defendant admits that complainant is now and has been engaged for more than twelve years last past in the transportation of passengers for hire and reward in and between certain municipalities, whether 142 in number defendant has no knowledge, but denies that it is entitled to carry on its business without the competition of defendant as such competition is now carried on, if competition it may be called, and further says that this Court cannot determine whether the said competition so-called carried on by said defendant is lawful or otherwise at the suit of complainant.

7. Answering the seventh paragraph defendant says that he admits that complainant's street railway tracks have been laid over the streets mentioned in said seventh paragraph, but as to whether the said consent ordinances and provisions thereof require complainant to pave and maintain pavement on said streets defendant has no knowledge. If said consent ordinances do require said complainant to so pave and maintain pavement on said streets defendant says that the said complainant has not complied with the provisions of said ordinances and has not paved and maintained pavement on said streets as such ordinances and provisions thereof require.

Defendant admits that he now is and for several months last past has been operating an auto bus commonly called a jitney, engaged in the business of carrying passengers for hire, which defendant holds out and announces to operate and run, and which said bus is in fact operated and run by said defendant.

He further admits that he indiscriminately accepts and discharges such persons as may offer themselves for transportation along said streets and highways and the parts thereof on which the railway tracks of complainant are laid and on which its cars are operated. He denies, however, that such jitney bus

is, in fact, operated or run by him in direct competition with complainant over the said streets or for the purpose of competing with said complainant, but he admits that some of his passengers would undoubtedly be forced to use the cars of the Public Service Railway Company for a portion of the distance covered by defendant if he, the said defendant, did not operate said bus, and in the sense that the Public Service Railway Company would, in fact, carry for a portion of the distance some of the passengers carried by defendant, if said defendant did not operate, there is competition between the said defendant and the said complainant.

He specifically denies that he continually uses the complainant's railway tracks in and on those streets by driving his auto bus or jitney upon and along the same and thereby impedes the progress of complainant's street cars and he specifically denies that he greatly and unnecessarily annoys, vexes, hinders and obstructs the complainant in the lawful use of its railway property and exercise of its franchises, and in the lawful performance of its duties as a carrier for hire.

Further answering the said paragraph defendant says that whatever incidental use he makes of said complainant's tracks in and about the operation of his auto bus is such a use as that under the law he is entitled to make.

8. Answering the eighth paragraph of the bill defendant admits that the legislature of the State of New Jersey in 1916 passed the act referred to in said paragraph, and that provisions of said act are substantially as set forth in said paragraph, but defendant refers to said act for more certainty. If the allegations of said paragraph may be taken as charging that defendant derives his right to the use of the public streets through and by virtue of said act defendant denies such charge of inference, and on the contrary says that he is entitled, as every other citizen, and was entitled before the passage of said act, to use the public streets for the operation of his auto bus for the carriage of passengers for hire and reward, and the public were entitled to have him use the said streets for the purpose of carrying passengers for hire and reward, and there was no need, in order that said defendant might lawfully use the said street of any express legislative or municipal permission; that the right of defendant and the public is guaranteed by the constitution of the State of New Jersey and of the United States, and that

while the legislature may have power to regulate the use of said streets and the right of defendant, it has no power to prohibit defendant from using said streets for the purposes aforesaid, and for it to prohibit the use of said street by the defendant for the purposes aforesaid, would be to deprive the defendant and the members of the public generally of the right to carry on a lawful business, and of the right of enjoying or acquiring, possessing and protecting property and of pursuing and obtaining safety and happiness, and would be in violation of the provisions of the fourteenth amendment of the Constitution of the United States, in that it would deprive defendant of his property without due process of law, and in that it would deny defendant the equal protection of the law. The act of 1916, the so-called jitney act, was passed by the legislature for the purpose of protecting the public generally and specifically those who used the busses of defendant and others similarly operating, but not for purposes of protecting the complainant in anywise. Whether defendant has or has not complied with provisions of said act is no concern of complainant, and complainant cannot in this proceeding seek to take advantage of any alleged failure of defendant to comply with the provisions of said act.

Defendant denies that he at times pretends that he has obtained the consent of the board or body having control of public streets for the operation of his said auto bus or jitney and the use of said street or streets of said city for that purpose, and has filed said policy of insurance and power of attorney required by said act, and that he has otherwise complied with the provisions thereof. On the contrary, protesting, however, that it is entirely immaterial and that complainant cannot take advantage of any alleged failure of defendant to comply with the provisions of said act, he says, that he has in all respects and has always stated that he has in all respects complied with the provisions of said act and has obtained the consent of the board or body having control of the public streets for the operation of his said auto bus or jitney and for the use of said street or streets for that purpose, and has filed the policy of insurance and power of attorney required by said act.

He denies the allegations of said paragraph that he has not obtained the consent as required by the act, and he denies that if he has obtained the consent such consent is not in the form

or of the character prescribed by law or contemplated by said act, and is altogether nugatory and void.

Defendant protests that the allegations of said paragraph are uncertain. If complainant intends to charge that the consent which defendant has obtained and which has been granted to said defendant by the municipalities is not in accordance with the provisions of said act and that certain formalities should have been observed by defendant which were not by him observed, defendant says that since the adoption of said act in 1916 all of the jitneys in the State of New Jersey, numbering more than a thousand, have been operating in all of the municipalities of the State after having obtained consents similar to that obtained by defendant and have filed bonds similar to that filed by defendant and have filed powers of attorney similar to that filed by defendant, and have otherwise complied with the said act in the same manner in which defendant has complied with said act; that said act has been construed by the various municipal authorities of the State of New Jersey, and by the State authorities, and by those operating jitney busses within the State of New Jersey, as requiring and only requiring such a consent and such a power of attorney and such a bond as has been obtained and furnished by defendant. Defendant claims and insists that he has complied with the provisions of said act aforesaid, and that if it is necessary before defendant operate, that defendant should comply with the provisions of said act, then defendant says that he has so complied with it.

Defendant further says that this court cannot and will not determine, at the suit of the complainant, whether the consent which defendant has, in fact, obtained and under which he is, in fact, operating, is such a consent as is referred to in the said act aforesaid or not. This court is without power to determine in this proceeding the validity of the said license furnished, if such it may be called, to this defendant in this suit brought by complainant alleging itself to be a competitor.

Defendant further answering the eighth paragraph denies that the use and operation of such bus or jitney in the streets is illegal, improper and a nuisance; denies that it constitutes an unlawful competition with complainant; denies that it unlawfully interferes with the operation of complainant's cars and the collection of its fares, and is a detriment to complainant's

business, diminished its revenues and is a hindrance to the performance and discharge of its public obligations, and is otherwise contrary to equity and good conscience.

9. Defendant denies the contents of the ninth paragraph of the bill.

10. Further answering the bill, defendant says that complainant is not exercising in the operation of its business any technical franchise other perhaps than the franchise of being a corporation. It is and has been for many years last past engaged in the business of transporting passengers for hire and reward, and is subject to all the liabilities and obligations of a common carrier. In furtherance of its business and for the more convenient carrying on thereof it obtained from time to time from the State of New Jersey and from the various municipalities of the said State, among others the City of New Brunswick, certain privileges in the public streets, to wit, the privilege of laying upon the public streets iron rails over which said iron rails it was privileged to propel cars engaged in the transportation of passengers for hire and reward. In view of the investment attached to the laying of the said rails, the right of the said complainant so obtained was a license coupled with an interest. By the granting of said privilege it did not obtain the exclusive right to carry passengers for hire and reward over the public streets over which its rails were laid, nor did it obtain the right to exclude from such public streets persons engaged in a competing business who might not have a similar license or an express permission of the State or one of its agents. In most instances, neither said complainant nor its predecessors paid any consideration for the privilege granted as aforesaid, save only that in some instances it agreed, as consideration for the granting of such privilege, that it would not charge more than a certain rate of fare and that it would keep the pavement between the rails and for a certain distance on each side thereof paved. In consideration of the granting of said privilege, however, complainant or its predecessors agreed, if not expressly, then by implication and operation of law, to maintain an efficient and adequate service so that the public desiring to be transported might be transported at reasonable rates of fare and with such safety as might be reasonably obtained and with such comfort as might be reasonable;

said complainant and its predecessors were bound by operation of law to furnish the passenger desiring transportation a seat, except under extraordinary circumstances. In order to enforce the liability of said complainant to furnish efficient and adequate service various municipalities of the State have passed ordinances requiring that the said complainant, when using the public streets for the purpose of carrying passengers for hire and reward upon the rails laid therein, should be prepared to furnish each person desiring transportation and willing to pay a fare a seat.

It became and was the duty of the said complainant and its predecessors to operate its business and manage the same as that it could perform the duties imposed upon it by the statutes and the ordinances and the common law.

2. Defendant says that the complainant and its predecessors did not perform the duties imposed upon it by law. He says that complainant and its predecessors so manipulated their business and so "watered" their stock and made such improper investments, as that, in order to attempt to pay a return upon an apparent invested capital which was, as defendant claims, not in fact invested, complainant and its predecessors adopted the policy of cutting down operating expenses as far as possible by operating as few cars as possible, and by crowding as many people as it was possible to crowd into such cars as were operated. Further to reduce expenses so that returns might be paid upon an apparent invested capital which was not, in fact, invested, complainant and its predecessors gave up extending the system so that large territories were developed which had no street car transportation facilities. Further, in order to pay returns upon said apparent invested capital, not in fact invested, complainant operated its street cars at slow rates of speed. Further, the complainant ceased observing the provisions of its contracts with the various municipalities to charge a certain rate of fare and charged rates of fare greatly in excess of the agreed rates, and defendant charges that said complainant is now charging fares in excess of the amount which it is required to charge by the contracts into which it entered at the time it obtained the consents to the exercise by it of the said privilege of laying rails in the public streets.

Answer.

3. Defendant says that by reason of the foregoing, some years prior to 1916 the situation had become such as that the complainant was not, in accordance with its contract and common law obligations, furnishing an adequate and efficient service and was not transporting passengers over the public streets with reasonable safety and reasonable comfort and at reasonable rates. Large territories were without means of communication with the centers of population by street car service. Complainant's system, so far as furnishing adequate and efficient service was concerned, had broken down. Thereupon, and in order to supply the public necessities, defendant and others similarly situated commenced the running of jitney or auto busses over the public streets for the carriage of passengers for hire and reward, and defendant says that in driving and operating his said auto bus he is performing a public service and is supplying a public need, and which said public need was caused by the failure of the said complainant and its predecessors to properly function. For this court now to restrain the operation of defendant would be not only to deprive defendant of his right to make a livelihood, and of his property without due process of law, but would also be to deprive the public of means of communication to which it is of right entitled.

4. Defendant further says that while defendant runs upon some of the streets upon which complainant operates its street railway lines he does not run solely upon said streets. Moreover he runs at a greatly increased speed than does complainant. The public is entitled to be moved from place to place at such reasonable speed as modern invention will permit. To prevent defendant from operating his said auto bus would force the public to the comparatively slow moving street cars of complainant, whereas they might be moved by the comparatively swift moving bus of defendant and those similarly operating.

5. Defendant further answering, says that while defendant operates over some of the streets over which the said complainant operates he also operates over other streets and in a territory in which the complainant does not operate, either himself or in conjunction and connection with other operators of jitney busses. To deprive defendant of the right of operating would be to deprive the public of transportation facilities in territory not reached by complainant.

6. Defendant further answering, says that many millions of people are carried in auto busses similar to those operated by defendant in a year. If the said auto busses were not operated, it is undoubtedly true that some of the persons who are now being carried by said auto busses would be carried by the complainant, but defendant says that it is impossible for complainant to properly and adequately care for any considerable proportion of the persons who are now carried by defendant and others similarly situated and represents to this court that it should not compel the public to return to the condition which existed before defendant and others commenced operating jitney busses when daily the members of the public in returning to and from their respective employments were obliged to travel in street cars packed as closely as it were possible to pack persons together within a confined space.

Defendant prays that the bill may be dismissed with costs.

MERRITT LANE,
Solicitor for and of Counsel with Defendant.

The complainant joins issue upon the answer of the defendant filed herein.

No opinion in this case, it being controlled by the opinions in the other cases.

Final Decree.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

PUBLIC SERVICE RAILWAY COMPANY, *Complainant,* *vs.* WILLIAM J. BANKER, JR., *Defendant.*	*On Bill, &c.* *Final Decree.*

The above cause coming on to be heard before the Chancellor, in the presence of Frank Bergen, L. D. Howard Gilmour, E. Ambler Armstrong and Robert H. McCarter, of counsel with complainant, and Merritt Lane, of counsel with defendant, and the Court having heard and considered the proofs offered by the respective parties, and the argument of counsel, and being of the opinion that the complainant is not entitled to the relief prayed in its bill of complaint;

It is, on this 14th day of February, 1921, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED AND DECREED, and the said Chancellor doth, by virtue of the power and authority of this court, hereby ORDER, ADJUDGE AND DECREE that the complainant's bill be dismissed, with costs to the respondent against complainant, in which said costs shall be included a counsel fee of five hundred dollars.

E. R. WALKER,
C.

Respectfully advised,

JOHN GRIFFIN,
V.-C.

Public Service Railway Company vs. William J. Banker, Jr.

NOTICE OF APPEAL.

Filed February 15, 1921.

IN CHANCERY OF NEW JERSEY.

PUBLIC SERVICE RAILWAY COMPANY, *Complainant,* *vs.* WILLIAM J. BANKER, JR., *Defendant.*	*On Bill, &c.* *Notice of Appeal.*

The complainant hereby appeals from the final decree bearing date the 14th day of February, 1921, and from the whole and every part thereof, made in this court in the above-stated cause, to the Court of Errors and Appeals.

Dated February 14th, 1921.

FRANK BERGEN,
Solicitor for and of Counsel with Complainant.

I conceive there is good cause for appeal in the above-stated cause.

FRANK BERGEN,
Of Counsel with Complainant.

Service of the above notice is hereby acknowledged February 14, 1921.

MERRITT LANE,
Solicitor of Defendant.

PETITION OF APPEAL.

Filed February 16, 1921.

NEW JERSEY COURT OF ERRORS AND APPEALS.

PUBLIC SERVICE RAILWAY COMPANY, *Complainant-Appellant,* *vs.* WILLIAM J. BANKER, JR., *Defendant-Respondent.*	*On Bill, &c.* *Petition of Appeal.*

To the Honorable the Court of Errors and Appeals of the State of New Jersey:

The petition of Public Service Railway Company, the appellant in the above-stated cause, respectfully shows:

That your petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the 14th day of February, 1921, wherein the said petitioner, Public Service Railway Company, was complainant, and William J. Banker was defendant, in this respect, to wit: the said decree adjudged that the bill of complaint be dismissed, with costs to the defendant against complainant, in which said costs should be included a counsel fee of five hundred dollars.

And your petitioner humbly appeals from the said decree which decrees as aforesaid, upon the ground that the same is erroneous and the relief sought and prayed for by your petitioner in and by its bill of complaint should have been granted.

Your petitioner therefore prays that the said decree of the said Chancellor may in the particulars aforesaid be reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

FRANK BERGEN,
Solicitor for and of Counsel with Petitioner-Appellant.

Public Service Railway Company vs. William J. Banker, Jr.

ANSWER TO PETITION OF APPEAL.

Filed February 16, 1921.

NEW JERSEY COURT OF ERRORS AND APPEALS.

PUBLIC SERVICE RAILWAY COMPANY, *Complainant-Appellant,* *vs.* WILLIAM J. BANKER, JR., *Defendant-Respondent.*	*On Bill, &c.* *Answer to Petition of Appeal.*

The answer of William J. Banker, the above-named respondent, to the petition of appeal of the above-named appellant:

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless, says and admits that a decree was, on the 14th day of February, 1921, last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

MERRITT LANE,
Solicitor for and of Counsel with Respondent.

Minutes of Hearing.

IN CHANCERY OF NEW JERSEY.

PUBLIC SERVICE RAILWAY CO., *Complainant,* v. WILLIAM D. REINHARDT, *Defendant.*	*On Bill, Etc.* *Minutes of Hearing.*
PUBLIC SERVICE RAILWAY CO., *Complainant,* v. ISADORE BARNETT, *Defendant.*	*On Bill, Etc.* *Minutes of Hearing.*
PUBLIC SERVICE RAILWAY CO., *Complainant,* v. WILLIAM J. BANKER, JR., *Defendant.*	*On Bill, Etc.* *Minutes of Hearing.*

Appearances:

For the complainant, Frank Bergen, Robert H. McCarter, E. Ambler Armstrong and L. D. H. Gilmour, Esqs.

For the defendants, Merritt Lane, Esq.

For the City of Newark, J. T. Congleton, Esq.

Before HON. JOHN GRIFFIN, *Vice-Chancellor.*

Chancery Chambers, Jersey City, N. J., December 16, 1920.

The Vice-Chancellor. Which cases will you try?

Mr. Bergen. The cases of Reinhardt, Banker and Barnett, which have all the questions, I believe, that are involved. If there is no objection, I will move the Reinhardt case first.

Mr. Congleton. I am appearing for the City of Newark. I desire to ask leave to intervene as a party defendant. I have given notice, for one of your earlier motion days, to the Public Service Company, that the City of Newark would ask to be admitted as a party defendant.

The Vice-Chancellor. Is there any objection?

Mr. Bergen. There is no objection.

The Vice-Chancellor. Then the City of Newark will be made a party defendant in the Reinhardt case.

Mr. Armstrong. (To Mr. Congleton.) Do you adopt the answer that is already filed?

Mr. Congleton. Well, the answer has not been filed yet.

Mr. Armstrong. No, I say, do you adopt the answer that is filed in the Reinhardt case?

Mr. Congleton. Oh, yes.

Mr. Lane. In the Reinhardt case, if your Honor please, I do not see him here.

(The defendant, Reinhardt, not being present in court at this time, Mr. Bergen moved the case of Barnett.)

Mr. Armstrong. If the Court please, I offer in evidence the agreement—

The Vice-Chancellor. Before proceeding, are these three cases to be tried together, or are they to be taken up separately?

Mr. Bergen. I think we will have to put in the proof separately, but they will be argued together, I should say.

The Vice-Chancellor. Well, in what case are you offering this paper in evidence?

Mr. Armstrong. In the case of Isadore Barnett. I offer and asked that it be marked Exhibit C. 1, the consolidation agreement between North Jersey Street Railway Campany, Jersey City, Hoboken & Paterson Street Railway Company and United Street Railway Company of Central Jersey, dated July 30, 1907, filed in the Secretary of State's office August 20, 1907, constituting Public Service Railway Company under what is known as the "Traction Act."

(The same is admitted without objection and marked Exhibit C. 1, December 16, 1920.)

Matthew R. Boylan, direct.

Mr. Armstrong. We have here certified copy of the Certificate of Entry of the Public Service Railway Company on the North Jersey Street Railway Company's tracks—is that consented to?

Mr. Lane. Yes.

Mr. Armstrong. I offer that, and ask that it be marked C. 2.

(The paper was thereupon admitted and marked Exhibit C. 2, December 16, 1920.)

MATTHEW R. BOYLAN, sworn.

Direct examination by Mr. Armstrong.

Q Mr. Boylan, what official position do you hold with the Public Service Railway Company? A General auditor.

Q How long have you been connected with that company and its predecessors? A Over twenty-five years.

Q The railroad running in Elizabeth, and running from Elizabeth to Newark, was the property of what company previous to the organization of the Public Service Railway Company? A North Jersey Street Railway Company.

Q Is that true of the Freylinghuysen avenue line running over Freylinghuysen avenue from Newark to Elizabeth? A Yes.

Q And at the time of the organization of the Public Service Railway Company that was being operated by the North Jersey Street Railway Company, was it? A Yes, sir.

Q Who owns and operates the street railways in Hudson, Essex and Union counties? A The Public Service Railway Company, with the exception of a small piece of track in Elizabeth, which is operated by the Morris County.

Q Now, what company, during the month of June, 1920, operated the street railroad along York avenue, North Broad street and Broad street in the City of Elizabeth, and Broad street and Freylinghuysen avenue in the City of Newark, County of Essex? A The Public Service Railway Company.

No cross examination.

Clifford B. Kay, direct.

CLIFFORD B. KAY, sworn.

Direct examination by Mr. Armstrong.

Q Mr. Kay, have you seen in operation an auto-bus, or jitney, on this route just mentioned between Elizabeth and Newark? A Yes, sir.

Q Did you see it in Elizabeth, and in Newark, both? A In Elizabeth.

Q What was the number of the bus, and by whom operated? A Bus No. 14. The operator I do not know, except by information as given by records from the City Hall—"Barnett."

Q By whom are you employed? A Mr. Ingalls, secretary of the Public Service Railway Company.

Q How long have you been employed by Mr. Ingalls?

The Vice-Chancellor. About?

A About one year.

Q And by whose direction did you make this observation? A By the direction of the assistant secretary, Mr. Feller.

Q Who is assistant secretary under Mr. Ingalls? A Yes.

No cross examination.

Mr. Armstrong. The answer admits the operation of the bus on these streets, if the Court please, by this defendant—the seventh paragraph.

Mr. Bergen. We rest, if the Court please.

Mr. Lane. Well, I rest.

Mr. McCarter. No defense?

Mr. Lane. No.

Mr. McCarter. If your Honor please, this case is one of too much importance to have any coquetry or foolishness govern its proceedings—

Mr. Lane. I am not indulging in any foolishness; I am taking your case as made.

Mr. McCarter. No? Well, I am not saying that we have been guilty of any coquetry, or you; but we allege that these jitneys are operating upon the highways to our disadvantage and loss, without the sanction and permission of the authorities. We have rested without prov-

ing the fact that they have not the sanction and permission of the authorities; we have done so because we are advised that the rule of law in such cases requires a defendant who (as our bill alleges that he has no such authority to do so) if he alleges that he has, must prove it. I am prepared to discuss that question.

The Vice-Chancellor. What is the use of discussing it, if the fact is readily proven.

Mr. McCarter. Well, we don't care; we don't think there is anything in the question of the burden of proof, or what not; we are perfectly willing to prove what they have got; and that is an insufficient thing; they have got some sort of thing, but they have what we claim is not the right thing. Now, this little game that is going on here is to find out upon whom is cast the burden of proving that, and our thought is that the burden is on the other side; and we are perfectly willing to discuss that question, or we are perfectly willing to prove what they have got. We do not want to have any snap judgment here, one way or the other; we want the facts presented.

The Vice-Chancellor. Well, if counsel wants to open the case and offer what they have got, all right. At first blush it would seem to me that before this act went into effect the jitneys had the right to run in the highways without any license, or under a local license, and that the Kates Act required that they run with a license and not without it. It may be that the presumption of law would be that they are obeying the law and running lawfully.

Mr. McCarter. Well, I am perfectly willing to discuss that question. I understand the rule to be perfectly well settled under the authorities, and particularly so in New Jersey, that while, ordinarily, he who asserts a negative must prove that negative (and we do assert a negative); nevertheless there is one great exception to that, and that is in a case where a defendant has a license or a permission to do a thing, which is negatived in the bill against him, in such a case, because of inconvenience, because of the fact that he knows what he has got, and

we do not know, presumptively, the burden is cast upon him to prove the fact which we negative in our complaint; and I can refer your Honor to plenty of authorities in this State for that thing. It seems to me that it is discussing a somewhat academic subject, because your Honor is not going to let this important question fall or rise on the mere order of proof. Now, we are endeavoring to try this case in an orderly way, and our thought is that if your Honor will hear discussion on that you will conclude that, if they want to rely on any kind of a license that they have got they must show that. I can refer your Honor to authorities, if you want them, upon that subject, but it does not seem worth while to waste any time. I understand that they have got something (and I understand that we are capable of showing that, if it is considered up to us to do it), and that that is all they have.

The Vice-Chancellor. Well, I suppose counsel have got to determine that themselves, as to what the order of proof is, and what they propose to offer. It would seem to be a shame to have the case go over on a fluke.

Mr. McCarter. Does your Honor want to hear argument on that question before deciding it?

The Vice-Chancellor. No, I don't know that I would want to decide it, off-hand. The proof is in the hands of the parties, and before a full decision is made they ought to offer it. I would assume, without further consideration, that the burden would be on the defendant to show his license, but, upon final reflection, I might change my mind on that; it might work either way; it is a rather close question, I should say, to be determined off-hand.

Mr. Lane. I will state my view of it. This case is in a court of equity, and the complainant is now here asking for equitable relief against a defendant said to be operating in violation of the law. Now, that is only a part of the case. It seems to me that it is the rule (maybe at common law) that where a party goes into a court of equity asking relief of equity to prevent another from

doing what, upon its face, is a legal thing, he must prove his case.

The Vice-Chancellor. Well, before the Kates Act it was a legal thing; but since the Kates Act there is a condition precedent placed upon a person using a bus on a highway to have a license. Now, if that changes the rule of evidence—

Mr. Lane. This court of equity, I take it, will not presume (and it will have to be based upon a presumption), first, that the defendant is violating the law and is guilty of a misdemeanor (because you must presume a crime—the Act makes it a misdemeanor)—and, secondly, that the city officials are guilty of a crime in permitting the operation by the defendant, because each of them is guilty of a crime if they did permit it without a license. Now, this court is going pretty far to say that it will presume the commission of a crime.

Mr. McCarter. This court is trying the issue raised in the bill, and we have already proven that we have rights on these highways that are being interfered with by somebody that we allege has no right; and unless he has a license, he has no right. Therefore, our case is made. Now, in substantiation of our case, we allege he has no such license as the law requires. He says he has. Therefore, the sole question upon that phase of the case is the question whether or not he is there without any right at all, or is there with a license. Of course, if he is there with a license, then one of the links in our chain of proof is lacking. Now, therefore, the concrete question is, has he? What is the presumption—what is the situation, when the case, with its present facts, is left?

After further argument by Mr. McCarter:

Mr. Lane. I have only this answer to make to the Attorney General: We are in a court of equity, not in a court of law; the argument that it would be inconvenient for him, in ordinary cases, to prove the absence of a license does not apply in this case, because counsel has stated that they have within their control, at this time,

evidence which can show the Court precisely the situation. Now, if they are in this court asking for equity, it seems to me that it is their duty, as part of their case, to lay before your Honor the entire case, so far as they know it; and that there is no obligation shifted to the defendant until they show to your Honor a case which calls for the intervention of equity.

The Vice-Chancellor. Well, suppose, for the moment, that there was no record made of your license, and you had something in your pocket which they could not get, except by a subpoena, and that you could readily produce that, and show your right, and you remain silent and do not do it, should not equity decide against you?

Mr. Lane. Why, that would be a different situation, entirely, from the cases at bar.

The Vice-Chancellor. In what respect?

Mr. Lane. Because they now having stated to your Honor that they know what we have, they know what the situation is.

The Vice-Chancellor. If they should produce a license or some paper issued by the City of Jersey City, or someone, and they say "This appears," and then they rest, and if, on the face of what they show it does not appear that you have any right, are you going to rest then, or are you going to supplement your proof as to your title, so as to show that you have good title?

Mr. Lane. If they show what we have, or if they show an absence of any title, we will, of course, supplement it, if we can; otherwise, we will rest.

The Vice-Chancellor. Well, I will rule against you on that; I will hold that it is your burden to show your right to run on the highway. If you want to open up your case to show what you have got you may do so. In the orderly course of pleading and evidence, it is in the nature of a condition subsequent coming from you, which should be proven by you.

Mr. Lane. I will call the City Clerk of Elizabeth.

John F. Kenah, direct.

JOHN F. KENAH, sworn.

Direct examination by Mr. Lane.

Q Are you the City Clerk of Elizabeth? A Yes, sir.

Q Have you produced here the record of the license granted to Isadore Barnett for the operation of a jitney in Elizabeth? A Yes, sir.

Q Will you produce it? A (The witness produces a paper.) He has two licenses; one was revoked, and there is one in force.

Q Which is the one in force, or which was the one in force in June, 1920? A Will I read the resolution?

Q Yes, if you will. A "By Commissioner Cissel: Resolved, That the clerk of this board be and he is hereby directed to issue to Isadore Barnett, who resides at No. 192 Chadwick avenue, Newark, N. J., a license to operate a jitney from August 22, 1920, to December 31, 1920—"

The Vice-Chancellor. That is after June 9th.

Mr. Lane. That covers the period.

Q Go ahead. A (Resuming) —"Route No. 3, Renewal. Adopted July 29, 1920."

Mr. Armstrong. The bill was filed in June. This was August, I understand it.

Mr. Lane. That is not the one I want. I want the one in effect in June, 1920.

The Witness. Here is another one that was granted August 19, 1920.

Mr. Lane. I don't want that; I want the one in effect in June, 1920.

A The one that was adopted September 30, 1920, was in force in 1920; it was a renewal—granted for a year. This is the minutes of the meeting of August, 1920. This was a license that was in force—

Q (Interrupting) I do not want that; there was a license in effect in June, 1920; when was that granted?

The Vice-Chancellor. (To Mr. Lane.) Well, you know.

Mr. Lane. I don't know, if your Honor please. I have had some difficulty in bringing this here; this is a public record, and I have got to do it by subpoena.

John F. Kenah, direct.

The Vice-Chancellor. I should think your client would have a copy of these licenses. (To the witness.) What are those, your minute books?

A The minute books, yes. I have got it right here now: "Minutes of October 19, 1919. By President Cissel, of the Board of Public Works: Resolved, That the clerk of this board be and he is hereby directed to issue to Isadore Barnett, who resides at No. 192 Chadwick avenue, Newark, N. J., two licenses to operate auto-buses for the term of one year, from August 22, 1919, to August 22, 1920, in Route No. 3. Renewal." Which was adopted.

Q Now, is Route No. 3 on Broad street, Newark, to the city line? A Yes.

Q I show you what purports to be a duplicate of such license, with your facsimile signature, and ask you whether this is a duplicate of the license which was, in fact, granted? A Yes, sir.

Mr. Lane. I will ask to have it marked for identification (and the same was thereupon marked A. 1 for identification.)

Q Is there an ordinance of the City of Elizabeth which has to do with the regulation of these auto-busses? A Yes.

Q Will you produce it? A (Witness produces a paper and hands it to examining counsel.) There is the supplement, also (handing examining counsel an additional paper).

Q That is an ordinance passed by the Board of Public Works? A Yes, sir.

Q Of the City of Elizabeth, on June 1, 1916, and approved June 3, 1916, and the title is "An Ordinance fixing the terms of consent for the operation of auto-busses in the City of Elizabeth, as the same are defined by chapter 136 of the Laws of 1916"? A Yes.

The Vice-Chancellor. What is that—the Kates Act?

Mr. Lane. Yes.

Q And this other paper is a supplement to that ordinance, entitled "Supplement to an Ordinance entitled 'An Ordinance fixing the terms of consent for the operation of auto-busses in the City of Elizabeth, as the same are defined by chapter 136

of the Laws of 1016,' '' passed May 9, 1918, and approved May 14, 1918? A Yes.

Q Was this ordinance and supplement published in accordance with the provisions of the law? A Yes, sir.

Q And are now in effect, and were in effect in June, 1920, in the City of Elizabeth? A Yes.

Q Under the terms of these ordinances, or, rather, of this ordinance and its supplement, approximately how many auto-bus licenses have been granted in the City of Elizabeth, which were operative in June, 1920?

Mr. Bergen. I object, as irrelevant.

The Vice-Chancellor. I will sustain the objection.

Mr. Lane. Note my objection on the record.

Q Has the City of Elizabeth ever granted any licenses for the operation of auto-busses otherwise than as provided by this ordinance and its supplement?

Mr. Bergen. Objected to as irrelevant.

The Vice-Chancellor. My theory of this case is that there are two features, as I understand it—the first is whether *you* have a valid license, regardless of what someone else has; and, second, even though you have not a valid license, is the Public Service Company in a position to contest your right on the highway—is there anything else involved?

Mr. Lane. Yes, sir; there is a third proposition, and that is, whether we have or have not a valid license, whether this court will pass upon it, and whether this court will pass upon it depends, to some extent, on what position has been taken by the various municipalities with respect to these licenses.

The Vice-Chancellor. You are dealing with the contemporaneous construction by all of these municipalities as to the way to transact business under this law?

Mr. Lane. Precisely; and that goes to a consideration of the question that, while a contemporaneous construction does not make the act any more legal, yet it does have some influence with a court of equity as to whether it is going to intervene.

The Vice-Chancellor. Well, that is true if there are ambiguities in the act; but is it true if the act is perfectly plain?

Mr. Lane. It is true, whether there are ambiguities or not. Indeed, the cases go to the extent of holding that where a municipal body has granted what it claims to be a license, a court of equity will not determine that not to be a license.

The Vice-Chancellor. Well, I think I will let you prove it, subject to your objection, Mr. Bergen. I will overrule my former judgment on that theory—that it may show a contemporaneous construction by the municipalities. (To the witness.) State now how many licenses were granted.

A I judge about fifty.

Q And they are still operating? A Yes.

Q And has the city ever granted any licenses in any other way, except as authorized by this ordinance and its supplement? A No, sir.

Q Do you know how much revenue there has been received by the municipality—

Mr. Bergen. I object to it as immaterial.

The Vice-Chancellor. One moment.

Q (Resuming) —during the year 1920 to date? Do you know? A I should judge about twelve thousand dollars—

The Vice-Chancellor. No, do you know—"yes" or "no."

A I do not know the exact figures, no.

Q Well, do you know the approximate figures? A Well, the City Treasurer is here, and he is under subpoena, I think; he can answer the question better.

Q All right; he knows better than you do, I suppose. By the way, is there a bond filed by Mr. Barnett, under the provisions of the act, or would the City Treasurer know that? A The Comptroller knows that. The bond of the jitney owner is in the possession of the Comptroller, who is also present.

Q Under subpoena by the Public Service Company? A I believe so.

John F. Kenah, cross.

Cross examination by Mr. Bergen.

Q Have you brought all the papers relating to this license of Barnett that was in force last June? A Yes, sir.

Q Any petition for the license? A Yes, we have that here, I believe. I do not notice the 1919 petition, but the 1918 petition, similar to it, is here.

Q Was there any ordinance passed by the Board of Works, or by the City Council of the City of Elizabeth, granting a license to Barnett, which was in force last June? A Yes, sir.

Q Have you got that here now—the ordinance granting the license to Barnett—not the general ordinance? A Just to Barnett? They grant them on application of the individuals.

Q I ask you if you have the ordinance granting to Barnett the license which was in force last June? A No, sir; no ordinance.

Q There never was any passed, was there? A No, sir.

Q You say you have produced every paper relating to Barnett's license which was in force last June? A I notice the application for the license—there is a similar one here in 1919.

Q I asked you have you produced every paper relating to Barnett's license which was in force last June? A The application for 1919 is missing from amongst the papers.

Q You have not got it here? A No; I can produce it at any time.

Q Was there any hearing on any application made by Barnett for a license, or the license that was in force last June—any public hearing on the subject? A No, sir.

By the Vice-Chancellor.

Q Well, was a public hearing advertised for? A No, they make application, and then it is referred to a committee on public licenses, and then they report at some meeting afterwards whether the license shall be granted or not.

Mr. Lane. There is no contention that we ever complied with the provisions of the 1906 Limited Franchise Act, if that is the point.

Mr. McCarter. That is the point.

Mr. Lane. We do not contend that we have complied with the provisions of that act.

Dennis F. Collins, direct—cross.

DENNIS F. COLLINS, sworn.

Direct examination by Mr. Lane.

Q You are the Comptroller of the City of Elizabeth? A Yes, sir.

Q Have you charge of the bonds which are filed by the various persons licensed to operate jitneys? A Yes, sir.

Q Have you a bond filed by Isadore Barnett? A Yes, sir.

Mr. Armstrong. A "policy," you mean.

Q A bond, or policy, whatever it is? A A policy; yes, sir. (The witness produces and hands to examining counsel a paper, which counsel now states is a Jitney Public Liability policy written by the State Mutual Liability Insurance Company, issued to Barnett; the amount is $5,000, and attaches October 22, 1919, and expires October 22, 1920.)

Mr. Armstrong. It is marked "Duplicate," is it not?

Mr. Lane. It is marked "Duplicate," yes.

Q Is this the only policy filed by Mr. Barnett, Mr. Collins, that you know of? A Yes, sir.

Mr. Lane. I ask that that paper be marked for identification, A. 2 (and the paper was so marked).

Q Have you the records, Mr. Collins, showing approximately the revenue derived by the City of Elizabeth from the operation of jitney busses during the year 1920? A No, I have not. The City Treasurer is present, and he could probably give you that.

Cross examination by Mr. Bergen.

Q General, that policy is marked "Duplicate," I think it says, doesn't it; it is stamped I think with some colored ink? A (After examining Exhibit A 2 for identification.) No.

Mr. Lane. There was a mark "Duplicate" there somewheres; I saw it myself.

Mr. Bergen. Yes, I saw it; it is stamped in very large letters.

A Oh, yes, it is, in type; it is typed "Duplicate," I see, underneath.

William J. Egan, direct.

Q Do you know where the other duplicate is? A I do not.

Q Have you any other papers relating to this license to Barnett, that was in force last June, besides that duplicate policy of insurance? A No, sir; that is all I am custodian of—this policy.

JOHN J. McGRATH, sworn.

Direct examination by Mr. Lane.

Q You are the City Treasurer of the city? A Yes, sir.

Q Do you know, approximately, what the revenue of the City of Elizabeth was, or has been, for the year 1920, down to the present time, from the operation of jitney busses? A About fifteen thousand dollars.

No cross examination.

WILLIAM J. EGAN, sworn.

Direct examination by Mr. Lane.

Q Mr. Egan, you are the City Clerk of the City of Newark? A Yes, sir.

Q Did the City Commissioners of the City of Newark pass an ordinance in assumed compliance with the Kates Act? A Not to my knowledge, sir.

Q Well, is there an ordinance of the municipality of the City of Newark with respect to the granting of jitney licenses? A Yes, sir.

Q Have you that ordinance? A I have not.

Q In whose custody would it be? A It is in my custody; I have the original ordinance in my office; I haven't it with me.

Q You haven't a copy of it here? A No, sir.

Q Do you know when it was passed? A I do not; prior to my time in office.

Q Passed by the old Board of Works? A Yes.

Q That was before the operation of the Walsh Act? A Yes, sir.

Q Will you give me the date when the Walsh Act was adopted by the City of Newark? A November 7, 1917.

Q Have you the records of any license granted to Isadore Barnett? A No, sir.

Joseph Crawford, direct.

Q In whose custody would that be? A It would be in the Department of Streets and Public Improvements, Division of Traffic and Jitneys, Mr. Crawford.

Q Have you any papers with respect to the granting of jitney licenses? A I have not.

Q Or any record? A No, sir.

JOSEPH CRAWFORD, sworn.

Direct examination by Mr. Lane.

Q Mr. Crawford, what is your position with the City of Newark? A Supervisor of Transportation.

Q As such, do you have charge of the operation of jitneys? A Yes, sir.

Q Have you the record of the granting of a license, on or about May 14, 1920, to Isadore Barnett, for the operation of a jitney in the City of Newark? A I have the consent here for Isadore Barnett.

Q Will you produce it? A Yes, sir. (Witness produces paper.)

Q Is this the consent that was in effect in June, 1920? A Yes, sir.

(The paper produced by the witness is marked for identification, A. 3.)

Q I show you now a duplicate, or card, marked "Duplicate," and ask you whether that is a duplicate of the consent which was granted by the Director of Streets and Public Improvements to Isadore Barnett, on May 14, 1920? A This was in effect on May 14, 1920.

Q And it was in effect in June, 1920? A Yes.

(The duplicate consent was thereupon marked for identification, A. 4.)

Q Have you a policy of insurance filed by Mr. Barnett? A No, sir; the Director of Finance has that; he is here.

Q Is he here? A Yes, sir.

Q Have you any other papers with respect to the granting of a license to Barnett? A I have an agreement made by Barnett with the city. (Producing a paper.)

Mr. Lane. I ask that it be marked for identification. (And the paper was thereupon marked for identification, A. 5.)

Q Is there a power of attorney that is filed with these policies of insurance? A Yes.

Q Who has custody of that? A The Director of Finance.

Q Have you a copy of the ordinance under which these consents were granted? A No, sir.

Q There is such an ordinance, is there not? A Yes, sir.

Q Do you know how many licenses, approximately, were in effect, similar to this granted to Barnett, in June, 1920? A Yes, sir.

Q How many? A 406.

Q And approximately the same number are still in effect? A Yes, sir; today.

Q And those busses carry from how many to how many—how do they range in size? A In tonnage they rate from a three-quarter ton to a four-ton; and, in passengers, from twenty-one to thirty-five or forty.

Q Do you have the records of the approximate revenue which has been received by the City of Newark for the operation of these busses, for the year 1920 up to date? A I keep in touch with the Department of Finance, and gather those figures month for month; the figures go through my office; yes, sir.

Q They do go through your office? A Yes.

Q How much has been taken in, in revenue, during the year 1920, to date? A About one hundred and sixty-five thousand dollars, up to the last of November.

Q Do you know, approximately, how many passengers they carried during the year 1920? A Oh, it is pretty close to four million.

No cross examination.

Mr. Lane. Mr. Bergen, will it be conceded, for the record, that, under the organization of the City of Newark, in the distribution of powers under the Walsh Act, the powers of the old Board of Works were vested in the Department of Streets and Public Improvements, of which Raymond is the Director?

Mr. Bergen. That is a question of law.

Mr. Lane. That is a question of fact. Under the Walsh Act, the Commissioners are required, at their organization meeting, to divide among the various departments the various powers of the old boards. Now, the Commissioners did give to the Department of Streets and Public Improvements all of the powers of the old Board of Public Works.

Mr. Bergen. We will admit that, subject to the question of relevancy. It is a matter of law, it seems to me.

The Vice-Chancellor. The only way a question might arise would be if the Commissioners, in the meeting, with a discretion to distribute the powers, did so according to their will, and not according to the statute. In other words, they might give to the new Street Commissioner the powers not only of the old Board of Works, but other powers.

Mr. Lane. As near as I can see, under the Walsh Act, they can give to the Department of Streets and Public Improvements all the duties which usually appertain to a financial officer or reverse it.

The Vice-Chancellor. I say, if there is discretion in them to prescribe the powers as they see fit, that is one question; but if they are, as matter of law, to divide or distribute the powers as provided by the statute, that would be another question.

Mr. Lane. They are not. The Commissioners are given discretion to divide the powers as they see fit; except that the Mayor must be the Commissioner of Public Affairs, whatever that may mean.

ALEXANDER ARCHIBALD, sworn.

Direct examination by Mr. Lane.

Q You are Director of the Department of Finance? A Yes.

Q As such, have you custody of the policy of insurance filed by Isadore Barnett? A I have.

Q Will you produce it? A (The witness produces a paper.)

Mr. Lane. The witness produces a policy which is called a "Jitney Public Liability Policy," issued by the State Mutual Liability Insurance Company to Barnett,

Dennis F. Collins, further direct.

for $5,000, which attaches October 22, 1919; expires October 22, 1920, and attached thereto is a power of attorney signed by Barnett. I ask that these two papers be marked for identification. (The two papers were accordingly marked, for identification, A. 6 and A. 7, respectively.)

The Vice-Chancellor. Could there be a joint bond given to two municipalities?

Mr. Bergen. I think not.

The Vice-Chancellor. Then this must be for the City of Newark (referring to the policy last produced), alone; and the one General Collins produced must be for the City of Elizabeth?

Mr. Bergen. But this seems to be one policy for the two towns.

No cross examination.

DENNIS F. COLLINS, recalled.

Further direct examination by Mr. Lane.

Q I show you a paper writing purporting to be a power of attorney signed by Isadore Barnett, and ask you whether that is the power of attorney which you had in your custody, presumptively under the provisions of the Kates Act? A Yes, sir.

Mr. Bergen. Did the General produce that?

Q You did produce that, did you not? A Yes, sir.

(The power of attorney identified by the witness was thereupon marked for identification, A. 8.)

No cross examination.

Mr. Lane. Now, I desire to offer in evidence the ordinance of the City of Elizabeth, which has been marked for identification; the supplement to the ordinance; the consent issued by the City of Elizabeth to Barnett; the policy of insurance filed with the Comptroller; the power of attorney filed with the Comptroller; the consent issued to Barnett by the City of Newark, and the power of attorney filed with the Treasurer or Director of Finance; the policy of insurance filed with the same official; the

ordinance adopted by the Board of Works, a copy of which we have not yet here, under which these consents were granted.

The Vice-Chancellor. By the City of Newark?

Mr. Lane. By the City of Newark, which, I think, completes the file.

Mr. Bergen. We have no objection to that, putting them in, subject to objection.

Mr. Lane. Well, I want it understood that I formally offered it in evidence. Oh, I also desire to offer copies (which we have not yet here) of the minutes of the Commissioners of the City of Newark allocating the various powers to the various Directors.

Mr. Bergen. We do not object to the method of proof, but only to the relevancy.

The Vice-Chancellor. That, of course, all goes back to the original proposition that they have not granted these licenses separately, by ordinance?

Mr. McCarter. Yes, sir.

The Vice-Chancellor. I think, for the present, I will overrule the objection, because that is the crux of the case, and I will consider it when I come to decide the case.

Mr. Lane. Now, if your Honor please, I desire to prove, unless it will be conceded, that ordinances similar to the ordinances which have been introduced in Newark, in essential details (that is, in Newark and Elizabeth, in essential details) have been adopted in, and that consents have been and are being granted under such licenses, to the operators of jitney busses in the Cities of Jersey City, Hoboken, Camden, Passaic, Paterson, and in most of the municipalities in this State; and that the jitney operators have filed and are filing policies of insurance and powers of attorney in the same form, in substantial detail, or substantially the same as the policy of insurance and power of attorney as has been offered here in evidence, for the purpose of showing a general construction put upon this Act by all of the municipalities of the State who have acted under the Act. There are certain municipalities that have not licensed jitney busses—one striking example is the City of Trenton—but they are very few; but all who have licensed them have licensed them under similar consents such as we have offered in evidence.

The Vice-Chancellor. Your theory being that they all ignore the effect of the Franchise Act, requiring the thing to be done in a certain manner?

Mr. Lane. Precisely—if that Act does apply.

Mr. McCarter. I think we ought to object to that. Of course, if counsel says it is not the fact, as I understand it, that the municipalities he has referred to are municipalities in issue in this suit, that would be one thing: He now proposes to have the Court conclude something with reference to a license, and the legality of it, in the City of Elizabeth, by what has been done in Camden and Passaic and Jersey City.

The Vice-Chancellor. Well, I do not think it is quite that way. As I see it, if the law is ambiguous, so that the various municipalities must put their own interpretation upon it, I think the Court will adopt that interpretation which they have generally placed upon it, as a matter of convenience. Of course, where there is no ambiguity there is no room for interpretation, really, because the law in that case interprets itself. I do not believe that I would hold, though, if the law is perfectly clear, that the interpretation placed upon an unambiguous act by the various municipalities would be treated as legal; it is only where there is an ambiguity, which calls for some interpretation and some action, that the Court regards the interpretation placed upon it by the municipalities as being the correct interpretation.

Mr. Lane. I quite fully realize that, in order to properly prove that, I have got to subpoena the evidence of everyone of these municipalities; now I do not want to do that, if I can avoid it.

The Vice-Chancellor. Has not this Franchise Act been declared to be applicable to this case?

Mr. Lane. It has not.

Mr. McCarter. We think it has.

The Vice-Chancellor. (To Mr. Lane.) Well, now, haven't you shown a sufficient course of interpretation by the large municipalities?

Mr. Lane. No, I don't think so. I think, with these cities I have mentioned, I would have. Nevertheless, there is no doubt about the fact. If there were any doubt about the fact, that would be another thing. There is not a single municipality of

this State that is operating under the Limited Franchise Act of 1906, so far as this jitney matter is concerned. I do not want to be obliged to bring the financial officers and the city clerks of these various municipalities here to prove what is unquestionably a fact.

Mr. McCarter. Well, I think we can state to your Honor, in order to expedite this matter—of course, subject to our objection as to relevancy—

The Vice-Chancellor. Oh, yes.

Mr. McCarter. —that we are quite willing that the case can go on, and that later counsel be permitted to prove, by certified copies from these municipalities he has referred to, all the documents that pertain to jitneys that are operating in those municipalities. I think that is fair, Mr. Lane.

Mr. Lane. Oh, no; that would compel me to produce copies of each of the licenses. I don't want to do that. I can only do it by putting upon the stand a man that will testify, first, that the consents are granted under ordinances which are similar to the ordinances which have been introduced in evidence; second, that there are so many consents out; third, that the city is deriving a revenue of so much money.

Mr. McCarter. Well, we would agree that a certified copy of any ordinance—a general or omnibus ordinance—can be produced; we will agree, I think, that a sample consent be produced, and a statement, over the signature of a responsible officer of the municipality that so many similar consents have been issued pursuant to that general omnibus ordinance; that nothing else is there with reference to the jitneys than those papers, other than the power of attorney (if there be such) and the policy; and whether or not that policy is a duplicate; and that the revenue is so much.

The Vice-Chancellor. Is not that fair?

Mr. Lane. That will cover it.

Mr. McCarter. Of course, we do not, by making that concession, admit the materiality of the evidence.

The Vice-Chancellor. Oh, no.

Mr. McCarter. We want this case to go on.

The Vice-Chancellor. Now, as I understand it, Mr. Lane is to have the proper officer of any of these municipalities certify a typical case?

Mr. McCarter. That is it.

The Vice-Chancellor. And then state that all the others are alike?

Mr. McCarter. Yes.

Mr. Lane. Well, I hope the officers of the municipalities will consent to do it without the process of subpoena.

The Vice-Chancellor. Oh, yes; I never have any trouble with them in that respect.

Mr. Lane. I also desire to prove that the Public Service Railway Company, in the City of Elizabeth, and in the City of Newark, were, prior to the action of the Board of Public Utilities Commission, obligated to charge a fare not in excess of five cents on the contracts, and that by reason of the operation of the Board of Public Utilities Commission those contracts have been abrogated, as set forth in the answer. I also desire to prove that, if this Court should enjoin the operation of these jitney busses, the Public Service Railway Company could not take care of the traffic in an adequate manner, as set forth in the answer. I also desire to prove that at the time these jitneys started operation the Public Service Railway Company was not taking care of the traffic in an adequate manner; and that it was because of the failure of the Public Service Railway Company to take care of the traffic in an adequate manner the jitneys commenced operation, as set forth in the answer, under paragraphs 1, 2, 3 and 4 of the separate defense, as well as paragraph 6 of that separate defense. Now, when this case was set down for hearing, after the motion to strike out the bill, this matter was brought to your Honor's attention, and your Honor at that time stated that you did not consider evidence along the lines that I have indicated was material or relevant, and I have not, therefore, prepared (as you stated that I need not prepare) to go into that branch of the case today. I, however, desire to put formally on the record my offer to substantiate those allegations in the bill of complaint, which I consider material and relevant—not as bearing upon the question as to whether the defendant has a legal right to operate on these streets—not even as bearing upon

the question as to whether the Public Service Railway Company has the legal right to prevent the defendant from operating upon the streets—but as bearing upon the question as to whether a court of equity, in the exercise of this extraordinary jurisdiction, will perform an act which will cause the inconvenience to the public that the action that the Court is asked to take will cause, at the instance of a utility corporation that has, by its operation made it necessary that the defendants and others similarly situated should perform the acts now complained of.

Mr. McCarter. Why don't they perform them in a legal way, then?

The Vice-Chancellor. Well, I do not recall that anything was said, much, about your answer, Mr. Lane.

Mr. Lane. Well, the word "answer" was not used.

The Vice-Chancellor. What I recall distinctly saying was that when it was attempted in this case to inquire into the merits of the bond issue and the stock issue of the Public Service Railway Company, I said that I was not going to make this court a public utility commission over again; that if there was a million or a thousand dollars involved, they were entitled to as much protection as if it were one hundred and fifty millions. I do not know that I went any further.

Mr. Lane. Your Honor did say that; but your Honor also stated that the question before your Honor, as your Honor considered it, was whether these consents under which the defendant was operating were legal consents, or not, and, secondly, whether this Court would determine the legality of the consents.

The Vice-Chancellor. There is nothing in my memorandum to that effect, Mr. Lane.

Mr. Lane. No, I am not talking about the memorandum. That was the discussion which took place at the time these cases were set down for trial.

The Vice-Chancellor. All the Court decided was in the memorandum which was sent to counsel.

Mr. Lane. All the Court decided, yes; but your Honor will remember that there was a discussion at the time this case was set down for trial.

The Vice-Chancellor. I know, but I don't know that the Court declared that it would not inquire into the necessity of the additional traffic, or anything of that kind.

Mr. Lane. No; what your Honor said was this: that as your Honor's mind was then inclined your Honor thought it was immaterial; and I asked your Honor whether I should come prepared to go into those matters upon the day set for hearing, and your Honor said that I need not.

The Vice-Chancellor. Well, there is some misconception; because my recollection is that all the Court said that you need not come in to disprove were the allegations of the Public Service Company that they had one hundred and fifty million dollars' worth of stock, bona fide and outstanding; whether its receipts were one million or two million dollars a year, and whether it paid so much tax to the State, and so much wages. I said that would be absolutely unnecessary.

Mr. Lane. Then there has been a misconception; because I understood your Honor's statement as to what you considered immaterial to go to what I call the affirmative defenses.

The Vice-Chancellor. What you say now is novel to me. If you desire to offer such evidence, you might do it in the regular way and have it passed upon; unless you make the offer, and counsel objects to it, and I will rule on it now, in the absence of any witnesses to testify.

Mr. Lane. Well; if there has been a misconception, it has been my misconception; but I was under the impression that when we were before your Honor in that other room, when this matter was taken up, that you said that if we were permitted to go into what we call our affirmative defenses it was useless to set this case down for one day, because it would be impossible to finish it in one day; and it will be impossible to finish it in one day if we are permitted to show the matters which I have stated.

The Vice-Chancellor. Do you mean that the Public Service Company is not doing its duty?

Mr. Lane. Precisely.

The Vice-Chancellor. A matter that may be inquired into by *quo warranto*?

Mr. Lane. Yes.

The Vice-Chancellor. I doubt very much whether I would assume the jurisdiction of the Supreme Court. As to whether there is any injury being done because the jitneys take the surplus passengers might be another question; and you might have very great difficulty in proving that fact.

Mr. Lane. Well, it becomes a battle of experts, to a great extent, or it becomes a matter of expert testimony, I mean, and that is the reason I stated to your Honor that it would be useless to set the case down for a day; and your Honor then said, as I understood it, that I need not come prepared to prove the affirmative defenses, because, as your Honor's mind was then inclined, your Honor thought that the only matter—I think your Honor used the term "you can be assured there will be no snap judgment," or words to that effect. I think you just said there would be no snap judgment.

The Vice-Chancellor. But the fact that you have not the witnesses here today does not make any difference, because you may have a day to bring them here, if it is necessary to prove your facts.

Mr. Lane. Our contention is, as I have already stated, and what we want to prove is, first, that in 1916, or about that time—at the time these jitneys started to operate—the Public Service Company was not handling the traffic in an adequate manner; its common law duty being to handle it in an adequate manner; and that it was because of the inadequate method in which the Public Service Company was handling the traffic that this jitney traffic grew up. Now—

The Vice-Chancellor. In other words, do you mean to say that it did not give sufficient service to the public in handling the traffic because, under no circumstances could it do it, or because it was neglectful in performance?

Mr. Lane. Because it was neglectful in performance. Well, I will not say that, your Honor—I used the words "neglectful in performance," but, as I view it, it does not make any difference whether it was neglectful in performance, or whether it could not do it. It did not do it, as a matter of fact.

The Vice-Chancellor. Well, if it could do it, and would not do it, why wouldn't it be subject to an ouster of its franchise for non-performance?

Minutes of Hearing.

Mr. Lane. That may be; but that is not the only penalty that would be put upon it. If, because of the failure of a public utility corporation to perform its common law duty there has been another business built up, the law prohibits that public utility corporation to go into a court of equity and ask relief from a court of equity, irrespective of the fact that it might be that, at common law, the State may proceed against it and oust it of its franchise. Now, I want to follow that up by proving, if the order asked for be granted by this Court, that the Public Service Company will not be able to handle the traffic now handled, or, as of the 9th of June, 1920, was handled by the jitneys, upon the theory that this Court will not, as a court of equity, perform an act which will result to the public disadvantage, at the suit of the person whose fault it is—whether it is a fault attributable to mismanagement, or attributable to other circumstances makes no difference.

The Vice-Chancellor. If the city wants to be properly served with jitneys, and the jitney-bus owners are now violating the law, is it not a very simple thing for them to obey the law and get the privilege?

Mr. Lane. That may be.

The Vice-Chancellor. Then how can the public suffer by their obeying the law?

Mr. Lane. Because your Honor does not distinguish between the relief granted as a matter of right in a court of law, and relief granted as a matter of equity and conscience in a court of equity. And the mere fact that this defendant is committing a crime (if it may be), and the mere fact that that crime operates as an injury to the complainant (if it be the fact) does not move a court of equity; there is something more that is needed before a court of equity will move; and that is that the cause must be a conscionable cause.

The Vice-Chancellor. Well, there is no question about the right of the Public Service Company under its franchise. The only question involved is whether persons who are violating the law can compete with them to their detriment. Now, if this was a case where the public would be very much injured by restraining the jitney owners, and there could not be relief for some time, the Court might follow the practice prevailing in nuisance cases,

and grant an injunction to restrain the operation for a period of, say, six weeks, or sufficient time to enable them to convert their plant so that it would not be a nuisance. A court of equity is not going to injure the public; but a court of equity is not going to sit by and see rights violated just because persons will not follow the law when the law is plain. It depends, too, of course, upon the jurisdiction of the Court to enforce the law. Now, if these gentlemen can get privileges to run their jitneys in a lawful manner, and they are not now operating according to law, then they are violating a right of the Public Service Company, and taking the nickels and dimes that should otherwise, lawfully, go to the Public Service Company; and they could not complain much to the Court having jurisdiction if they are restrained from doing it until they obeyed the law.

(After further argument by Mr. Lane):

The Vice-Chancellor. Now, you have stated what you want to offer?

Mr. Lane. I have stated what I desire to prove.

The Vice-Chancellor. What have you to say, Mr. Bergen, or Mr. McCarter?

Mr. McCarter. Why, if your Honor please, I cannot say anything half so well as what your Honor has said. If it were true, and capable of proof (which we do not think it is) as Vice-Chancellor Lane has suggested, that at the time these jitneys started, and the only reason they did start was that the Public Service Company was perfectly inadequate to perform its public duty, and that they have continued so, and are today inadequate, and there were no other way by which jitneys could be permitted to come in and help the public, perhaps there would be something in the idea that the Court should go slow, and that your Honor ought to wait and hear evidence, which we say cannot be produced. It is not a question of expert evidence, it is a question of fact. But your Honor has hit it so well that I do not see that I can say it better than just what your Honor did—namely, if our contention is correct, all these jitney owners have to do is to come in under the Limited Franchise Act and get a license under that, and your Honor could give them the time in which to apply there; and, therefore, the sole question, as it seems to us, and the momentous question behind this important litigation, is the

question about which everything else centers, namely: Can these jitneurs, boasting that they only have to come in under the Kates Act, be permitted, as against the Public Service Company, to do that? And we think, therefore, that the offer should be overruled, because there is nothing in it.

The Vice-Chancellor. Well, the other proposition is whether the Limited Franchise Act applies?

Mr. McCarter. Of course; he reserves that; he is not conceding that. You see, counsel is working both ends against the middle.

The Vice-Chancellor. I think I will overrule the offer now, Mr. Lane, and give you an exception; but I will reserve the right, when I examine these acts carefully, to determine whether I will open the case to permit you to offer this evidence. It is purely a question of law.

Mr. Lane. I think that is all, if the Court please.

Mr. McCarter. Before we proceed to any other case we would like, in this case, to offer in evidence (we will produce it later) an ordinance that was passed by the City of Newark, which was reviewed by Justice Kalisch in a case to which reference has been made, giving to an omnibus company, or whatever it was, of Newark, permission to operate. That is (if you may deem it such) a practical construction our way; and we have not the ordinance here.

Mr. Congleton. I will produce a copy of the printed minute, Mr. McCarter.

Mr. McCarter. Thank you.

Mr. Lane. I object to the offer, unless it is accompanied by all of the proceedings with respect to the General Omnibus Company ordinance, because our contention is that that has no application to the operation of a jitney or of jitney busses, as defined by the Kates Act, at all.

Mr. McCarter. Well, we will offer all the documents in connection with the matter.

The Vice-Chancellor. Your theory is that the city could not, by an omnibus ordinance, license more than one jitney at a time?

Mr. Lane. That is the theory of the Public Service Company; that is not my theory, at all.

The Vice-Chancellor. What was the theory of the case decided by Justice Kalisch? Was that an omnibus ordinance?

Mr. Lane. It was not an omnibus ordinance; it was an omnibus company—the General Omnibus Company applied for a franchise to the City of Newark, for a period of fifteen years, for the purpose of operating a fleet over a certain designated route, under the Limited Franchise Act of 1906. That ordinance was granted, or, rather, an ordinance was passed granting that license for fifteen years, under the 1906 Limited Franchise Act. Certiorari went to the Supreme Court. The Supreme Court affirmed the ordinance; and because Justice Kalisch said that was the proper way to grant a consent, it is said by the Public Service Company that it followed that all consents granted under the Kates Act of 1916 had to be granted in that way, under the Act of 1906. That is the argument of the Public Service Company. Now, I say that the whole record of the General Omnibus case shows that this was a different thing entirely—a different thing dealt with, than the grant of a license to a jitney here and a jitney there.

The Vice-Chancellor. Suppose you take the record that they had in the Supreme Court—the printed book has it all in it; and if you have that in you have put before me all that the Supreme Court considered.

Mr. Armstrong. Yes, sir.

Mr. Lane. Well, it is not offered for the purpose of showing what the Supreme Court had before it; it is offered upon the theory that this is one instance where the municipality construed the Kates Act different from what I have said they construed it.

Mr. McCarter. Well, we offer the ordinance; and I don't know whether you are going to enter into our psychology about it; but we offer the ordinance; and you say you want everything that went with the ordinance, and we are agreeable to that; and, as a convenient way of proving that offer we present the printed book; but if you want certified copies of all the documents—

Mr. Lane. I have not seen the book, but if it is all in the book, that is all I want.

CASE CLOSED.

Mr. Bergen. Now, if the Court please, we notified the counsel that we would move three cases today—two others besides this; the facts in those cases differ but little, except in one of them the jitney operates within the limits of a particular municipality (the City of Newark, I think) alone; and in the other case it operates in two or more municipalities, and it has filed no policy at all in one municipality; and it occurred to me whether it is advisable to argue this Barnett case now, or put in the proof in the other two cases, and argue all three together. I think the questions will be substantially the same, except that in one case there is no pretense of any policy being filed, or any duplicate, or copy.

The Vice-Chancellor. I suppose, if the present case (Barnett) is the master case, that the little difference in the proof in the other two cases might be offered. Of course, that won't make a very nice record.

Mr. Bergen. No, it won't. The question is whether we should argue this case now, or put in the testimony in the other two cases, and argue the three together. I am willing to take either course that is agreeable to the others.

Mr. Armstrong. I think, in the Reinhardt case, we could very well agree with counsel that the consent and the policy and the other matters that have been offered here (in the Barnett case) are the same (and the answers are identically the same in all of the cases), and that the offer made on the part of the defendant would be exactly the same; and in that case I think we can make the record up in that way.

Mr. Congleton. I am not sure that my motion went to the extent of being admitted in this Barnett case; I mentioned specifically the Reinhardt case.

The Vice-Chancellor. Oh, yes; you are admitted in it, and you adopted the answer of the other defendant.

Mr. Seymour (representing the defendant, Reinhardt). The only distinction in the Reinhardt case is that Reinhardt operates altogether within the City of Newark; and practically, the testimony you have here of Mr. Crawford and Mr. Archibald would be exactly the same in the Reinhardt case. You have the bond and the power of attorney.

Mr. Armstrong. We will have photoscopic copies made of those.

The Vice-Chancellor. Well, then, the Reinhardt case could be practically submitted under this case, with the exception of the fact that he is operating in Newark and not in Elizabeth.

Mr. Lane. There is one matter, as to the Reinhardt case, if any point is going to be made of it: If this Court is going to be asked to determine whether the duplicate policy filed with the City of Elizabeth is in compliance with the act, that question is not in the Reinhardt case. He operates solely within the City of Newark, and he has a license to operate within the City of Newark, and he has filed one policy with the City of Newark, and received one license from the City of Newark. That is the only difference in the case, if your Honor please.

The Vice-Chancellor. In the Banker case, you say, he operates in three cities, and in each he has filed his policy?

Mr. McCarter. In two, your Honor. Now, can we make the same concession in the Banker case?

Mr. Lane. I do not understand the distinction there; what is the distinction there?

Mr. Armstrong. There is no policy in South Amboy at all. That is our information.

Mr. Lane. If your Honor please, we, as a matter of fact, do not know, in the Banker case, whether there was a duplicate policy of insurance filed with South Amboy or not. Banker says there was—that is, in June. Now, there may be some mistake about that, and I don't want to take his word for it, unless I examine him.

The Vice-Chancellor. Well, is that the only difference between that case and the others?

Mr. Lane. Yes. This is the fact—that new policies of insurance have, since the commencement of this suit, in the ordinary course of business, been written; and if a policy of insurance was not filed in June of 1920, a policy of insurance is now filed, or is about to be filed, with South Amboy. I am told it is now filed in South Amboy.

Mr. Armstrong. Well, we only know about when we made our inquiry, and that is what they told us.

Minutes of Hearing.

Mr. Lane. Well, that may be. The original bond in the Banker case was filed in New Brunswick, and duplicates are filed in the other municipalities through which Banker operates.

Mr. Armstrong. That is, of the same policy.

Mr. Lane. Precisely. The original policy is filed in New Brunswick; the duplicates of those policies are filed in the other municipalities.

Mr. Armstrong. Well, you will produce what was filed at the time we filed this bill?

Mr. Lane. Yes; but then I will ask leave, in case the duplicate was not filed in South Amboy, for permission to bring it to the attention of the Court before the final decree, if such a duplicate has been filed.

Mr. Armstrong. That is all right.

Mr. Lane. I might also add to the stipulation that I ask counsel to agree to, with respect to the construction put upon this act by the various municipalities, this: that where busses operate through various municipalities—more than one municipality—it has been the uniform practice for the original policy of insurance, required to be given under the provisions of the act, to be filed in one municipality, and for duplicates of them to be filed in others.

Mr. McCarter. We cannot admit that.

The Vice-Chancellor. What kind of a policy is it—whom does it run to?

Mr. Lane. The policy is provided by the act, if your Honor please, and it does not run to anybody. The agreement is to indemnify the bus owner against loss from liability imposed by law in the operation of a certain bus, wherever that bus may operate, within certain territory described in the policy; and then there is an endorsement on the policy which requires the insured to pay any final judgment, up to five thousand dollars, recovered by any third person on account of the ownership, maintenance and use of the automobile described in the said policy, or any fault in respect thereto, and it is further stated that the policy is "written to comply with the provisions of an act entitled 'An Act concerning automobile busses, commonly called jitneys, and their operation in cities,' approved March 7,

1916, and known, &c."—the Kates Act. Now, that is the form of policy that is used. You see, the policy secures, so far as the operation of the particular bus for which it is written, a third person who may suffer loss, up to the extent of five thousand dollars, wherever the bus may be at the time of the happening of the accident, within the limits indicated by the policy.

The Vice-Chancellor. Now, when you come to your duplicates, if the jitney operates in two or three cities, are the duplicates filed in the various municipalities duplicate originals?

Mr. Lane. They are duplicate originals. You see, the act requires only the getting of one policy; that is all.

The Vice-Chancellor. Does it state for what area the one policy shall be given?

Mr. Armstrong. On the streets or highways of that city.

Mr. McCarter. You see, under the practice that these people have pursued, if the same man (as in the case that has been tried) operates a jitney in Newark and Elizabeth, he files a policy in Newark and the duplicate in Elizabeth, for five thousand dollars. The extent of the liability of the insurer, on that original and duplicate, is only five thousand dollars. Now, he has an accident in Newark which exhausts the policy, and if he has an accident in Elizabeth there is nothing to meet it. Now, we claim that the whole purview of the act is that there should be, in Elizabeth, or wherever he operates, or wherever he gets consent under that act (assuming that it is the kind of consent that he should get) a policy for five thousand dollars to answer for accidents in that city. Now, that is a question of law, and I understand (for I want to get our record straight, and we are all trying to co-operate to that end, as I understand it) that, so far as the third case, the Banker case, is concerned, the facts with reference to the use of the streets, under authority, by the Public Service Company, that were proven in the Barnett case are conceded with reference to that municipality, namely, South Amboy: that South Amboy is a city; that they have a similar kind of a license down there that they have produced for Newark; and that they are to be permitted to show exactly what they did have there in the way of a policy of insurance either now (if filed today) or to be filed; or whether it was filed; or whether it was a duplicate, or whether it was original—and, of

course, that they are operating in the City of South Amboy upon streets upon which we have tracks laid upon which we are operating. Now, under those circumstances, it seems to me that it is useless to go on with any further proof, if those facts are conceded. Then we have the three issues here, ready to be argued.

Mr. Lane. I still desire to offer proof that the practice has been to permit, where jitneys have been operating through several municipalities, the filing of duplicate bonds in all but one municipality; and in connection with that, I draw your Honor's attention to the fact that it probably (except in so far as it may go to the equity of the case) will become a matter in which your Honor will have no concern, because the City of Paterson passed an ordinance a short time ago requiring that the jitneys should file a bond for the City of Paterson exclusively, and there was a certiorari allowed of that ordinance by Mr. Justice Minturn, and that certiorari has been argued before Justice Minturn, sitting in chambers, and, in the orderly progress of events he will decide it in a short time, and will decide the legal question, which will be binding on this Court, as to whether the duplicate policies are proper, or whether they are not.

Mr. McCarter. Well, we cannot very well concede that evidence of some universal practice about this thing should be admitted. If counsel can prove that, and your Honor thinks it is material, why, then, he will have to prove it, that is all; we cannot admit any such thing. We do not think it is the fact, and, at any rate, we think it is utterly immaterial. Certainly, no construction of that kind ca novercome the requirements of the law. Now, the law is either one way or the other; and if these owners of jitneys have seen fit to construe the law that way, and the cities have acquiesced in it (which we deny), why, we think that is utterly immaterial.

The Vice-Chancellor. Well, that, of course, is a very important question, because a jitney owner ought not to be permitted to escape the expense of a premium for a policy of insurance, for the protection of the public, where he is bound to file a policy in each municipality, by filing it only in one. If the people are entitled to a policy in each municipality, it is for their protection, and they are entitled to have it.

Mr. Lane. Well, the construction which has been put upon this act by the municipalities is that the bond required is one bond. An accident can happen to a bus in only one place at one time. Mr. McCarter says that an accident may happen in the City of Newark which would exhaust the bond, and then one may happen in the City of Elizabeth—so it may—an accident may happen in the City of Newark and exhaust the bond; but the bond is not for the protection of the people of the City of Newark, or of South Amboy, or any particular place; it is for the protection of the people who may use that jitney; and that is the construction—

The Vice-Chancellor. Well, if the jitney strikes a foot passenger, doesn't the bond cover that?

Mr. Lane. Yes.

The Vice-Chancellor. Then it is for the protection of the general public using the highway.

Mr. Armstrong. "Such city," are the words of the statute.

Mr. Lane. Well, however erroneous it may be, that is the construction placed upon this act by the body to whom the legislature has seen fit to delegate the enforcement of this act, under its express terms.

The Vice-Chancellor. Well, has it not been consented that you may offer the certificate of the City Clerk, or proper officer, showing what has been done in a typical case, subject to an objection as to its admissibility?

Mr. Lane. Well, I do not think that the consent went far enough to permit me to offer a certificate that where busses are operated through more than one municipality it is the practice of those municipalities to accept a duplicate policy.

The Vice-Chancellor. I think the stipulation or consent went to that extent.

Mr. Lane. If it did, that is sufficient.

The Vice-Chancellor. In other words, it took in a typical case, showing the form of petitions, consents, policy of insurance, whether original or duplicate, and so on.

Mr. Lane. If it did, that is all I want.

The Vice-Chancellor. That is what I understood to be the fact; but Mr. McCarter objected to the offer, and I will admit

you to offer the thing, subject to his objection, and pass on his objection later.

Mr. Lane. I might, in line of that, go so far as to say this—that if it be the law that a jitney must file a bond in every place through which it operates, then, as figured out, at the time of the argument of this Paterson case, in a typical case coming from Paterson, the jitney would be under the obligation of putting up forty-five thousand dollars in bonds, or something like that.

The Vice-Chancellor. Well, if the legislature says that he must, what difference does it make?

Mr. McCarter. Well, can we go to a hearing on these three cases? It seems to me we have all the issues we want to raise now.

The Vice-Chancellor. That is satisfactory to the Court.

Mr. McCarter. Now, that we have these three cases disposed of, we do not simply move the other cases; they are held back; and we will argue and have these cases disposed of.

Mr. Lane. All right.

The Vice-Chancellor. Counsel may argue now, if they desire.

Counsel thereupon argued the cases.

Chancery Chambers, Jersey City, February 14, 1921.

Present: Mr. Frank Bergen for the complainant; Mr. Merritt Lane for the defendants.

Mr. Lane. Your Honor stated that we might present the decrees in the cases of *Public Service Railway Company* v. *Barnett,* and others, this morning, as your Honor will recollect. Before presenting the decrees, I want to present and have considered in evidence these certificates. Your Honor will recollect that, when we closed, it was with the arrangement that I might obtain from the various municipalities certificates with respect to the manner in which they had construed the act, and certificates with respect to the amount of compensation received from jitneys. I have succeeded in getting replies from Jersey City, Passaic, Paterson, Morristown, Atlantic City, and here is one that does not appear upon its face to bear any indication of what town it is from—well, whichever town that was, I can

locate it by examining the letter that was enclosed with it; I want these papers to be considered in evidence, if you have no objection, Mr. Bergen?

Mr. Bergen. If the Court please, at the time when this matter was before your Honor on the motion to strike out parts of the bill, I think your Honor appreciated the importance of an early disposition of this matter by the Court of Errors, and you proposed to decide the case very promptly, in the hope that we could get it on at the November Term; but that was impracticable; and now, that this bill is dismissed absolutely, the case could not be argued even at the next term of the Court of Errors—

The Vice-Chancellor. It may be, by consent.

Mr. Bergen. Yes; it strikes me that if counsel should consent to argue the case at the next term of the Court of Errors, so that this important question may be disposed of—

Mr. Lane. I have no objection to that.

Mr. Bergen. I will get the case ready as quickly as possible.

The Vice-Chancellor. That is why I was a little anxious about it, because the case was tried in December, and if I had had the briefs then I could have decided it during Christmas week, but as I did not, and Mr. Lane's brief came in on January 5th, and I was in the midst of trial work and preparing opinions for the Court of Errors, I was delayed somewhat; so, if you consent, Mr. Lane, that it come on at the next term, that will simplify the matter.

Mr. Lane. I have no objection to that.

Mr. Bergen. I will admit these papers in evidence, of course. And I will proceed at once to print the case.

Mr. Lane. May it be also understood that any more papers that I get in, of the same nature, between now and the time the case is submitted may also be submitted in evidence?

Mr. Bergen. That is all right; I have no objection to that.

Exhibit Reinhardt Case.

EXHIBIT REINHARDT CASE.

AUTO BUS ORDINANCES AND RULES.

AN ORDINANCE fixing the terms of consent for the operation of auto busses as the same are defined by Chapter 136 of the Laws of 1916.

BE IT ORDAINED by the Board of Street and Water Commissioners of the City of Newark:

1. The term "auto-bus," as herein used, shall mean an auto-bus as defined in Chapter 136 of the Laws of 1916.

2. No auto-bus shall be operated wholly or partly upon any street until the owner thereof shall have obtained the consent of the Board of Street and Water Commissioners as hereinafter provided. Such consent shall be issued to the owner of such auto-bus for the operation thereof by the owner thereof or by servants or agents duly accredited for that purpose by such owner and such consent shall not be deemed to authorize the operation of any auto-bus by any lessee or person other than the owner or his duly accredited agents or servants.

3. Said consent shall not be granted except upon compliance by the owner of any auto-bus with the following conditions:

There shall be filed with the General Superintendent of Works an application which shall contain the name of the owner, his age, residence and business address, if any, the street or streets over which it is desired to operate and for permission to operate whereon application is made, the character and estimated capacity of said auto-bus, together with a statement of the basis of such estimate and said application shall definitely state whether said auto-bus is to be operated by said owner personally or by agents or servants duly accredited by such owner. Every person operating an auto-bus shall be duly licensed to operate a motor vehicle by the State Department of Motor Vehicles and shall submit before operating said auto-bus evidence satisfactory to the Board of Street and Water Commissioners of his responsibility and of his ability to operate such auto-bus at points of congested traffic in the city.

4. If the Board of Street and Water Commissioners shall consider such application favorably the board shall authorize the General Superintendent of Works to issue to the applicant a con-

sent in writing to operate such auto-bus. In such consent there shall be incorporated the name and address of the owner, the street or streets and terminals over which consent to operate is granted and the manufacturer's number of the auto-bus. No such consent shall be issued by the General Superintendent of Works until the owner shall have filed a policy in the form provided for in Chapter 136 of the Laws of 1916 with the Comptroller of the city and shall have signed a statement wherein he agrees that in consideration of the issuance of such consent he will pay to the City of Newark five (5%) per cent. of the gross receipts from the carrying of passengers by said auto-bus, as provided in said Chapter 136, and agreeing that said auto-bus will be operated as an auto bus as herein defined only upon the street or streets for which consent is given, that he will not carry at any time passengers in excess of the number mentioned in his application and will not permit said auto-bus to be operated except by a person satisfactory to the Board of Street and Water Commissioners as hereinbefore mentioned in section 3 of this ordinance, and that the owner or his servants or agents operating such auto-bus will comply with the regulations now in force or hereafter to be adopted concerning the operation of such auto-busses in the streets of the City of Newark.

5. Every auto-bus for the operation of which consent shall have been given as hereinabove provided shall bear prominently displayed upon it the number of such consent, such number to be obtained from the General Superintendent of Works, and shall likewise bear prominently displayed upon it the route for which consent has been granted, together with the fare to be charged in all cases where such fare exceeds five cents.

6. It shall be unlawful to drive any auto-bus when any passenger is standing upon the running board, fender, mud-guard or back thereof, or while any passenger is riding in said auto-bus outside the body thereof or in such a manner as to obstruct the driver's view or his control of the vehicle, or with a greater number of passengers than the number stated in such application; to drive recklessly or to drive rapidly to pass any auto-bus, trolley car or vehicle in order to obtain any prospective passengers, or to race with any other vehicle; to refuse to carry any persons who properly apply for transportation.

Exhibit Reinhardt Case.

7. No fare shall be collected on any such auto-bus by the driver thereof while such auto-bus is in motion.

Every person owning and operating an auto-bus as defined in Chapter 136 of the Laws of 1916 shall, on or before the tenth day of each calendar month, file with the city treasurer a statement, verified by oath, showing the gross receipts from the business of said auto-bus or busses during the preceding calendar month, and shall at the same time pay to the city treasurer five per centum (5%) of such gross receipts as a monthly franchise tax for revenue for the use of the city; provided, that if the route over which said auto-bus is operated shall extend beyond the limits of the city, then such person shall include in such statement the length of the route over which said auto-bus is operated, both within and without the city, and shall pay as said franchise tax to said city five per centum (5%) of such proportion of the gross receipts as the length of the route in the city bears to the whole length of the route.

8. Upon the monthly report of gross receipts and the payment of five per cent. (5%) therein, as provided by Chapter 136 of the Laws of 1916, the City Treasurer shall issue to the person so paying a receipt showing the date and amount of payment, and from and after the 11th day of every calendar month no such auto-bus shall be operated unless the operator thereof shall have in his possession such receipt for the preceding calendar month and shall display the same to any inspector of the Board of Street and Water Commissioners or to any police officer of the City of Newark, upon request. Between the first and the 11th days of each month, every such operator shall have in his possession, as above provided, either the receipt for the preceding calendar month or for the month preceding such preceding calendar month.

9. If any section, clause or provision of this ordinance shall be adjudged invalid, such adjudication shall apply only to the section, clause or provision so adjudged and the rest of this ordinance shall remain valid and effective.

10. In addition to the penalty of one hundred ($100) dollars provided for in Chapter 136 of the Laws of 1916 for failure to file a monthly report of receipts, any person violating any of the provisions of this ordinance shall be subject to a fine of ten ($10)

dollars for the first offense and twenty-five ($25) dollars for every second and subsequent offense.

11. This ordinance shall take effect immediately.

Approved—May 22, 1916.

RULES.

No. 1: All auto-busses shall hereafter operate on each trip over the streets for which consent has been granted and over the full length of such streets between the termini of such route as set forth in the consent, as granted by this board.

In the event that consents have been issued to operate any auto-bus over more than one route, such bus shall continue to the end of the route upon which at any specific time it may be operating.

No. 2: MOVED that Rule No. 2 relating to the operation of auto busses in the City of Newark, be and the same is hereby amended to read, as follows:

Every duly registered driver of each auto bus in the City of Newark, for which consent to operate has been issued by the General Superintendent of the Board of Street and Water Commissioners shall wear conspicuously displayed on the outside front of his coat or other outer garment, on the right-hand side, at all times, when in charge of such auto-bus, or in the discharge of his duties as such driver thereof, an identification badge furnished by the City of Newark, and in default thereof shall immediately forfeit said badge to the Board of Street and Water Commissioners.

Any person who shall loan, sell, deface, mutilate or dispose of said badge without express authority of the General Superintendent shall immediately forfeit his driver's permit and said badge to the Board of Street and Water Commissioners.

All persons to whom a badge has been issued by the General Superintendent shall deposit the sum of Three Dollars ($3.00) with the General Superintendent as security for the return to the City of Newark of said badge, either on demand by the City or voluntarily.

No. 3: Any person to whom consent has been granted by the Board of Street and Water Commissioners, for the purpose of operating an auto-bus over the streets of the City of Newark,

shall register with the General Superintendent each and every driver before permitting him to operate the said auto-bus.

No. 4: All persons to whom consent has been granted to operate an auto-bus by the Board of Street and Water Commissioners shall on Monday of each week, file with the General Superintendent, a statement on cards furnished by said General Superintendent, showing the number of trips made daily and the amount of fare collected on each trip, together with the signatures of the drivers making said trips and collecting said fares, countersigned by the owner of said auto-bus.

Any person operating an auto-bus refusing to sign said statement shall be refused further permission to drive, and any owner of an auto-bus refusing or neglecting to file said card shall have his consent to operate an auto-bus revoked by the Board of Street and Water Commissioners.

No. 5: Any driver of an auto-bus operating in the City of Newark, who shall smoke or strike matches while operating said auto-bus over the streets of the City of Newark, shall immediately forfeit his right to operate.

No. 6: The Chairman of the Committee of Streets and Highways, or any employee designated by him for such purpose shall, after hearing, be empowered to suspend the license of any driver, or the consent of any owner, to operate an auto-bus for a period not exceeding one week. Any person so suspended who shall drive or operate such auto-bus during the term of said suspension shall forfeit said license or consent, as the case may be.

No. 7: Any consent heretofore granted shall be revocable for failure on the part of the owner to comply with the terms of the agreement signed by him or her, or with any of the provisions of the ordinance entitled "An ordinance fixing the terms of consent for the operation of auto-busses as the same are defined by Chapter 136 of the Laws of 1916, approved MAY 22, 1916, and the rules and regulations adopted by said Board.

Exhibit Barnett Case.

EXHIBIT BARNETT CASE

AN ORDINANCE

Entitled "Supplement to an Ordinance entitled 'An Ordinance fixing the terms of consent for the operation of auto-busses in the City of Elizabeth, as the same are defined by Chapter 136 of the Laws of 1916.' "

BE IT ORDAINED BY THE MAYOR AND BOARD OF PUBLIC WORKS OF THE CITY OF ELIZABETH:

1. Every applicant for license to operate an auto-bus in the City of Elizabeth, N. J., under the provisions of Chapter 136 of the Laws of 1916, the supplements thereto or amendments thereof, shall be a citizen of the United States, and over the age of twenty-one years, or a corporation duly incorporated under the Laws of New Jersey to operate auto-busses.

2. Every person, persons or corporation to whom a license has been, or may hereafter be granted by the Board of Public Works to operate an auto-bus over the streets of the City of Elizabeth, before said license becomes operative, shall register with the Board of Public Works of the City of Elizabeth the make and license number of said car; also the name and address of each and every driver employed by such person, persons or corporation to operate said auto-bus in the City of Elizabeth, and any change in drivers so employed shall be immediately reported, and their names and addresses registered with the Board of Public Works.

3. Every person, persons or corporation, to whom a license has been or may hereafter be granted by the Board of Public Works to operate an auto-bus, shall keep said auto-bus in a clean condition, and properly lighted. Smoking shall be strictly prohibited at all times in any auto-bus while operating under said license as aforesaid.

4. Every person, persons or corporation licensed as aforesaid to operate an auto-bus in the City of Elizabeth, within one week after receiving said license, and before operation thereunder, shall file with the Board of Public Works a schedule showing the time upon which said auto-bus is to be operated, which schedule shall be strictly adhered to, and no changes shall be made in said schedule filed until such change or changes have

been submitted to the Board of Public Works and have received the approval of said Board.

5. All auto-bus stops to take on or let off passengers at street intersections or crossings shall be made at the near side of such street intersections or crossings.

6. It shall be the duty of every person, persons or corporation licensed as aforesaid, to file with the Board of Public Works, on or before the tenth day of each calendar month (in addition to the statement required to be filed with the City Treasurer), a report showing the gross receipts for the previous month.

7. Every person, persons or corporation licensed as aforesaid, shall from time to time renew the insurance policies as required under Chapter 136 of the Laws of 1916, before the expiration thereof, and all policies of renewal shall accurately describe the auto-bus intended to be covered, and shall also contain the name and the manufacturer's number of the auto-bus. No auto-bus licensed as aforesaid shall be operated after the termination of said insurance, until said licensee has furnished insurance policy satisfactory to the Board of Public Works.

8. It shall be the duty of every person, persons or corporation licensed as aforesaid, to see that the driver or drivers employed by them to operate said auto-bus or auto-busses shall use diligent care in the operation thereof, and that no driver shall hold conversation or discourse with any person or persons riding in auto-bus operated by him, while the same is in motion.

9. Terminal points of said auto-busses shall be designated as follows:

Elizabeth Avenue Route: South side of C. R. R. tracks over Broad Street; and on Trumbull Street, corner of First Street.

South Broad Street Route: South side of C. R. R. tracks over Broad Street; and on Brunswick Avenue at City Line.

Morris Avenue Route: Intersection of Morris Avenue and Cherry Street; and on Brunswick Avenue at City Line.

Linden and Rahway Route: Southeast corner of Broad and East Jersey Street, on East Jersey Street.

Newark Route: On South Broad Street, corner of Elizabeth Avenue.

The Board of Public Works may, from time to time, by resolution, change or regulate all terminal, or starting and stopping points, for the purpose of improving the efficiency of handling

the traffic, as may seem to be for the best interest of the traveling public.

10. Every person, persons, firm or corporation, to whom a license has been or may hereafter be granted shall display in a prominent place within said auto-bus a printed copy of this ordinance, to be furnished by the Board of Public Works.

11. Every license heretofore or hereafter granted to operate an auto-bus, shall be revocable for failure on the part of the owner to comply with the said license, and the terms contained in the application therefor, signed by said person, persons or corporation, or with any of the provisions of an ordinance entitled "An Ordinance fixing the terms of consent for the operation of auto-busses in the City of Elizabeth, as the same are defined by Chapter 136 of the Laws of 1916," passed June 1, 1916, and of which this is a supplement.

12. Any person, persons or corporation violating the provisions of this ordinance shall be subject to a fine of ten dollars ($10.00) for the first offense and twenty-five dollars ($25.00) for the second and each subsequent offense, and in addition thereto the Board of Public Works may, at its discretion, suspend or revoke the license of any person, persons or corporation so violating this ordinance.

13. If any section, clause or provision of this ordinance shall be adjudged invalid, such adjudication shall apply only to the section, clause or provision so adjudged, and the rest of this ordinance shall remain valid and effective.

14. This ordinance shall take effect immediately.

Passed May 9, 1918.

(Signed) R. B. CISSEL,
President Board of Public Works.

(Signed) VICTOR MRAVLAG,
Mayor.

Approved May 14th, 1918.

Attest:

(Signed) JOHN F. KENAH,
Clerk Board of Public Works.

Exhibit Barnett Case.

EXHIBIT BARNETT CASE

AN ORDINANCE

Fixing the terms of consent for the operation of auto-busses in the City of Elizabeth, as the same are defined by Chapter 136 of the Laws of 1916.

BE IT ORDAINED BY THE MAYOR AND BOARD OF PUBLIC WORKS OF THE CITY OF ELIZABETH:

1. The term "auto-bus" as herein used, shall mean an auto-bus as defined in Chapter 136 of the Laws of 1916.

2. No auto-bus shall be operated wholly or partly upon any street until the owner thereof shall have obtained the consent of the Board of Public Works as hereinafter provided. Such consent shall be issued to the owner of such auto-bus for the operation thereof by the owner thereof or by servants or agents duly accredited for that purpose by such owner and such consent shall not be deemed to authorize the operation of any auto-bus by any lessee or person other than the owner or his duly accredited agents or servants.

3. Said consent shall not be granted except upon compliance by the owner of any auto-bus with the following conditions:

There shall be filed with the Clerk of the Board of Public Works an application which shall contain the name of the owner, his age, residence and business address, if any, the street or streets over which it is desired to operate and for permission to operate, whereon application is made, the character and estimated capacity of said auto-bus, together with a statement of the basis of such estimate and said application shall definitely state whether said auto bus is to be operated by said owner personally or by agents or servants duly accredited by such owner. Every person operating an auto-bus shall be duly licensed to operate a motor vehicle by the State Department of Motor Vehicles and shall submit before operating said auto-bus evidence satisfactory to the Board of Public Works of his responsibility and of his ability to operate such auto-bus at points of congested traffic in the City.

4. If the Board of Public Works shall consider such application favorably the Board shall authorize the Clerk of the Board of Public Works to issue to the applicant a consent in writing

to operate such auto-bus. In such consent there shall be incorporated the name and address of the owner, the street or streets over which consent to operate is granted and the manufacturer's number of the auto-bus. No such consent shall be issued by the Clerk of the Board of Public Works until the owner shall have filed an insurance policy and also a power of attorney nominating and constituting the Comptroller of the City of Elizabeth his true and lawful attorney for the purpose of acknowledging service of any process out of a court of competent jurisdiction to be served against the insured by virtue of the indemnity granted under said insurance filed, in the form provided for in Chapter 136 of the Laws of 1916, with the Comptroller of the City, and shall have signed a statement wherein he agrees that in consideration of the issuance of such consent he will pay to the City of Elizabeth five (5%) per cent. of the gross receipts from the carrying of passengers by said auto-bus as provided in said Chapter 136, and agreeing that said auto-bus will be operated as an auto-bus as herein defined only upon the street or streets for which consent is given, and he will not carry at any time passengers in excess of the number mentioned in his application and will not permit said auto-bus to be operated except by a person satisfactory to the Board of Public Works as herebefore in Section 3 of this ordinance provided, and that the owner or his servants or agents operating such auto-bus will comply with the regulations now in force or hereafter to be adopted concerning the operation of such auto-busses in the streets of the City of Elizabeth.

5. Every auto-bus for the operation of which consent shall have been given as hereinabove provided shall bear prominently displayed upon it the number of such consent, and shall likewise bear prominently displayed upon it the route for which consent has been granted, together with the fare to be charged in all cases where such fare exceeds five (5) cents.

6. It shall be unlawful to drive any auto-bus when any passenger is standing upon the running board, fender, mud guard or back thereof or while any passenger is riding in said auto-bus outside the body thereof or in such a manner to obstruct the driver's view or his control of the vehicle, or with a greater number of passengers than the number stated in such application; to drive recklessly or to drive rapidly to pass any auto-bus,

trolley car or vehicle in order to obtain any prospective passengers or race with any other vehicle; to refuse to carry any persons who properly apply for transportation.

7. No fare shall be collected on any such auto-bus by the driver thereof while such auto-bus is in motion. Every fare paid by any passenger riding on such auto-bus shall be registered by the driver or the person having charge of the collection thereof, and no owner or the servant or agent of such owner shall receive any fares except such as are registered, and such registering device shall be produced monthly to the Clerk of the Board of Public Works and also to the City Treasurer, for their inspection, and shall be so kept by the owner of such auto-bus as to show the correct gross receipts received from the operation of the same as provided for in Chapter 136 of the Laws of 1916.

8. Upon the monthly report of gross receipts and the payment of five (5%) per cent. thereon, as provided by Chapter 136 of the Laws of 1916, the City Treasurer shall issue to the person so paying a receipt showing the date and amount of payment, and from and after the 11th day of every calendar month no such auto-bus shall be operated unless the operator thereof shall have in his possession such receipt for the preceding calendar month and shall display the same to any inspector of the Board of Public Works or to any police officer of the City of Elizabeth, upon request. Between the first and eleventh days of each month every such operator shall have in his possession, as above provided, either the receipt for the preceding calendar month or for the month preceding such calendar month.

9. If any section, clause or provision of this ordinance shall be adjudged invalid, such adjudication shall apply only to the section, clause or provision so adjudged, and the rest of this ordinance shall remain valid and effective.

10. In addition to the penalty of one hundred ($100.) dollars provided for in Chapter 136 of the Laws of 1916 for failure to file a monthly report of receipts, any person violating the provisions of this ordinance shall be subject to a fine of ten ($10.)

Exhibit Barnett Case.

dollars for the first offense and twenty-five ($25.) dollars for every second and subsequent offense.

11. This ordinance shall take effect immediately.

Passed June 1/1916.

(Signed) R. B. CISSEL,
President Board of Public Works.

Approved June 3rd/1916.

(Signed) VICTOR MRAVLAG,
Mayor.

Attest:

(Signed) JOHN F. KENAH,
Clerk Board of Public Works.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

PUBLIC SERVICE RAILWAY COMPANY, *Complainant-Appellant,* *vs.* WILLIAM D. REINHARDT, *Defendant-Respondent.*	*On Appeal from Court of Chancery.*
SAME *vs.* ISADORE BARNETT.	*On Appeal from Court of Chancery.*
SAME *vs.* WILLIAM J. BANKER, JR.	*On Appeal from Court of Chancery.*

BRIEF FOR COMPLAINANT-APPELLANT.

The Facts.

These three cases were heard together by Vice-Chancellor Griffin for the reason that the principal question is involved in each case.

Reinhardt operates two auto busses in the city of Newark, on Broad street, from Bank street to Orange street, and on Orange street from Broad to 14th street. On a part of the route, *i. e.,* on Broad and Orange streets, Public Service Railway Company operates a street railway. Reinhardt operates two jitneys, and has filed with the chief fiscal officer of Newark two insurance policies. The provisions in the policies for the payment of loss and damage are not in accordance with the statute (P. L. 1916, p. 283, commonly called the Kates act), for the reason that by their terms they purport to insure him against accidents that may occur anywhere, and are not restricted to accidents in the city. Besides, the consent which he obtained from the city was a mere license, and was not obtained in the manner prescribed by the limited franchise act of 1906 (P. L., p. 50).

Barnett operates a jitney in Elizabeth and Newark. In Elizabeth, along Newark avenue, North Broad street and Broad street; in Newark, on Broad street and Frelinghuysen avenue. On all of these highways Public Service Railway Company operates a street railway. Barnett has a license from each city. He has filed a policy of insurance with the chief fiscal officer of Newark, and a copy thereof with such officer of Elizabeth.

The criticism as to the terms of the policy, and also of the consent, made in the Reinhardt case is applicable in the Barnett case.

Banker operates a jitney in and between New Brunswick and South Amboy. In New Brunswick, on Albany street, George street and Throop avenue. In South Amboy, on Main street, Broadway and Bordentown avenue. On all of these streets in New Brunswick and South Amboy Public Service Railway Company operates a street railway. Banker has a consent from New Brunswick in the same form as in the Reinhardt and Barnett cases, and has filed a policy of insurance in that city. He has a similar consent from South Amboy, but has filed no policy or copy of policy there.

The Legal Questions.

I.

None of the defendants in these cases applied for and obtained a consent for the use of any of the streets or highways on which they are operating their jitneys or auto busses, as required by chapter 36 of the laws of 1906 entitled "An Act regulating the granting by municipalities of consent to the use of streets, avenues, parks, parkways, and other public places," commonly called the limited franchise act (P. L. 1906, p. 50). That act, in its first section, declares that—

> "Hereafter, where by law the consent of any municipality of this state is required for the use of any street, avenue, park, parkway, highway or other public place, either above, below, or on the surface thereof, such consent shall not be granted by such municipality except as hereinafter provided."

The second section describes the manner in which such consent shall be obtained. It states, in substance, that no consent for the use of any street, &c., shall be granted by any munici-

pality except upon petition filed with the clerk by the *person* or corporation desiring the same. The petition must specify the period for which the consent is asked, and the uses in detail for which the street, &c., is desired; and in the case of a street railway the character of the route proposed to be constructed, &c. It will be noticed that the statute applies not to street railway companies alone, but to any other corporation or any person that must have the consent of a municipality for the use of any of its streets. The second section further states that upon filing such petition the same shall not be considered by the official board authorized to grant consent until notice shall have been given by publication and posting, which notice shall contain certain information specified in the act. The act further provides that at the time fixed in the notice, or subsequently, the official body of the city may, by ordinance, and not otherwise, give its consent.

It is conceded in these cases that no such petition was filed or hearing held, or ordinance passed. In a word, the act of 1906 was entirely ignored by the defendants and by the official boards or bodies of the cities that granted the alleged licenses. In the case of *Public Service Railway Co.* v. *General Omnibus Co.*, 93 N. J. L., 344, it was held by the supreme court that proceeding under the limited franchise act was a proper method to obtain the consent required by the Kates act, that act and the limited franchise act being *in pari materia*. Consequently the respondents, and all of them, not having the consent of the cities in which they are operating jitneys, are illegally using the highways mentioned above.

II.

None of the said defendants have filed with the chief fiscal officer of the city in which they operate their auto busses or jitneys a policy of insurance as required by chapter 136 of the laws of 1916, entitled "An Act concerning auto busses, commonly called jitneys, and their operation in cities," commonly called the Kates act (P. L. 1916, p. 283). That act, after defining auto busses or jitneys, states in section 2 that no auto bus shall be operated wholly or partly along any street in any city until the owner shall obtain the consent of the board or body having control of public streets in such city for the operation of such auto bus and use of the streets; "and no such consent

shall become effective and no such operation shall be permitted until the owner of such auto bus in any city shall have filed with the chief fiscal officer of the city in which said auto bus shall be licensed and operated an insurance policy of a company duly licensed to transact business under the insurance laws of the state of New Jersey in the sum of five thousand dollars ($5,000) against loss from the liability imposed by law upon the auto bus owner for damages on account of bodily injury or death suffered by any person or persons as the result of an accident occurring by reason of the ownership, maintenance or use of such auto bus upon the public streets of such city, and such consent shall continue effective and such operation be permitted only so long as such insurance shall remain in force," &c. That section further requires the owner of the auto bus to file with the chief fiscal officer of the city a power of attorney to acknowledge service of process in suits to compel payment for damages.

The 5th section of the act declares that—"Any person operating an auto bus in any of the streets of any city in this state at any time, after sixty days from the time when this act shall take effect, without complying with the provisions of this act, shall be deemed guilty of a misdemeanor and subject to the penalties therefor provided by law."

The policies of insurance filed in these cases are not available exclusively by those who suffer injuries from accidents in the cities in which the consents are granted, but appear to protect anybody who suffers an injury by the operation of the jitney anywhere. The language of the policy in this respect purports to insure:

> "Against loss from the liability imposed by law upon the assured for damages on account of bodily injuries, or death at any time resulting therefrom, accidentally suffered by any person or persons not employed by the assured, caused by or resulting from the maintenance or use of any automobile described and enumerated herein, including the loading and unloading of goods carried therein, provided such bodily injuries or death are suffered as the result of accidents occurring within the period of three months, beginning on the first day of June, 1920, at noon, and ending on the first day of September, 1920, at noon, standard time, address of assured, as given in this policy."

There is the following endorsement on the policies:

> "This policy is written to comply with the provisions of an act entitled 'An Act Concerning Automobile Busses, commonly called jitneys, and their Operation in Cities,' approved March 7th, 1916, and known as chapter 136 of Laws of 1916, State of New Jersey, and as a condition precedent to insurance any of the provisions of within policy which are in conflict with said above recited act shall be null and void.
>
> "In pursuance of the provisions of said above recited act this policy shall cover the payment of any final judgment recovered against the assured by any person in an action for damages on account of the ownership, maintenance and use of the automobile bus or busses herein specified and insured, or any fault in respect to them or either of them, such payment to be for the benefit of every person suffering loss, damage or injury as described in this policy and in said act.
>
> "It is further agreed by the Company that the fiscal officer of the City of Newark, State of New Jersey, issuing licenses to assured under this policy, may, in place and stead of the assured, give notices to the Company of accidents, claims and suits as required by condition 'D' of within policy, and the Company agrees to give such fiscal officer five days' notice of cancellation of this policy prior to the date at which said cancellation shall become effective."

This does not agree with the language of the statute. Busses are frequently used outside of the route contemplated at the time the license is given, and in fact outside of the city that grants the license, and the policy as written seems to be broad enough to cover those who are injured outside of the city that gave the consent. The case of *Fischer* v. *Pollitt,* argued before Mr. Justice Minturn in the supreme court and decided January 17th last and not yet reported, holds that such policies should be restricted so as to be available only by those who suffer injury in the city that grants consent to the owner of the jitney.

III.

The defendant Barnett filed a policy of insurance with the chief fiscal officer of the city of Newark as described above, and a copy of said policy, but not an original policy, with the chief fiscal officer of the city of Elizabeth, and operates his jitney or auto bus in both cities. This was expressly held to be unlawful in the case of *Fischer* v. *Pollitt, supra.*

IV.

The defendant Banker filed a policy of insurance with the chief fiscal officer of the city of New Brunswick, as described above, and none in the city of South Amboy, although operating therein. Consequently he is operating in South Amboy without even a copy of a policy of insurance on file.

V.

The complainant, being in the enjoyment of a legal franchise to operate conveyances for hire and to act as a common carrier along the streets mentioned above and being, concededly, severely injured by the competition of the defendants along the several routes that they parallel, is entitled to an injunction to prevent the further interference with its business and for the purpose of protecting its franchise.

VI.

That a company is entitled to protection of its franchise and business by injunction in such a case as this has been repeatedly held by this court. Such a franchise is property, its owner is heavily taxed for its use and is entitled to have his property protected. *The Citizens Coach Co.* v. *The Camden Horse R. R. Co.*, 33 N. J. Eq., 267. In the important case of *D. & R. Canal & Camden & Amboy R. R. & Trans. Co.* v. *Camden & Atl. R. R. Co.*, 16 N. J. Eq., 321, it was held by the court of chancery as early as 1863 that—

> "An injunction is the proper remedy to secure to a party the enjoyment of a statute privilege, of which he is in the actual possession, and when his legal title is not put in doubt."

That states the exact situation of the complainant in the present case. And it was also held by the same court in that case that—

> "If a corporation goes beyond the powers with which the legislature has invested it, and in a mistaken exercise of those powers interferes with the rights or property of others, equity is bound to interfere by injunction if the exigency of the case require it. Whether those rights are invaded by a mistaken or a fraudulent exercise of power is immaterial."

Of course an individual is in no better position than a corporation that interferes with the rights or business of others. He is not immune from restraint by injunction. In fact, he may not be in so strong a position as a corporation that so interferes, because in the case of an individual there is no question as to the power of a court of equity to enjoin the exercise by a *de facto* corporation of powers which it may not possess *de jure*. In the present cases all of the defendants are individuals,—not corporations.

In the case just referred to an effort was being made to construct a railroad across this state in competition with the Camden & Amboy R. R. Co. The facts of this case are set forth fully in the opinion of Chancellor Green on the application for preliminary injunction which was denied, 15 N. J. Eq., 19, for the reason that it was not clear that defendants intended to compete with the complainants. They were only building a railroad that might be used to compete and might not. The chancellor, however, on final hearing, on supplemental bill, enjoined the defendants, but rested his decision somewhat if not entirely on an agreement between the state and the Camden & Amboy R. R. Co., which prohibited the state from authorizing any competing railroad prior to the year 1869, without the consent of the Camden & Amboy Company. The case was brought to this court, where the injunction was sustained (18 Eq., 546). This court, however, said that the ground on which the chancellor had rested his opinion was too narrow, holding that it was not necessary that the Camden & Amboy R. R. Company should have an *exclusive* franchise in order that its business might be protected by injunction. Chief Justice Beasley, writing the opinion of the court, said (at p. 572):

> "When, therefore, the complainants [Camden & Amboy R. R. Co.] obtained from the state the right to establish their road, I think that, by the intrinsic force of such grant, such franchise was exclusive against all persons but the state. A competing road, set up without a legislative grant, is a fraud upon such grant, and is a plain public nuisance. The consequence is, that the case of the complainants, in my opinion, does not, necessarily, rest upon the express clause in their charter guaranteeing to them an exclusive privilege. After the 1st of January, 1869, when the effect of that clause will be spent, the defendants, as at present constituted, will have no greater right than they now have, to establish a line of railroad to compete in business with the complainants between the cities of New York and Philadelphia."

It is, therefore, clearly settled, and has never been denied in this State, that a corporation engaged in business is entitled to have its property and business protected against invasion by a party not authorized by law to carry on a competing business. In the case of *The Elizabethtown Gas Light Co.* v. *Green*, 46 Eq., 118, Vice-Chancellor Van Fleet said, at p. 123:

> "*Third.* It is also established that a court of equity has power to protect a corporation, holding an exclusive franchise, from irreparable injury, arising from the usurpation of a like franchise, whether the usurpation be committed by natural or artificial persons. The leading cases on this subject in this state are the *D. & R. Canal and Camden & Amboy R. R. & Trans. Companies* v. *Camden & Atl. R. R. Co. and R. & D. Bay R. R. Co.*, 1 C. E. G. 321; S. C. on appeal, 3 C. E. G., 546; *Pennsylvania R. R. Co.* v. *National Ry. Co.*, 8 C. E. G. 441."

And the decree in *The Elizabethtown Gas Light Company* case was affirmed by this court on the opinion of Vice-Chancellor Van Fleet (49 Eq., 329).

It is true that in *The Elizabethtown Gas Light Company* case Vice-Chancellor Van Fleet stated that he understood that *Jersey City Gas Co.* v. *Dwight*, 29 Eq., 242, had been overruled by this court in the *National Docks case*, 32 Eq., 755; but in *The Elizabethtown Gas Light Company case* in an opinion by the late Chancellor Magie, in which Chief Justice Beasley and Justices Depue, Scudder and Van Syckel joined it was said that Vice-Chancellor Van Fleet was mistaken in thinking that the *National Docks case* had overruled the *Dwight case, supra.* Speaking upon that point the opinion states:

> "The previous decision [that is, the decision in the *Dwight case*] was not followed [by Vice-Chancellor Van Fleet in the *Elizabethtown Gas Light Company case*] because it was conceived to have been overruled by this court in *National Docks Ry. Co.* v. *Central R. R. Co., supra,* the decision in which was pronounced to be irreconcilable in principle with the former case. But the views of this court in the case referred to were misconceived. For, in that case, there was no fraudulent evasion of, but an exact compliance with, every formal requirement of the law. Thereupon, this court held, a corporation *de facto* came into existence, amenable for its faults to the state alone, and that a collateral inquiry into the motives and purposes of those who had subscribed to stock could not be demanded by any private person."

The Elizabethtown Gas Company case turned on the question whether the Court of Chancery could disrupt a *de facto* corporation, and it was held that it could not. There is, as stated above, no question of collateral attack on a *de facto* corporation involved in the cases now under consideration.

It is stated in the opinion of the vice-chancellor, and it is obviously the fact, that the complainant has expended "sums of money running into millions in the construction and equipment of its road in order to enable it to carry on its business as a common carrier; and likewise expends large sums of money annually as necessary maintenance and operation charges." The opinion also states that the complainant is suffering a loss by the competition of the respondents, and that the jitneys in the city of Newark alone carry about four million passengers a month. The vice-chancellor, however, was under the impression that there was no power in the court of chancery to protect the property and business of the complainant from competition, not only unlawful but positively forbidden, in the absence of lawful municipal consent. This view of the matter in our opinion is directly contrary to the decision of this court in the *Camden & Amboy case, supra.* In that case this court not only defined the right of the complainants to carry on their business unmolested, but also defined the remedy for the violation of that right, as follows:

> "The controversy in this case, therefore, is between the complainants and mere wrong-doers, and the question thence arises, has a railroad company any redress against a competition unwarranted by law, and which materially affects the value of the privileges with which it is legally vested? I am at a loss to perceive upon what premises, or by what course of reasoning, other than an affirmative answer to this question could be justified. A franchise to build a railroad for public use and to take tolls, is property, the title to which is held from the sovereign; and, like every other thing susceptible of private ownership, it must, of necessity, be under the protection of the laws. Unless it can be shown that this species of right is altogether anomalous in its character, and is under the control of exceptional rules, a wrongful invasion of such right cannot but be followed by a legal vindication. Theoretically, then, the claim to judicial redress is clear, and all legal analogies, as well as decided cases, concur in support of the same view."

This court, in that case, adopted precisely the remedy pursued by the complainant in the present case.

In the recent case of *Brooklyn City Railroad Co.* v. *Whalen,* the appellate division, second department, and subsequently the New York court of appeals, held that a street railway company, operating in Brooklyn, was entitled to an injunction to prevent the operation of competing omnibuses which the Board of Estimate and Apportionment of the city of New York had attempted to authorize Whalen, an official of the city, to operate. The Board of Estimate and Apportionment had power to confer franchises to operate omnibuses in the city, but the court held that the power could not be conferred upon a city official. The case in the appellate division is reported in 182 N. Y. Supp., p. 283, 191 App. Div., 737, and unanimously affirmed by the court of appeals last June, 128 N. E., 215. A similar statement of the law may be found in *Bartlesville Electric L. & P. Co.* v. *Bartlesville Interurban Ry. Co.,* 109 Pac., 228.

The same view as to the right of a utility corporation to restrain unlawful competition has been expressed in other cases in New Jersey than those already cited. See *Millville Gas Light Co.* v. *Vineland L. & P. Co.,* 72 N. J. Eq., 305; and this court held in the case of *Borough of Madison* v. *Morristown Gaslight Co.,* 65 N. J. Eq., 356, that the extent of the right of a gas company under its charter to lay mains could be inquired into on bill in equity and the company restrained from exercising its franchises beyond their legitimate scope.

In *West Jersey Traction Co.* v. *Camden Horse R. R. Co.,* 53 Eq. 163, this court, in determining whether or not an injunction should issue to protect one street railway company from an infringement by another of its franchise for the use of streets, examined in detail the regularity of the proceedings leading up to the passage of the ordinance upon which the infringing company relied, and concluded that the consent upon which the reliance was had was not a lawful consent.

It cannot be necessary to refer to other authorities on a point so clearly settled in this state; nevertheless, the court may be interested to turn to the great case of *The Proprietors of the Charles River Bridge* v. *The Proprietors of the Warren Bridge,* decided by the supreme court of the United States in 1837, and reported in 11 Peters, 420. In that case it appeared that in 1785 a bridge was built across the Charles river by the

complainant, and in 1828 the legislature of Massachusetts incorporated a company by the name of The Proprietors of the Warren Bridge, &c., for the purpose of erecting another bridge over the Charles river within sixteen rods of the older bridge on the Charlestown side, and fifty rods on the Boston side. The older company filed a bill for injunction to restrain the younger company from erecting the Warren street bridge, and a supplemental bill to restrain its use, and none of the very eminent counsel and jurists who participated in the argument and decision of that case apparently had the slightest doubt as to the correctness of the remedy which the complainant pursued. The decision of the case, however, turned upon the question whether the legislature of Massachusetts had power to authorize the construction of the bridge at Warren street, the charter of the older company "not containing any express contract that the state would not authorize another bridge to be built to the injury of the corporation." That question is not involved in the present case, but it may be noted in passing that the supreme court of Massachusetts sitting in equity had divided equally in its effort to decide the case (7 Pick. 344), and only four of the seven judges of the supreme court of the United States sustained the defendant's contention. Story and Thompson dissented and McLean agreed with the complainant on the merits, but voted to dismiss the bill because he did not think the question could be reviewed by the federal supreme court.

There is a passage in the opinion of Justice Story in that case at page 608 which is well worthy of serious consideration in the present cases, and for that reason we quote it:

> "For my own part, I can conceive of no surer plan to arrest all public improvements, founded on private capital and enterprise, than to make the outlay of that capital uncertain and questionable both as to security, and as to productiveness. No man will hazard his capital in any enterprise in which if there be a loss, it must be borne exclusively by himself; and if there be success, he has not the slightest security of enjoying the rewards of that success for a single moment. If the government means to invite its citizens to enlarge the public comforts and conveniences, to establish bridges, or turnpikes, or canals, or railroads, there must be some pledge, that the property will be safe; that the enjoyment will be co-extensive with the grant, and that success will not be the signal of a general combination to overthrow its

> rights, and to take away its profits. The very agitation of a question of this sort is sufficient to alarm every stockholder in every public enterprise of this sort throughout the whole country."

It is respectfully submitted that the decrees brought up for review should be reversed, and that the cases be remitted to the Court of Chancery with directions to grant injunctions according to the prayers of the bills.

FRANK BERGEN,
ROBERT H. McCARTER,
Counsel for Appellants.

New Jersey Court of Errors and Appeals

PUBLIC SERVICE RAILWAY COMPANY,
Complainant-Appellant,

vs.

ISADORE BARNETT,
Defendant-Respondent.

PUBLIC SERVICE RAILWAY COMPANY,
Complainant-Appellant,

vs.

WILLIAM J. BANKER,
Defendant-Respondent.

On Bills.

On Appeals from Chancery.

PUBLIC SERVICE RAILWAY COMPANY,
Complainant-Appellant,

vs.

WILLIAM D. REINHARDT,
Defendant-Respondent.

BRIEF FOR RESPONDENTS.

The complainant filed some thirty-six bills in the Court of Chancery against individual defendants.

They were identical with the exception of the statement as to the location of route, names of defendants and matters of similar nature. The prayer of each of the bill is that "——his servants, agents and employees be enjoined and restrained from further continuing the operation of said jitney or auto bus in competition with complainant in the streets of the city of——— or in any other city in this State."

A motion was made to strike the bill. After argument the Court carried the motion until final hearing.

Three cases were taken as typical of the lot and were brought on for final hearing. On the hearing on the motion to strike out, and on the final hearing, counsel for complainant expressly disclaimed:

1. That the Public Service Railway Company had any exclusive right to operate conveyances over the public streets for hire and reward.

2. That the defendants were using the tracks of complainant in any particularly offensive manner. Complainant expressly stated that its sole contention was that defendants had not complied with the provisions of the Act of 1916, commonly called "the Jitney Act," Chapter 136 of the Laws of 1916, and that not having complied with the provisions of that act defendants had no right to use the public streets for the operation of jitneys and that complainant having a right to use the public streets for the operation of its trolley cars might complain of the unlawful use of the streets by defendant, the special injury to complainant being the loss caused by the competition of the jitney.

The result was a denial of the relief prayed for by complainant for the reasons stated in the conclusions of the Vice-Chancellor (p.).

An appeal was immediately taken. Under the direction of the Vice-Chancellor the respondents have acquiesced in the bringing on of this appeal for hearing, if possible, at the March Term. The state of case has not yet been prepared or served, nor has the brief of counsel for complainant. Time has not been sufficient.

There is, therefore, submitted to this Court for the respondents the brief used before the Court of Chancery, slightly altered.

ARGUMENT.

I.

The limited Franchise Act of 1906, 3 C. S. of N. J. p. 3562, amended C. S. of N. J., 1st Supp. p. 1037, does not apply to consents granted under the provisions of the so-called Kates Act, Laws of 1916, p. 283, and supplemented by a supplement to An Act Concerning Municipalities, i. e., the Home Rule Act, Laws of 1917, p. 319, which supplement is found in Laws of 1920, p. 182.

The argument is that the consent of the municipality which is required by section 2 of the so-called Kates Act, Laws 1916, p. 283, must be granted in accordance with the provisions of the limited Franchise Act, 3 C. S. of N. J. p. 3572.

Under the limited Franchise Act it is provided that where, by law, the consent of any municipality of this State is required

for the use of any street, &c., such consent shall not be granted (see amendment, 1912, 1st Supp. C. S., p. 1037) without a petition "which petition shall specify the period for which such consent is asked, and the uses in detail for which such street, avenue, park, parkway, &c., is desired, and whether above, below or on surface thereof." Upon the filing of the petition public notice is required to be given by publication in one or more newspapers, once a week for two weeks, and by posting, &c. Upon the date fixed by the notice, or upon such subsequent date, &c., "the board or body of said municipality may, by ordinance, and not otherwise, grant, for a period not exceeding fifty years, the right to use the street, avenue, park, &c." Under the provisions of Section 3 the ordinance is not to be acted upon the day it is introduced. Under the provisions of Section 4 it is not to become effective until an acceptance, in writing, is filed. Under the provisions of Section 7: "Every consent to the use of any street, &c., granted under the provisions of this act shall be for a term of years, and not in perpetuity, and shall not in any case exceed fifty years."

The Kates Act, Laws of 1916, p. 283, is entitled:

> "An Act concerning auto busses, commonly called jitneys, and their operation in cities."

Section 2 provides: No auto bus shall be operated wholly or partly along any street in any city until the owner or owners thereof shall obtain the consent of the board or body having control of public streets in such city for the operation of such auto bus and the use of any street or streets of said city. No such consent shall become effective and no such operation permitted until the owner shall have filed with the chief fiscal officer an insurance policy, etc. The section also provides:

> "Any such consent may be revoked by the governing body of the city granting the same after notice and hearing whenever it shall appear that the person to whom such consent was granted has failed to furnish and keep in force the insurance and the power of attorney herein required, or to comply with any terms or conditions imposed by the board or body granting such consent or any law of the State of New Jersey."

Section 3 provides for the payment to the city of a certain proportion of gross receipts.

Section 5 provides that any person operating an auto bus in any of the streets of any city in this State without complying

with the provisions of the act shall be deemed guilty of a misdemeanor.

By an act entitled "A supplement to an act entitled 'An act concerning municipalities'" (the Home Rule Act, which is found in the laws of 1917, p. 319, which supplement is found in the laws of 1920, p. 182) it is provided that "the governing body of every municipality shall have power to make, enforce, amend or repeal ordinances to license and regulate auto-busses, commonly called jitneys, and the owners and drivers of all such vehicles and to fix the fees for such licenses, which may be imposed for revenue, and to prohibit the operation of all such vehicles in the public streets or places of such municipality, unless such ordinances are complied with, whether such auto-busses, commonly called jitneys, are operated over routes wholly or partly within the territorial limits of such municipality; provided, however, this shall not be in substitution of but in addition to whatever other right, power and authority any such municipality may at any time have as to licensing, regulating or control of the operation of such auto-busses, commonly called jitneys, and this act shall not be construed as modifying or repealing an act entitled 'An act concerning auto-busses, commonly called jitneys, and their operation in cities,' approved March seventeenth, one thousand nine hundred and sixteen, or any supplement or amendment thereof."

The question is not whether a franchise granted by the city under the provisions of the limited Franchise Act may be considered as a consent under the Kates Act of 1916, which was the question involved in Public Service Railway Co. vs. *General Omnibus Company, 93 N. J. L., 344. It is whether every consent under the Kates Act* **must** *be obtained in the manner prescribed by the limited Franchise Act of 1906.*

Although counsel for the Public Service Railway Company in the Court of Chancery stated that the contention that the limited Franchise Act of 1906 did not apply to the Kates Act of 1916 hardly deserved the dignity of being termed an argument counsel in the same breath stated that the Public Sercice Railway Company in the General Omnibus case contended that very thing. I assume that the Public Service Railway Company's attorneys were sincere in their argument before the Supreme Court in the General Omnibus Company case, as they must be considered equally sincere in their argument before the Court of Chancery, but assuming their sincerity in both in-

stances, it seems to be quite clear that there is so much doubt as to whether the consent obtained by the defendant granted under the Kates Act of 1916 is valid or not as to make applicable *the well established rule that the Court of Chancery will not determine the legality of municipal consents having to do with the exercise of a franchise.*

In the case of the *Public Service Railway Company* vs. *General Omnibus Company,* as appears from the state of case, the application for a franchise was on behalf of a corporation to operate motor busses over certain designated routes for a period of fifteen years. There were five routes in all specified. The rates of fare were fixed. It was provided that a bond of $10,000 should be filed. The city was given the right to purchase the property. The consent did not purport to be a consent granted solely under the Kates Act. Section 2, sub-divisions a, b and c, of the ordinance, provided substantially that the conditions of the Kates Act should be complied with. The question before the Supreme Court was whether an omnibus company was such a company as could obtain a franchise under the provisions of the limited Franchise Act, the Public Service contending that it was the legislative intent to confine the granting of a franchise by a municipality for the use of its public streets and places to street railways and traction companies only. The Supreme Court said that there was no such intent *and that is all that the Supreme Court decided;* this is far from holding that every consent under the Kates Act must be obtained in accordance with the provisions of the limited Franchise Act. It is quite clear that this is not intended from a perusal of the acts themselves.

The limited Franchise Act provides for a franchise for the use of the street for a certain specified definite period of time not exceeding fifty years. It provides for the acceptance of the ordinance, and as originally adopted required, if the application were for a period of time of more than twenty years, a referendum election.

The Kates Act is "An Act concerning auto-busses, commonly called jitneys, and their operation in cities," and it is complete in itself.

The consent of the city is not for any limit of time. On the contrary, there is an express provision that it may be revoked by the governing body of the city granting the same after notice and hearing, whenever it shall appear that the person to whom

such consent has been granted has failed to furnish and keep in force the insurance and the power of attorney therein required, or to comply with any terms or conditions imposed by the board or body granting such consent or any law of the State of New Jersey. It then provides, Section 3, for the payment of a certain revenue. It is not a supplement to an act concerning cities, or an act concerning municipalities, or an act concerning streets. Standing alone it is capable of enforcement in all its parts.

The limited Franchise Act applies, by its terms, to cases *where the consent of any municipality of this State is required. Under the Kates Act the consent of the municipality as such is not required.* The provision is that the owner shall obtain the consent *of the board or body having control of the public streets in such city.* The consent of the board or body having control of the public streets may be granted in any way that municipal action may be evidenced, either by resolution or by ordinance. The statute which provides that "the consent of a board shall be obtained" is complete in itself. It is not necessary that the manner in which such consent should be acquired should be set forth in detail. The common law is read into the statute.

It is clear from a reading of the Kates Act that it does not contemplate a permanent thing. It contemplates a mere license, a permission, an acquiescence, not a franchise for a certain number of years which may equal fifty; a permission or license which is revocable in the manner prescribed by the act. If it is a franchise under the provisions of the limited Franchise Act, then proceedings must be taken to forfeit it in accordance with the law governing franchises. *The only possible ground upon which it can be coupled with the limited Franchise Act of 1906 is that in both acts the word "consent" is used.* But the use of this word in both acts does not necessarily indicate a legislative intent that the consent referred to in the Kates Act is one of the consents referred to in the limited Franchise Act. It is necessary that a peddler or a huckster have the consent of the city to the use of the streets. It is necessary that one have the consent of the city to the moving of a house across the street. It will not be contended that such a consent is within the purview of the act of 1916.

If from a consideration of the two acts standing alone it cannot be determined, with certainty, whether the legislative intent was that the consent required by the Kates Act should be

granted in accordance with the provisions of the limited Franchise Act or not, or, if it appears from a consideration of the language of the two acts that the language is so broad as that it may be claimed that consents under the Kates Act must be obtained under the provisions of the limited Franchise Act, then the application of established rules with respect to the construction of statutes compels a construction which will *not* require consents under the Kates Act to be obtained under the provisions of the limited Franchise Act even if the very words of the statutes seems to so require.

And these rules and their application are:

1. While the legislature may pass absurd legislation, if it is so inclined, before a court will adopt such a construction of a statute as will lead to an absurdity it will inquire whether there is not some other interpretation possible which will not lead to that result.

25 Ruling Case Law, Sec. 257.

2. One of the established rules for the construction of statutes is that they should have a rational, sensible construction, if their meaning is at all doubtful. When the language of a statute fairly permits, a construction which will lead to an unreasonable result should be avoided.

25 Ruling Case Law, Sec. 256.

3. If, giving to the words of an act their literal or natural meaning, the conclusion reached would be unreasonable or absurd, some other meaning within the reasonable scope of the words may be adopted to avoid that result, if it appears that such other meaning may probably have been the one intended.

25 Ruling Case Law, Sec. 257.

4. It is to be presumed that the legislature did not intend a law to work a hardship or injustice, and it is a reasonable and safe rule of construction to resolve any ambiguity or absurdity in a statute in favor of a just and equitable operation of the law.

25 Ruling Case Law, Sec. 258.

5. Where great inconvenience will result from a particular construction that construction is to be avoided, unless the meaning of the legislature be plain.

25 Ruling Case Law, Sec. 260.

6. A statute will not be so construed as to work public mischief, unless required by clear, unequivocal words.

25 Ruling Case Law, Sec. 261.

Prior to the adoption of the Kates Act jitneys operated without regulation. As argued elsewhere, their right to operate did not spring from the Kates Act. Their right to operate is based upon the common-law right of the individual to do a lawful business and of the common-law right of the public to be transported. I should say here that it is not only the constitutional rights of the operators of these jitneys which is affected, it is the constitutional right of the members of the public to means of transportation.

The Kates Act was attacked as unconstitutional. Its constitutionality was sustained as a regulatory act.

West vs. *Asbury Park,* 89 N. J. L. 402.

In that case there was under consideration a general ordinance with reference to the granting of permits or consents to jitney busses to operate. The ordinance was sustained. *It was not suggested that the ordinance should have provided that the consents should have been obtained in accordance with the provisions of the limited Franchise Act. Indeed, the remarks of Justice Swayze in West* vs. *Asbury Park is opposed to any such construction.*

There is grave doubt as to whether the legislature has the power to prohibit the operation of jitneys.

Jitney Bus Ass'n vs. *City of Wilkes-Barre,* 100 Atl. 954.

It is not to be assumed that the legislature intended to prohibit unless it stated so in express language.

To require individual jitney owners to obtain consents in the manner prescribed by the limited Franchise Act would be prohibition, not regulation. In the City of Newark alone there are over four hundred jitneys. This would mean four hundred separate applications, four hundred separate advertisements for hearings, four hundred separate ordinances and advertisement of their passage. There would not be sufficient commissioners and their deputies to listen to these applications. Moreover, the business is, to a certain extent, transit. Jitney owners drop out and new ones come in. To require in each case the procedure contemplated by the limited Franchise Act of 1906 would impute to the legislature an intent to effect an absurd

and unreasonable result as well as a result which might well be claimed to be unconstitutional.

As 25 Ruling Case Law states, section 223:

> "Where the literal construction of an act will produce results so extraordinary and unjust that they cannot be deemed to have been within the legislative intent, the general language of the act must be restricted so as to accomplish the general intent and declared purpose of the act. All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence, and may be restricted in meaning to adapt their meaning to the subject matter in reference to which they are used. Although the language of a statute is general, it may be limited in its operation to cases falling within the mischief intended to be remedied."

Ia.

It is a well-settled rule that the contemporaneous construction of a statute by those charged with its execution and application, especially when it has long prevailed, while not controlling, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous.

Every municipality in this State subject to the act and their proper law officers have construed this statute as not requiring a consent under it to be granted under the limited Franchise Act. Every prosecutor of the pleas in the State has so construed it. The act was adopted in 1916 and for a period of four years its construction has remained unquestioned. Thousands of consents have been granted under it. Hundreds of thousands of dollars paid into the city treasuries.

In *State* vs. *Kelsey,* 44 N. J. L., p. 1, the Supreme Court said:

> "The legal rule is succinctly expressed in the maxim of the civil law, '*contemporanea expositio est fortissima.*' The doctrine has such prevalence that it is applicable not only in the exposition of statutes, but in the interpretation of constitutions of government."

And the rule is approved by the Court of Errors and Appeals in *Commonwealth Roofing Co.* vs. *Riccio,* 81 N. J. E. 486, citing *State* vs. *Kelsey,* 44 N. J. L. 1; *Fritz* vs. *Kuhl,* 51 N. J. L. 191, 200; *McNeal Pipe Co.* vs. *Lippincott,* 57 N. J. L. 540.

In *McNeal Pipe Co.* vs. *Lippincott,* 57 N. J. L. 540, Mr. Justice Magie, speaking for the Supreme Court, said:

> "Such, at least, is a possible construction of the acts, and it is the construction which has always been adopted in practice."

Contemporary construction is entitled to greater weight where, as in this case, private rights are not involved. So far as Public Service is concerned the legislature had full and complete power to permit jitneys to operate without consent, to permit them to operate with the consent of a municipality obtained by mere motion; to require them to obtain consent under the limited Franchise Act (perhaps). Whether they should be licensed at all, or, if licensed, how, is a matter entirely between the public, the jitney drivers and the State. The private rights of Public Service are not affected, and Public Service cannot be heard to complain in a court of law whatever course the legislature takes.

The construction put upon the act by the authorities delegated by the legislature to enforce the act is, in such a case, entitled to almost controlling weight. Every municipality acting under the act has construed it in the way contended for by the defendant here. It was suggested that the granting of the franchise by the City of Newark to the General Omnibus Company is an illustration of another construction. This is not so. The City of Newark by its grant of a franchise to the General Omnibus Company not only granted the consent required by the Kates Act, but something more.

Although the construction is confined to a period of some four years this does not destroy its weight. While it may be confined to a period of four years, it has been in existence since the act was passed, and it is universal. All the jitneys in the State are operating under such a construction, and hundreds of thousands of dollars, as I have stated before, have been paid into the city treasuries by virtue of such construction.

The courts are especially reluctant to overturn a long-standing executive or departmental construction where great interests have grown up under it and will be disturbed or destroyed by the announcement of a new rule, or where parties who have contracted with the government upon the faith of such construction will be prejudiced.

In 25 Ruling Case Law, Sec. 273, it is stated:

> "But further, the meaning publicly given by contemporary or long professional usage is usually presumed

to be the true one, even when the language has etymologically or popularly a different meaning."

Ib.

The weight to be given to executive or departmental practice is increased when the legislature in re-enacting the law or another law in pari materia fails to indicate in any way its disapproval of the settled construction of the officer or department, or where an implied approval of such construction may otherwise be deduced from subsequent legislation, or failure to alter the practice by legislation.

This rule is to be considered in conjunction with another rule, *i. e.:*

Ic.

Where the language of a statute is in any manner obscure, or of doubtful meaning, the court in construing such statute may with propriety recur to the history of the times when it was passed and of the act itself, in order to ascertain the reason as well as the meaning of particular provisions in it.

25 Ruling Case Law, Sec. 268.

Newark vs. *Board of Equalization of Taxes,* 80 N. J. L. 258.

The court will take judicial knowledge of the fact that for the past two years attempts have been made to get the legislature to place the regulation of jitneys within the control of the Public Utility Commissioners. These attempts have been fostered by Public Service Railway Company, the complainant here, the theory of the company being (in the argument advanced) that inasmuch as the jitneys are competing with Public Service they should be subject to regulation as is Public Service. The legislature must be presumed to have known of the construction placed upon the Kates Act. They must be presumed to have known that consents were being granted by all of the municipalities in manner other than under the limited Franchise Act. It was not suggested in the legislative proceedings that the executive officers of the government and the municipalities were mistaken in their construction of the act.

The failure of the legislature to, for four years, notwithstanding the fact that the subject of regulation was continuously be-

fore it, correct the construction put upon the act by the municipalities is of the greatest significance.

But of greater significance is the fact that in 1920 the legislature passed a supplement to an act, "An Act concerning municipalities," that is, the Home Rule Act, which supplement is found in P. L. 1920, p. 182. This act gave the governing body of every municipality power to make, enforce, amend or repeal ordinances to license, and regulate auto-busses, commonly called jitneys, and the owners and drivers of all such vehicles, and to fix the fees for such licenses, which may be imposed for revenue, and to prohibit the operation of all such vehicles in the public streets or places of such municipality, unless such ordinances are complied with, provided that the act should not be construed as modifying or repealing an act entitled "An Act concerning auto-busses, commonly called jitneys, and their operation in cities."

This legislation in practical effect is a re-enactment of the Kates Act of 1916. It is inconceivable that had the legislature differed with the practical construction which has been placed upon the Kates Act by the municipalities and the prosecutors, that it would have specifically referred to, in the act of 1920, the act of 1916 and stated that that act should not be considered as modified or repealed.

The power of the legislature to bind the court as to the construction of a statute where no private rights are involved is unquestioned.

See 25 Ruling Case Law, Sec. 265.

It is generally held that a legislative body may, in many cases, themselves furnish the rule to govern the courts, provided no constitutional right of the party concerned is violated.

There is no constitutional right of Public Service involved in this litigation.

Id.

Public policy must be regarded under the construction of the statute.

Jersey City Gaslight Co. vs. *Consumers Gas Co.,* 13 Stew. Eq. 427, 430.

Spencer vs. *Morris,* 67 N. J. L. 500.

It is for the legislature to determine public policy and the legislature has determined that the public policy of this State requires the regulation of jitneys, not their suppression. If the Kates Act is to be construed as requiring a consent under the provisions of the limited Franchise Act it will result in suppression, not regulation, a result opposed to public policy.

As stated by Ruling Case Law (25), Sec. 216:

> "In the interpretation and construction of statutes the primary rule is to ascertain and give effect to the intention of the legislature. As has frequently been stated in effect, the intention of the legislature constitutes the law. All rules for the interpretation and construction of statutes of doubtful meaning have for their sole object the discovery of the legislative intent, and they are valuable only in so far as, in their application, they enable us the better to ascertain and give effect to that intent."

Section 222:

> "When the intention of a statute is plainly discernible from its provisions that intention is as obligatory as the letter of the statute, and will even prevail over the strict letter. * * * Whenever the legislative intention can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction may seem contrary to the letter of the statute."

If it be said that the opinion of the Supreme Court in *Public Service* vs. *General Omnibus Company* is favorable to a construction that the consent under the Kates Act must be obtained under the provisions of the limited Franchise Act, which I deny, it can with greater force be said that the opinion of the Supreme Court in *West* vs. *Asbury Park,* where the constitutionality of the act was involved, is favorable to a construction that the consent required by the Kates Act need not necessarily be obtained under the limited Franchise Act.

And this leads me to the second point.

II.

The Court of Chancery had no jurisdiction to, at the suit of a competitor, determine the legality of the consents held by the defendant for the use of the public streets.

The only decree which the Court of Chancery could make would be that the defendant should cease operating until he complied with the provisions of the Kates Act. The defendant would continue to operate, claiming to have complied with the Kates Act so far as he is advised, whereupon, upon proceedings for contempt, the Court of Chancery would be asked to determine that the consents referred to in the Kates Act must be obtained under the provisions of the limited Franchise Act.

The Tennessee Court said in *Memphis Street Railway Co.* vs. *Rapid Transit Company,* L. R. A. 1916 B. 1143, at p. 1150:

(One of the two cases in which injunction such as prayed for in the case at bar was granted.)

> "When a business may not be conducted as matter of common right, but legislative authority is necessary, such authority, when conferred, is exclusive against all persons not endowed with like authority. Such rights, so bestowed by law, may not be infringed except by authority of the State and will be protected by injunction against unlawful invasion."

(Language entirely too broad. Certainly under this language the saloonkeeper with a license may enjoin the saloonkeeper without a license.)

> "As a matter of course, the observation just made is only applicable to clear cases, as the case before us. If the franchise or license of a complainant was doubtful, an injunction would not be awarded to protect it; **nor could the validity of a license or franchise possessed by a competing defendant be questioned, and its exercise restrained in proceedings of this character.** Geneva-Seneca Electric Co. *vs.* Economic Power & Constr. Co., 136 App. Div. 219, 120 N. Y. Supp. 926; Coffeyville Min. & Gas Co. *vs.* Citizens' Natural Gas & Min. Co., 55 Kan. 173, 40 Pac. 326; Market Street R. Co. *vs.* Central R. Co., 51 Cal. 583. We are in full accord with the views expressed in these and like cases. Questions upon the regularity of a charter, the validity of a franchise, and the like, are to be determined upon suit of the Attorney General or other constituted authority, and not on suit of a competing corporation."

> "In the case at bar, however, defendants make no claim to any license or franchise, although such license is a statutory prerequisite to the pursuit of defendants' business. The validity of complainant's franchise, on the other hand, is not impeached."

Although no cases were cited by counsel for the complainant in opposition to this statement of the law, nevertheless counsel seemed to assume that for some reason or other the Court of Chancery was not bound by such limitation, notwithstanding the remarks of Vice-Chancellor Van Fleet in *The Elizabethtown Gas Light Company* vs. *James S. Green,* 46 N. J. E. 119, affirmed in the Court of Errors and Appeals, 49 N. J. E. 329.

I, therefore, pass to a consideration of some of the cases in which the principle has been applied. Many of them will be found cited in the Tennessee case, and many more in the Puget Sound Traction Company case, L. R. A. 1918 F, at p. 470.

If an attack could be allowed by Public Service against the operation of jitneys for the reasons that this attack is made, then a saloonkeeper, who had a license, might apply to the court to enjoin a saloonkeeper, without a license, from doing business; so a huckster, so any other person, who is entitled and is obliged to obtain a license before using the streets, Hahne & Company in Newark, which operates a fleet of trucks for the delivery of its goods, which trucks must be licensed, could enjoin Goerke & Company, engaged in a similar line of business, from operating trucks upon the ground that they were not licensed.

These analogies are not far fetched.

In *Baxter Telephone Company* vs. *Cherokee County Mutual Telephone Association, et al.,* 94 Kan. 159, 146 Pac. 324, a suit was brought by a telephone company against another telephone company in a competitive field upon the ground that the second telephone company did not hold a license from the Public Utilities Commission, which license, it was claimed, was required by law. It was insisted that while the first telephone company was subject to lawful competition it could not be properly subjected to unlawful competition. The Court declined to grant the injunction prayed for and said:

> "Assuming for the moment that the business of the Baxter Local No. 121 is of such a character that it would require a license from the Public Utilities Commission before engaging in the telephone business in Baxter Springs,

it must be conceded that, in the exercise of a sound discretion, the Public Utilities Commission might grant that license; and, if it did, its competition for public patronage would be just as keen, and it would occupy the streets and diminish and divide the revenues of appellant just as much, with a license as without one. Licenses to engage in any trade or calling within the limits of a city are common. Hackmen, draymen, pawnbrokers and the like are required in most Kansas towns to have licenses issued by the city authorities. But we think the licensees of these callings could hardly maintain an injunction suit against any person who presumed to exercise any such calling without a license; yet the competition of an unlicensed hackman or pawnbroker would tend to lessen the business and diminish the revenues of those lawfully engaged in such business. Doctors, lawyers, and school teachers require a license or certificate to practice their professions; but none of these could maintain a suit to enjoin another person from engaging in any of their peculiar professions without such certificates, notwithstanding any probable loss of income on account of the invasion of their professions by unlicensed practitioners. We can see no fundamental difference between the telephone business and any other business, except that, owing to its importance and general use, one telephone system is likely to be more satisfactory and less expensive than where two or more such companies occupy the same field. This the legislature has recognized, and has provided that, as a matter of public policy, no public utility like a telephone company excepting one strictly mutual, will be authorized to do business until it has obtained a certificate or a license of authority as a public convenience and necessity within the community where it seeks to do business. This is a part of the State's program for the regulation of public utilities, but the administration of that program, and the enforcement of the law pertaining thereto, are vested in public officers authorized to use the name of the State to carry it into execution. Prior to the passage of the Public Utilities Act, any number of telephone companies which could persuade a city government to grant a franchise for the use of the streets and alleys might establish a telephone system within such city. The competition of these would affect the business and affect the revenues of other utilities of the same character which had previously been established. The enactment of the public utilities law was an extension of the police power of the State over such utilities, but it did not grant any additional rights to such utilities as were established and maintained before the adoption of that act; and the Baxter Telephone Company procured no rights there-

> under which it can maintain against possible competitors. The public utilities law was not enacted as an extension or enlargement of the powers and privileges of an existing telephone company."

This case is in complete analogy with the case at bar.

In *Coffeyville Min. & Gas. Co.* vs. *Citizens' Natural Gas & Min. Co.*, 1895, 55 Kan. 173, 40 Pac. 326, the Court held that it could not, in an action brought by a rival, try the right of the defendant to lay pipes in the street for the purpose of supplying natural gas.

In *Chicago Tel. Co.* vs. *Northwestern Tel. Co.* (Supreme Court of Illinois), 1902, 65 N. E. 329, there was a suit by the plaintiff against the defendant to enjoin a rival telephone company from constructing poles, etc., upon the public streets. The defendant telephone company claimed to be operating by virtue of an ordinance. The Court said:

> "It is doubtful, however, whether the question as to the validity of this ordinance can be raised in this proceeding. It is a familiar principle of law that the validty of a franchise or charter cannot be questioned or tested in a collateral proceeding, but only in a direct proceeding, instituted by the city or the people through the proper person or official. Thompson *vs.* Candor, 60 Ill. 244; Bushnell *vs.* Machine Co., 138 Ill. 67, 27 N. E. 596; Lees *vs.* Commissioners, 125 Ill. 47, 16 N. E. 915. * * * It is also to be observed that an obstruction in the nature of a public improvement placed in the streets of a city by the permission of the city, either express or implied, is strictly a matter between the city and the private corporation constructing the improvement; so that any action to test the right to so obstruct the street should be brought by the city, or by some public officer on behalf of the city."

So in the case at bar, the right of these jitneys to be upon the street is strictly a matter between the State and the city and the jitney owners.

In *re Franklin Trust Co.* vs. *Pensinular Pure Water Co.*, Circuit Court of Appeals, 89 C. C. A., 49, 161 Fed. 855, the appellant had a franchise for the furnishing of water. The appellee began the construction of a system of water pipes upon the territory served by the appellant. The question raised was that the appellee was violating the statute requirements; that the appellee had not the power to occupy the streets or highways. To appellant's bill the appellee filed its answer "exhibiting cer-

tain claimed franchises or permits from the Board of Supervisors of Elizabeth City, county and the councils of the towns of Hampton and Phoebus for the occupancy of the highways, streets and avenues." The injunction was denied upon the ground that the appellant had no standing in a court of equity to question the validity of appellee's charter or municipal authority, under which it proposed or was acting, even if they were invalid. "Such acts," the Court said, "should be attacked by a direct action instituted for this purpose and cannot be attacked collaterally by a proceeding in equity." High on Injunctions, 2n Ed. Sec. 917. *Savings & Trust Co.* vs. *Bear Valley Irrigation Co.* (C. C.) 112 Fed. 693; *Osborn* vs. *Mo. Pac. Railroad Co.*, 147 U. S. 259, 13 Sup. Ct. 299, 37 L. Ed. 155."

In this case the Court held that a court of equity will not determine the validity of what purported to be municipal permits. The head note of the case is: "The power of a water company under its charter and municipal ordinances to lay its pipes in streets and highways cannot be collaterally attacked by another corporation in a suit in equity for an injunction."

In *Geneva-Seneca Electric Co.* vs. *Economic Power & Construction Company,* 120 N. Y. Supp. 926, Supreme Court, Appellate Div., Fourth Dept., 1910, the Court says:

> "In this case, so far as I am able to understand the facts, the proposition is this: A corporation legally constituted is serving a city and its inhabitants with electrical power having no exclusive franchise. It is conducting a profitable business. Another alleged corporation, which we assume has no corporate rights, assumes with the consent of the city to engage in the same business. Can such first corporation complain because the acts of the other, although in violation of law, may tend to decrease its revenue or earning capacity. * * * But independent of the authorities, the proposition is presented as to whether a corporation, authorized by its charter to supply a municipality with electrical lighting and power and not having an exclusive franchise, may question the attempted exercise of such power by another corporation or individual, whether or not such corporation is legally constituted and whether or not such individual is authorized by law to conduct such business. We conclude that the whole trend of authority is to the effect that such plaintiff cannot, in an action brought to obtain an injunction, question the authority of the competing corporation, or the right of the individual in the premises. If such were not the law, then every corpora-

tion could raise the question as to the legality of its competing neighbor."

In *New Hartford Water Co.* vs. *Village Water Company,* 87 Atl. 358, the plaintiff was a water company, created by the legislature, under a special charter. The defendant, it was charged, was exceeding its charter power. The Court said:

> "Whether the defendant is exceeding its charter powers is a question to be only raised by its stockholders or by the State, or by parties who receive some special damage from the *ultra vires* acts."

The head note of this case says that judgment was entered for the plaintiff, and that the defendant appealed and the action was affirmed. As a matter of fact, the judgment was for the defendant and the plaintiff appealed and the judgment was affirmed.

In *re Atchison, Topeka & Sante Fe Railway Company* vs. *General Electric Ry. Company,* 112 Fed. 689, Circuit Court of Appeals, Seventh Circuit, 1902, held that a railway company whose rights were injured by the construction of a street railway company, with respect to a crossing, has no standing in equity to question the passage of the ordinance granting the permit to the street railway company, either upon the ground that it had been fraudulently obtained or that the municipality had no power to pass it. The Court said:

> "But it is insisted on behalf of the complainant that on the facts set up in its bill, the ordinance must be treated as passed without the required consent of abutting owners, and therefore illegal and void, which being true, the defendant should be held as proceeding with the work without any authority of law whatever, whereas in the cases referred to lawful consent of the city was shown. The real ground upon which relief by injunction is denied in such case is that the use of the street being within the purposes for which it is laid out, and therefore a proper use, the right to occupy is properly a question between the defendant and the municipality having the control of its streets and charged with the duty of keeping them free from unlawful obstructions, or between the defendant and the public generally, the individual being left to his action for damages for any injury resulting to his property. He has no standing in equity on account of public injury or for the purpose of inflicting punishment upon the defendant for its wrongful acts."

In *Cumberland Gaslight Company* vs. *West Virginia & Maryland Gas Company,* 182 Fed. 667, Circuit Court, D. Maryland, 1910, in an action at law brought by the plaintiff against the defendant to recover damages because of the competition of the defendant, which it was claimed was unlawful, because the defendant company did not have the permit required by law, the Court said: "The plaintiff says the mayor and city council have no authority under their charter to pass any such ordinance or to confer any such privileges upon the defendant. It claims that it is in the position of one having a ferry or toll-bridge franchise. The sovereign power may grant to anyone else a like franchise; but, until such grant is made, the plaintiff has the right to prevent any unauthorized person from laying gas pipes in a public street, precisely as the owner of a ferry or bridge franchise may under like conditions, successfully object to the establishment of a competing bridge or ferry. This right, it contends, it may assert in equity by a bill for an injunction, or, as in the present case at law, by a suit for damage." The Court says: "There are analogies between a franchise to lay gas pipes and a franchise to keep a ferry. There are also differences. It may be a question whether the analogies or differences are more important." The Court referred to *Jersey City Gas Company* vs. *Dwight,* 29 N. J. E. 242. It did not note that said case had, in effect, been overruled as Vice-Chancellor Van Fleet himself stated by the National Dock case. It held that the plaintiff had no cause of action.

In *Fort Plain Bridge Company* v. *Smith,* 30 N. Y. 44, the plaintiff was maintaining a toll bridge for public use; the defendant, without any special authorization from the legislature, commenced the construction of a free bridge for public use, just above and within forty-nine feet of the bridge of the plaintiff. The effect of the proceeding was to destroy the value of plaintiff's franchise. It was contended that the free bridge was unlawfully erected; that it was a public nuisance. To this the Court says:

> "But assuming that it is a public highway and that the bridge is an obstruction to navigation, and therefore a public nuisance, yet no one has the right to abate it, or sustain an action for damages occasioned by the erection, unless he has himself sustained some damages not sustained by the rest of the community. The rights of the plaintiff are not, in contemplation of the law, injured by the new bridge, and hence they are not entitled to either

an injunction or damages." And the Court further says: "But it is said that the defendants could not legally erect their bridge without authority from the legislature, and hence any person injured may resist its erection or recover damages therefor. There are three cases in which authority from the legislature is necessary to erect a bridge over a stream. One is when the stream is navigable; 2d, when the State owns the bed of the stream, and 3d, when the right to take toll is desired."

"It was decided by the Court of Errors in The Canal Appraisers *v.* The People, 17 Wend. 571, that the bed of the Mohawk belonged to the State, and of course the defendants have no right to use the property of the State for their own benefit, without its consent. But I do not understand what right the plaintiffs have to complain of this appropriation of the bed of the stream while the State officers make no objection to it."

In *Old Forge Company* v. *Webb*. 65 N. Y. Supp. 503, affirmed 68 N. Y. Supp. 1145, it was said that a railroad was constructed without warrant of law; that it diverted the traffic from the owners of a line of steamers operating between the same points. The Court said:

"The allegation as to damage is that by reason of the facts recited the established use and enjoyment of the plaintiffs' properties will be interfered with, and their salable values decreased. This, I take it, means that a competing line of communication between the Mohawk & Malone Railroad and Eagle Bay will divert traffic, and so cause an injury, but this injury is not caused by the alleged nuisance. In itself, this nuisance inflicts no private damage. The damage comes, if at all, not because of the existence of any nuisance, but because of the construction of a rival line of traffic to Racquette Lake. Precisely the same damage would result were the line built for the whole distance over private property. The peculiar damage mentioned in the books must be directly caused by the nuisance. It may not merely accompany it."

(So in the case at bar, precisely the same damage will be caused to the Public Service if these jitneys operated under lawful permit.)

The Court said that a case directly in point was that of *Ft. Plain Bridge Company* v. *Smith*, 30 N. Y. 44. Here the defendants were erecting a free bridge over the Mohawk River, and for this purpose they trespassed upon the property of the State. The plaintiff who owned a toll bridge some fifty feet below,

which would be rendered worthless by the new structure, sued to enjoin it. The action failed, because such a state of facts did not show any special or peculiar damage resulting from the trespass. A similar result was reached in *Groat* v. *Moak,* 94 N. Y. 115.

The rule has been applied to competing street railways.

The right of one street railway company to urge that another street railway company was using the street without proper license to do so was denied in *Market Street R. Co.* v. *Central R. Co.,* 51 Cal. 583, the Court stating that if the defendant was in fact occupying or using the street without proper license to do so it was no concern of the plaintiff any more than of any other private person, but must be inquired into by the appropriate procedure.

That one street railway company has no such interest as will enable it to maintain an action for an injunction to restrain another street railway company from laying its tracks apparently on the same streets as those of the first company is held in *Christopher & T. Street R. Co.* v. *Central Crosstown R. Co.,* 67 *Barb.* 315. It is stated that the first company occupied no such relation toward the other company or the public streets as entitled it to bring an action to restrain the second company from using the public streets; that the rights conferred upon the first company by its charter were not exclusive, and did not prevent the legislature from conferring authority to fix the terminus of the second company's road at a point designated, nor did it confer upon the first company the power or duty of interfering to protect the public interest either on behalf of the city or of the general public; that if there was any excess of power in the claim of the second company to run its tracks to the point in question, only the public could interfere to restrain it by injunction, unless it should be shown that some actual interference with the tracks as laid at that time by the first company had taken place or was about to be attempted.

In *Doane* v. *Lake Street Elevated Railroad Company,* 36 L. R. A. 102, Illinois Supreme Court, 1896, it was held that at the suit of an abutting property owner the validity of a consent granted by the city to the construction of a street railway company could not be determined.

In view of what Vice-Chancellor Van Fleet said in *Elizabethtown Gas Light Company* v. *Green,* 46 N. J. E. 118. affirmed by

this Court, it is hardly necessary to refer to cases from other jurisdictions.

In that case it appeared that the Elizabethtown Gas Light Company had the privilege of laying pipes in the City of Elizabeth. The defendants asserted the same right under the provisions of a special statute under which a corporation was authorized to be formed to be known as the Metropolitan Company. This statute provided that before operating some $30,000 was to be paid. It was charged by the complainant that this $30,000 had never, in fact, been paid; that the grant, therefore, never became effective and complainants sought an injunction restraining defendants from using the streets for the purpose of laying pipes to be used in competition with complainants. Vice-Chancellor Van Fleet denied the relief. He said:

> "But the ground on which the complainant principally relies is, that the Metropolitan Company never acquired a right to place gas pipes in the public grounds of Elizabeth. This is, in fact, its fundamental proposition, and the line of argument by which it was attempted to be maintained was this: the payment of $30,000 by the stockholders, either to the commissioners or into the treasury of the corporation, was a condition precedent to organization, and that until this condition was performed it was impossible for the corporation to acquire either corporate life or power; in other words, that the legislative grant was only to take effect after the stockholders had paid $30,000, and as the truth is that that sum has never been paid, the grant never acquired vitality, and that, as a consequence, the Metropolitan Company stands now precisely in the same condition as it would if no attempt had been made to make a grant to it. It is not necessary, in my judgment, to decide whether this argument construes the grant made to the Metropolitan Company correctly or not, for if it be conceded that it does, still it is certain, beyond all dispute, that until it is made clearly to appear that the condition in question was imposed in favor of the complainant or for its benefit, so that it has a clear right to demand its observance, the complainant's position, with respect to the condition, is that simply of a stranger, and hence it stands without the least pretence of right to complain of its breach. It is only the parties to a grant made subject to conditions, or those in whose behalf or for whose benefit the conditions are imposed, that have a right to ask that they shall be performed, or to seek protection against their breach, or redress for their violation. The complainant

> is not mentioned in the charter of the Metropolitan Company. The charter contains no word or sentence which, by the most lax construction, would support even a conjecture that the condition under consideration was imposed for the benefit or protection of the complainant. A contrary purpose is manifest. The charter granted to the Metropolitan Company shows that the legislature thought the welfare of the people of the City of Elizabeth would be promoted by the creation of another corporation, possessing the same powers and privileges held by the complainant, to compete in business with the complainant. The purpose of the condition is obvious; it was imposed to protect such persons as should become creditors of the Metropolitan Company. That was its only purpose. The power, however, to require its performance, or to overlook or waive its breach, resides alone in the State. No one but the State can take advantage of the breach of such a condition, or compel a corporation subject to such a condition to either perform or to surrender its franchises. This, as I understand, is the principle on which the decision of the Court of Errors and Appeals, in National Docks R. R. Co. *v.* Central R. R. Co., 5 Stew. Eq. 755, rests. I failed to recognize and apply this principle in deciding the Jersey City Gas Co. *v.* Dwight, 2 Stew. Eq. 242."

That case went to the Court of Appeals and was affirmed upon the opinion of Vice-Chancellor Van Fleet, 49 N. J. E. 329. Precisely what this court decided and the extent to which this court went is indicated by the opinion of Magie, *J.*, dissenting, 49 N. J. E. 330. He said:

> "In this view the requirement of payment before organization, if treated as a condition precedent, was imposed for the benefit of the public. But appellant has no special interest in the condition, and if its case must stand on the claim now under consideration, I agree with the learned Vice-Chancellor that it cannot take advantage of the breach of the condition."

The Court of Errors and Appeals intended to affirm Vice-Chancellor Van Fleet's statement that Jersey City Gas Company case had been overruled. (See Magie's dissenting opinion, p. 335.)

Applying the reasoning of the Elizabethtown case—if a corporation acting under assumed authority of the legislature should attempt to lay rails in the streets in which the rails of complainant are laid, and it was charged that the defendant company had not complied with certain provisions of the law under

which it was empowered to act and that its compliance with such provision of the law was a condit on precedent, the Court of Chancery could not enjoin, at the suit of the complainant, the individual so acting from laying the rails. *A fortiori,* that court cannot enjoin the defendant in the case at bar, who does not even seek to lay rails or interfere with any exclusive right of complainant, or of any of its property which it has placed in the public street under exclusive right, but who is merely carrying on a competing business which he had the right to carry on prior to the act of 1916 free of any regulation and since the act of 1916 subject to regulation, from operating upon the ground that he has not complied with some of the provisions of the regulatory act.

In *Jersey City Gaslight Co.* v. *Consumers Gas Co.,* 40 N. J. E. 427, a bill was filed on behalf of the Jersey City Gaslight Company, incorporated by city charter for the purpose of manufacturing and selling gas and to the right to use the streets of Jersey City against the Consumers Gas Company, the claim being that the Consumers Gas Company had, under the statute, the right to furnish gas only of a certain standard; that the Consumers Gas Company was not furnishing gas of that standard. That it therefore was violating the law and had no right whatever to furnish gas. Van Fleet stated the situation thusly (p. 429):

> "They (the complainants) say the legislature, in enacting the statute under which the defendants were organized, did not intend to authorize or permit corporations formed under that statute to compete with existing corporations, specially chartered, unless such new corporations furnished gas of the quality prescribed by the statute, and they therefore insist that the defendants, in furnishing gas of a quality below that which the statute requires, are carrying on an unlawful competition with them, and thus doing what amounts, in its practical effect, to an invasion of their franchise. * * * The complainants claim a conditional monopoly. That is what their claim, plainly stated, amounts to. They say that unless the defendants furnish gas of a specified quality they alone are to have the right to supply the citizens of Jersey City with gas. Whenever a suitor asserts a right of this nature, as the foundation of his right to relief, he must produce, in support of his claim, a plain grant, or fail. To doubt, in such a case, is to deny."

The Court said (p. 432) that whether a corporation has forfeited its franchises was a matter for the State, and further:

> "But I think it should be said, in addition, that if the defendants have been guilty of a breach of their statutory duty, their misconduct has not resulted in legal injury to the complainants. The complainants are not consumers of the gas furnished by the defendants; no contract relations exist between them and the defendants, and so, if the defendants are not performing the whole measure of their statutory duty, their delinquency does the complainants no harm. That provision of the statute which prescribes the quality of the gas which corporations organized under it shall supply was obviously designed for the benefit and protection of such persons as should become consumers of their gas, and such persons are the only persons who can be injured by its violation. Its violation invades no right of the complainants and deprives them of nothing which the law secures to them; consequently it cannot be made the basis of any sort of judicial relief to them."

This is in line with what the Vice-Chancellor said in *Elizabethtown Gas Light Co.* v. *Green,* 46 N. J. E. 119. The Jersey City Gaslight Company case was cited with approval in *Atlantic City, &c. Co.* v. *Consumers, &c. Co.,* 70 N. J. E. 536. In that case the complainant was incorporated under special charter with the right to manufacture gas and to sell it to the inhabitants of Atlantic City. The defendant was incorporated under a general act. That general act provided that the pipes, etc., should be laid in a certain way. The bill was to restrain the defendant from laying its mains in violation of the provisions of the act. The theory was that the complainant having a franchise to sell the gas and to use the public streets for that purpose was entitled to be free from competition by anybody except one proceeding in accordance with the law. The Court denied the preliminary relief upon the authority of the Jersey City Gaslight Company case. On final hearing final relief was denied. 72 N. J. E. 346. The case then went to this court and the Court of Chancery was affirmed upon the opinion of Vice-Chancellor Bergen, 74 N. J. E. 455.

What Vice-Chancellor Van Fleet said in Jersey City Gaslight Company case is in accord with what the New York Court of Appeals said in *Fort Plain Bridge Company* v. *Smith,* 30 N. Y. 43, and what the New York Court said in *Old Forge Company* v. *Webb,* 65 N. Y. Supp. 503, affirmed 68 N. Y. Supp. 1145.

It is hard to conceive in view of the Elizabethtown Gas case, the Jersey City Gaslight Company case and the Atlantic City case, heretofore referred to, how it can be contended that the complainant is entitled to the aid of the Court of Chancery in compelling defendants to comply with statutory regulations.

In this State, prior to the adoption of the Jitney Act, jitney busses operated, and might operate, without regulation and without permission. Some of the cases in which relief similar to that sought by complainant in the case at bar has been considered have gone upon the theory that the use of the streets by jitney busses was illegal unless specially authorized. In this State the operation of jitney busses or any other vehicle over the highway is legal subject to regulation. No express permit is required unless specifically provided for in some statute. It was not doubted in the Citizens' Coach Company case against Camden Horse Railroad Company but that the Citizens' Coach Company had the absolute right to use the public streets for the carrying of passengers for hire and reward without express permission. That stage coaches had the right to use the public streets for hire and reward has always been the law of this State. 6 N. J. L. Journal, 310. A jitney or motor-bus carrying passengers for hire and reward is but the old stage coach and omnibus in another form as the electric street and railway car is the old horse car in another form. Being common carriers and using the streets they are subject to regulation as were such coaches and omnibuses.

West v. *Asbury Park,* 89 N. J. L. 402, 99 Atl. 190.

Puget Sound Traction Co. v. *Grassmeyer,* L. R. A. 1918 F. 469.

The Washington Court, which decided the case of *Puget Sound Traction Co.* v. *Grassmeyer* seemed to proceed upon the theory that a jitney was an outlaw unless specially authorized.

See *Hadfield* v. *Lundin,* L. R. A. 1918 B. 909.

But such is not the law of this State. Assuming now that the jitneys had the right to operate without express permission, but were subject to regulation, the Jitney Act of 1916 does not result in conferring authority upon the owners of jitneys to operate. It merely places upon the persons desiring to operate certain obligations *for the benefit of the general public.* Defendant does not rely upon the act of 1916 for his authority to act. He concedes that the legislature has the power to regulate his

operation, and to prescribe certain obligations which he should be under if he does operate. Unless, therefore, the act of 1916 was adopted for the purpose of protecting, in some way, the Public Service, it cannot complain in any court of a violation of that act.

The situation is entirely different from that which was disclosed in *The Brooklyn City Railroad Company* v. *Whalen,* in the Appellate Division, New York Supreme Court, 182 N. Y. Supp. (Advance Sheets) No. 3, p. 283. In that case the Brooklyn City Railroad Company filed a bill against Whalen, individually and as Commissioner of Plants and Structures to enjoin him from operating jitney busses in competition with the Brooklyn City Railroad Company. The case turned very largely upon the power of the city under its charter. The interest of plaintiff was questioned, but was sustained by the court upon the ground that the statute provided that no stage or omnibus route should be established without a franchise and that no franchises should be granted except upon notice to such Railroad Company as might be operating a railroad which would be affected by the competition. The statute required a certificate of public convenience and necessity. As Judge Gray said in *People* v. *Public Service Commission,* 195 N. Y. 157, 88 N. E. 261:

> "The certificate of public convenience and necessity is to be granted upon considerations, not alone bearing upon the convenience of the public, but affecting the other transportation companies, which are already serving the territory. They have the right to be considered and to be protected where there is no necessity for a wider public service against the designs of persons more interested in forcing terms from them than in subserving the public convenience."

The Court said:

> "Moreover, no bus lines can be established in streets occupied by the plaintiff unless a certificate of convenience and necessity be secured, and upon an application for such certificate the plaintiff has a right to be heard. People *v.* Public Service Com., 195 N. Y. 157, 88 N. E. 261. A common carrier therefore has a legal right to question the necessity and convenience to the people of a paralleling common carrier. In the days before the power of public regulation the control of common carriers was established and recognized as it is now, competing roads were built, not for the benefit of the public, but so to injure the established road as to compel it to purchase in self-defense. This was recognized as an abuse and the cor-

rection applied was the law that no line of transportation should be established without a certificate of public convenience and necessity."

Note that in New York while the street railway companies may be heard on an application for a certificate of public necessity and commerce, it is not suggested that a proper subject for consideration is whether the result of the granting of the permit will be to take money from the existing lines. It is the *public* necessity and convenience that is to be solely considered, and I urge that it is beyond the power of the legislature under our existing constitution to regulate jitneys where the regulation is for the purpose of aiding Public Service by suppressing competition.

The Jitney Act of 1916 does not contain any such provision as is contained in the New York Act. It may be charged that, under the limited Franchise Act of 1906, if the Jitney Act requires a franchise to be granted under that act, Public Service may have a right to be heard, but as I have heretofore argued, if that question is to be raised in this case, the authorities are uniform to the effect that the Court of Chancery will not determine in advance of a determination at law the validity of the consent of defendant.

The decision of the Appellate Division, which was affirmed by the Court of Appeals in the Brooklyn City Railroad Company against Whalen case, is important. It is insisted that the stress which was laid by the Court, upon the fact that the statute, the violation of which was there counted upon, was adopted for the protection of complainant, indicates quite clearly that in a case like that at bar where the statute was not adopted for the protection of complainant no relief could be afforded.

Counsel for complainant relied for authority on the court below upon *Jersey City Gas Light Co.* v. *Dwight,* 29 N. J. E. 242. In that case Vice-Chancellor Van Fleet, on an order to show cause, enjoined the defendants from using the public highways of Jersey City for the purpose of laying or placing gas-pipes as conductors therein. He apparently considered that the right of the complainant was exclusive. The complainant had, by grant from the State, the right to place pipes in the public streets, and the Vice-Chancellor said:

"The rule must be considered settled, that no person can acquire a right to make a special or exceptional use of a public highway, not common to all the citizens of the state, except by grant from the sovereign power."

It may be quite true that the grant of a right to lay pipes in a public street is such a privilege as is exclusive against all others not holding similar privileges. Such reasoning may likewise apply to the laying of rails in a public street. It does not apply, however, to the use of the public streets by stage-coaches, omnibusses, or jitney busses in the transportation of passengers for hire and reward. The Court determined that the defendants had no right to use the public streets for the purpose of laying pipes and issued an injunction. Counsel in his brief below said

> "The right of a utility corporation lawfully using a public street as against others seeking to carry on the same business without lawful authority was explained in the case of Jersey City Gas Light Co. *v.* Dwight, 29 N. J. Eq. 242, by the late Vice-Chancellor Van Fleet with his customary force and lucidity."

The Vice-Chancellor did not explain anything of the kind. What he did explain was the right of a utility corporation, having power to lay pipes in a public street as against others doing a similar business, seeking to lay pipes. It is applicable to the case at bar if you substitute for the word "pipes" the word "rails." The doctrine of the Gas Light Company case does not apply to the case at bar assuming it still to be entitled to consideration as authority. It would apply to the enjoining of any person from laying rails in a public street over which cars were to be operated for the transportation of passengers for hire and reward.

III.

The rights of the Public Service Railway Company are not of such a nature as to permit it to seek relief in any forum.

Complainant has no exclusive right to the use of the streets for the transportation of passengers for hire.

> *Camden Horse R. R. Co.* v. *Citizens' Coach Co.*, 31 N. J. E. 525, 33 N. J. E. 267.

Beasley, *C. J.*, in a concurring opinion in that case said (33 N. J. E. 282):

> "Nor does it seem to me that any class of persons is excluded from the enjoyment of this public right. A company or a corporation engaged in a business competition with that of this railroad company neither loses nor gains

anything by such a relation. The entire street can be used in such a competition to the same extent, and in the same manner, as it is lawful to use it in the pursuit of any other business."

Taggart v. *Newport Street R. Co.*, 1890, 7 L. R. A. 205;
Camden R. Co. v. *Preston*, 59 N. J. L. 264;
Orange and Newark Horse R. R. Co. v. *Ward*, 47 N. J. L. 561;
Newark Passenger Railway Company v. *Block*, 55 N. J. L. 605.

Such coaches manifestly have an absolute right at common law to the use of the streets.

Citizens' Coach Co. v. *Camden Horse R. R. Co.*, 33 N. J. E., at p. 283;
6 N. J. L. Journal 310.

That a street railroad is not a railroad in a strict sense and the operation of a street railway is not an operation under a true franchise is indicated by the cases heretofore referred to and

Louisville v. *Louisville City R. Co.*, 2 Dwall (Ky.) 175;
Lincoln St. R. Co. v. *McClellan*, 54 Neb. 672, 74 N. W. 1074;
Bloxham v. *Consumers, etc.*, 36 Fla. 519, 18 So. 444, 29 L. R. A. 507;
Marsillon Bridge Co. v. *Cambria Iron Co.*, 59 Ohio St. 179, 52 N. E. 192, 194;
Cincinnati Street Railway Co. v. *Snell*, 32 L. R. A. 276,

in which latter case the Ohio Court said:

"So long, therefore, as there is no unreasonable interference with the public right of passage, railways in streets are lawful structures; but if operated upon the theory of exclusive right to their track, they become wrong-doers."

Taggart v. *Newport Street R. Co.*, 7 L. R. A. 205, in which case the Court said:

"The only considerable privilege which the horse car has over other vehicles is that, being confined to its tracks, it cannot turn aside for other vehicles, while they are forced to turn aside for it; but this is an incidental matter, insufficient to make the horse railroad a new servitude."

The moment it is realized that whatever right the complainant has to be free from interference is not the right to be free

from interference with respect to the conduct of its business, but only with respect to the use of its rails, there is no difficulty in the application of familiar principles.

Complainant has no exclusive or semi-exclusive right to carry passengers for hire. It has the right to maintain its tracks and to exclusively use them for the purpose of transporting passengers for hire, except the legislature otherwise ordain.

Public Service is attempting to obtain relief based upon the theory that it is entitled to be free from competition unless that competition is authorized by the legislature. In other words, that it has a right to transport passengers for hire exclusively except against those who may have a similar privilege obtained from the legislature. This is not its right. Its right is limited to the special privilege which it enjoys, that is, the privilege of conducting its business upon tracks laid in the public street. It has the exclusive right to use these tracks for that purpose save only as against those having a similar right obtained from the legislature. But as was held in the Citizens' Coach Company case and in many other cases the incidental use of the tracks by a competitor does not infringe that right.

The moment this distinction is kept in mind the determinations of the courts in the cases which have been heretofore referred to are clearly understandable.

As the Kansas Court said in *Baxter Telephone Company* v. *Cherokee County Mutual Telephone Association,* 146 Pac. 324:

> "It must be conceded that, in the exercise of a sound discretion, the Public Utilities Commission might grant that license, and, if it did, its competition for public patronage would be just as keen and it would occupy the streets and diminish and divide the revenues of appellant just as much, with a license as without one."

In *Fort Plain Bridge Company* v. *Smith,* 30 N. Y. 43, the New York Court of Appeals said:

> "And, of course, defendants have no right to use the property of the State, but I do not understand what right the plaintiffs have to complain of this appropriation of the bed of the stream while the State officers make no objection to it."

As the New York Court said in *Old Forge Company* v. *Webb,* 65 N. Y. Supp. 503, affirmed 68 N. Y. Supp. 1145:

> "This, I take it, means that a competing line of communication between the Mohawk & Malone railroad and

> Eagle Bay will divert traffic, and so cause an injury, but this injury is not caused by the alleged nuisance. In itself this nuisance inflicts no private damage. The damage comes if at all, not because of the existence of any nuisance, but because of the construction of a rival line of traffic to Racquette Lake. Precisely, the same damage would result were the line built for the whole distance over private property. The peculiar damage mentioned in the books must be directly caused by the nuisance. It may not merely accompany it."

So in the case at bar. The injury to Public Service is occasioned, if there be any injury, by the competition. *It is not occasioned by the competition without a license.* While the injury may accompany a nuisance, for if these jitneys are on the streets without a license they may be nuisances, the injury is not caused by that which causes the acts of the defendants to be a nuisance.

IV.

Expressed shortly, the franchise of the Public Service is not to transport passengers for hire and reward, but to lay and maintain rails throughout the public streets and to operate cars thereon.

The difficulty has arisen in this class of cases from treating the franchise of the railroad company as a franchise to transport passengers for hire. This is not true. There is no franchise needed to transport passengers for hire over the public streets. The franchise of a steam railroad is not the right to transport passengers for hire, nor is it the right to maintain rails over a public thoroughfare. It is the right to maintain a public thoroughfare and to charge tolls for the use thereof. It is the maintenance of the public thoroughfare which makes it a true franchise.

If this view of the right of a street railway is kept in mind it is clear that the use of the public thoroughfares by jitneys is not an infringement of the franchise of the railroad company, even if you call it exclusive. The jitneys, true, are carrying passengers for hire and reward over the public streets, but this is not a franchise right of the street railway. The jitneys are not maintaining rails in the public streets, which is, if anything is, the franchise of the railroad company. It is upon this theory that the courts have uniformly held that mere competition in the carrying of passengers is not an injury to the franchise right

of a street railroad company. I am familiar with the rule stated in Pomeroy Equity Jurisprudence, Vol. 5, 2nd Edition, sec. 2016, p. 4558, that an injunction is the appropriate remedy to protect the enjoyment of a franchise against continuous encroachments, and illustrated by numerous cases, but before the Court will act to protect a franchise against encroachments it is important to know precisely what the franchise to be protected amounts to.

In *Metropolitan Railroad Co.* v. *Quincy R. Co.*, 1866 Mass., 12 Allen 269, the Court said:

> "The charter of a street railway corporation is the grant of a franchise to lay iron rails on part of the public highways, to run horses and cars thereon for the transportation of passengers, and to receive fares for such transportation, in consideration of the benefit to the public, resulting from the establishment of such means of travel, and in compensation for the expenses incurred by the grantees in laying their rails and running their cars. Although such a grant does not deprive ordinary travellers of the right to pass over the whole highway, including that part on which the rails are laid, so long as they do not unreasonably interfere with the passage of such cars, it is clearly inconsistent with the use of the tracks by other similar corporations for the running of vehicles of the same kind for the transportation of passengers for hire without like authority from the legislation, for the grant of such a franchise would be of no benefit to the grantees, if it merely authorized them to incur the expense of laying rails adapted to the drawing of passenger cars upon which when laid, all other corporations, without compensation, or reimbursement to them, would have equal rights to run similar cars and to receive like fares."

This is a clear statement by the Massachusetts Court of the extent of the franchise of a street railway company and of what constitutes an infringement, and it is the reasoning underlying the Citizens' Coach Company case. As the Court of Appeals said in *Camden, &c., Ry. Co.* v. *Preston*, 59 N. J. L. 264:

> "Trolley companies, by permission of the legislature, may, in common with all persons, lawfully use that part of the highway over which their tracks are laid. Every other citizen may use all parts of the way, including the railway tracks excepting use of the rails, for the purpose of conducting the business of transportation in competition with the trolley companies."

In *Newark Passenger Railway Co.* v. *Block*, 55 N. J. L. 605, the Court of Appeals said:

> "When authority was granted to lay rails on highways and to run thereon cars drawn by horses for the carriage of passengers, it was long questioned whether such a use of the highway did not impose an additional burden upon the land, and whether such a grant could be made without compensation. It was finally settled by the weight of authority that the use of the highway by such cars was only a modification of the original use to which it had been devoted, and that no additional burden was imposed by such grant. That doctrine was adopted in this state. Citizens Coach Co. *v.* Camden Horse Railway Co., 6 Stew. 267. *But it must be conceded that a grant of a right to use the highway in a mode imcompatible with its customary use by the public would impose an additional burden, and could not be made without compensation.*" (Italics mine.)

And further:

> "The right to the use of the highway by such cars is not paramount to the rights of others in the customary use thereof; it must be used in a manner consistent with such rights of others. Such a paramount right as is contended for could not, in my judgment, be granted without compensation, and it surely cannot be acquired from a vague notion of a public demand for rapid transit."

The extent of a street railway franchise is explained in 25 Ruling Case Law, title "Street Railways," secs. 35, 36. It is the right to lay and maintain rails in the public streets. So the extent of the street cars' right to the use of the tracks is explained in 25 Ruling Case Law, sec. 97, and the effect of the Citizens' Coach Company case is stated by the editor:

> "The right of the public to use the tracks of a street railway company does not give to one the right to run vehicles on the tracks which are built for and adapted to running on the rails the same as street cars."

V.

A consideration of the cases relied upon by the Public Service Railway Company.

In his brief below counsel refers to the Statement of Vice-Chancellor Van Fleet in *Elizabethtown Gas Light Company* v. *Green*, 46 N. J. E. 118, at p. 123, in which the Court, quoting *Delaware & Raritan Canal and Camden & Amboy R. T. & Trans.*

Co. v. *Camden & Atlantic R. R. Co., et als.,* 16 N. J. E. 321, on appeal, 3 C. E. Gr. 546; *Pennsylvania R. R. Co.* v. *National Railway Co.,* 8 C. E. Gr. 441, said that the Court of Chancery had power to protect a corporation holding an exclusive franchise from irreparable injury arising from the usurpation of a like franchise. Counsel, also, upon the oral argument, notwithstanding his disclaimer of an exclusive franchise, quoted in *extenso* from the Delaware & Raritan Canal Company case, and again quoted from that case in his brief. There is a fundamental difference between a street railway company and an ordinary railroad company, and the two cases which were referred to by counsel have no application whatever.

In these two cases the Court was dealing with the right to lay and maintain a railroad. The maintenance of a railroad in its original sense has been determined to be a true franchise. As defined by Blackstone a franchise is

> "A royal privilege or branch of the king's prerogative, subsisting in the hands of a subject."

The operation of highways and the taking of tolls for the use of highways were, from time immemorial, royal prerogatives. When railroads were first built the theory was that they were highways. Any person might use the highways with their own cars upon paying a toll to the "railway company."

In law, it was determined therefore that the railway was a highway. The privilege of maintaining this highway, including the taking of tolls, was the privilege of the State, just as the maintenance of a toll road, or any other highway, was the privilege of the State. It was, therefore, early held that before such road could be maintained and operated it was necessary that there should be a grant from the State. Being a true franchise, the grant from the State was exclusive except as against the State, and this reasoning led to the determination of the Court in the case of the Delaware & Raritan Canal, etc., Company. Chief Justice Beasley, who delivered the opinion of the court in that case (18 N. J. E. 570), said:

> "A railroad for popular use is *publici juris;* it cannot be legally erected without a legislative permission; and the consequence is, that the road established by the defendants, in excess of their legislative powers, is a public nuisance, and an usurpation of the rights of sovereignty vested in the body politic."

He likened the maintenance of this railroad highway to the maintenance of ferries and said:

> "'If a ferry,' says Blackstone, 'is erected on a river, so near to another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one,' 3 Black. Com. 219. And to the same effect is the case of Blissett *v.* Hart, Willes' R. 508; the Court, speaking of a ferry, say: 'It is a franchise that no one can erect without a license from the crown; and when one is erected, another cannot be erected without an *ad quod damnum.* If a second is erected without a license, the crown has a remedy by a *quo warranto,* and the former grantee has a remedy by action.' The books are replete with cases sustaining actions for encroachments upon the exclusive enjoyment of privileges of this class. The rule of the common law is clearly indisputable. The franchises to maintain markets and toll bridges belong to the same category and were under the same protection."

In the early days there was a clear distinction between the right of charging tolls for the use of the highway or railway and the right of the railroad company to charge passengers on its own cars for transportation. The right of charging passengers upon its own cars was not considered as a franchise. But in the evolution of things this distinction ceased. The reasoning, therefore, applicable to railroads based upon the theory that the operators of railroads are exercising, as Blackstone put it, "a royal privilege or branch of the king's prerogative," does not apply to the operators of street railways. The very same Judge who decided the Raritan & Delaware Railroad Company case (Chief Justice Beasley) said in *Citizens' Coach Co.* v. *Camden Horse Railroad Co.,* 33 N. J. E., at p. 283:

> "On the other hand, I have no idea that, by thus having laid this track, such company acquired the exclusive right to use the space so occupied, or any part of such space. That space still remained part of the public street, open, in its entire area, to the use, in the ordinary way, of every citizen. Such citizens, under such conditions, could use, as a part of the street, either transversely or longitudinally, the rails so laid. I would refer only so far to the authorities as to say that, with almost entire unanimity, they maintain this right in the public as against such a chartered right as the one now in question. And it is also obvious that it is upon this foundation alone that the legislative claim, which has been several times sanctioned by the courts of this State, to appropriate the public streets to the use of these railroads, without making com-

> pensation to the land owners whose title extends over the property so applied, can be justified. Nor does it seem to me that any class of persons is excluded from the enjoyment of this public right. *A company or a corporation engaged in a business competition with that of this railroad company neither loses nor gains anything by such a relation. The entire street can be used in such a competition to the same extent, and in the same manner, as it is lawful to use it in the pursuit of any other business.*"

The concurring opinion of Chief Justice Beasley is not in discord with the opinion which was delivered by Magie. The right of the railroad company to maintain a railroad in the public streets is not a true franchise. The business of carrying passengers for hire and reward never was a prerogative of the State. The right to be a common carrier was a common law right. The king never claimed the sole privilege of transporting either passengers or goods. Because of the public nature of the calling it was subject to public regulation, but until the legislature acted in regulating it was lawful to carry on the business without regulation. A street railway company obtains a special privilege in the carrying on of a business which, subject to governmental regulation, any person is privileged to carry on. It obtains the privilege of laying rails in the public streets. It has a *license*. The granting of such a license is exclusive only to this extent that no one else may lay rails in the same space occupied by the rails of the railroad company. Nor can, as was held in the Citizens' Coach Company case, any person designedly use the tracks of the railroad company for the purpose of carrying on a competing business. As was also held in the Citizens' Coach Company case any person may carry on a competing business and may in the business incidentally use the tracks. It was not claimed or intimated in the Citizens' Coach Company case that the Citizens' Coach Company required a special license from the State.

In considering the case of the *Citizens' Coach Co.* v. *Camden Horse Railroad Co.*, Elliott on Streets, section 965, says:

> "The doctrine is not one to be extended, although it is probably true that in the particular instance a just rule was laid down and correctly applied. We suppose that a railroad track is property, but we suppose also that if tracks are laid in a road or street, the owners of them must submit to the use of the street in the ordinary modes of travel, *although the effect may be to injure their property by wear and tear.* It is probably true that a rival

company cannot continuously use the property, but we do not believe that it follows from this that a competing omnibus or stage line may not use the same street and occasionally drive upon the track in order to enable other vehicles to pass. It is only when the rival stage or omnibus line makes a continuous use of the space occupied by the tracks that its owners can be justly deemed wrongdoers. We should hesitate to assert to a rule which would enable a street railway company to practically drive a competing omnibus line from the street, although we incline to the opinion that it might prevent the competing line from continuously using the space occupied by its track. The firmly settled rule is that a street railway company takes its franchise subject to the right of the public to use the street in the ordinary mode, and there is fair reason at least for holding that any one, whether the owner of omnibusses or not, may use the street, provided no special or continuous use is intentionally made of the space occupied by the tracks of the railway company."

The only difficulty with Elliott is that from a reading of what he says one would assume that the New Jersey Court went further, or that there was likelihood of the New Jersey Court going further, than it should have gone. A consideration of the Citizens' Coach Company case will indicate that the New Jersey Court went to the extent, and only to the extent, that Elliott says it should have gone.

A street railway is not in a strict sense a railroad.

Louisville v. *Louisville City R. Co.*, 2 Dwall. (Ky.) 175;

Lincoln St. R. Co. v. *McClellan*, 54 Neb. 672, 74 N. W. 1074;

Bloxham v. *Consumers, etc.*, 36 Fla. 519, 18 So. 444, 29 L. R. A. 507;

Marsillon Bridge Co. v. *Cambria Iron Co.*, 59 Ohio St. 179, 52 N. E. 192, 194.

In *Cincinnati Street Railway Co.* v. *Snell*, 32 L. R. A. 276, the Ohio Court said:

"So long, therefore, as there is no unreasonable interference with the public right of passage, railways in streets are lawful structures; but if operated upon the theory of exclusive right to their track, they become wrongdoers."

Citing as authority, among others, *Citzens' Coach Co.* v. *Camden Horse R. R. Co.*, 33 N. J. Eq. 267, and *Newark Pass. R. Co.* v. *Block*, 55 N. J. L. 605.

In *Camden, &c., Ry. Co.* v. *Preston,* 59 N. J. L. 264, this Court said:

> "Trolley companies, by permission of the legislature, may, in common with all persons, lawfully use that part of the highway over which their tracks are laid. Every other citizen may use all parts of the way, including the railway tracks, excepting use of the rails, for the purpose of conducting the business of transportation in competition with the trolley companies. Citizens' Coach Co. *v.* Camden Horse Railroad Co., 6 Stew. Eq. 267."

On page 266 it said:

> "Willful and unnecessary obstruction to the car's progress, at its usual and lawful speed, could have been punished by legal process. The legislature, however, did not clothe the railway company with power by violence to enforce the law for its benefit, or to punish the violation of a public right. It could not take the law into its own hands, and, by violent means, force the obstructing vehicle from its way. In doing so it would clearly become a wrongdoer."

In *Orange and Newark Horse R. R. Co.* v. *Ward,* 47 N. J. L. 561, this Court, in speaking of one driving along a railroad track of a trolley company, said:

> "The plaintiff was rightfully upon the track using it in the manner that he did, as a part of the public street. Coach Company *v.* C. H. R. R. Co., 6 Stew. Eq. 267."
>
> "Before he was obliged to leave it in submission to the superior right of use vested in the company, he was entitled to some notice or timely signal that the company then required the track, for passing its car."

In *Newark Passenger Railway Company* v. *Block,* 55 N. J. L. 605, this Court said:

> "Public highways have been acquired by dedication or condemnation for the use of the public in passing and repassing. Up to very recent times the public have used the rights of passing and repassing on highways, on foot or on horseback or in vehicles drawn by horses or other animals. When authority was granted to lay rails on highways and to run thereon cars drawn by horses for the carriage of passengers, it was long questioned whether such a use of the highway did not impose an additional burden upon the land, and whether such a grant could be made without compensation. It was finally settled by the weight of authority that the use of the highway by such cars was only a modification of the original use to which it had been devoted, and that

no additional burden was imposed by such grant. That doctrine was adopted in this state. Citizens' Coach Co. *v.* Camden Horse Railway Co., 6 Stew. Eq. 267. But it must be conceded that a grant of a right to use the highway in a mode incompatible with its customary use by the public would impose an additional burden, and could not be made without compensation."

On page 611 the Court said:

"The right to use the highway by such cars is not paramount to the rights of others in the customary use thereof, it must be used in a manner consistent with such rights of others. Such a paramount right as is contended for could not, in my judgment, be granted without compensation, and it surely cannot be acquired from a vague notion of a public demand for rapid transit."

See also Elliott on Railroads, section 32; Elliott on Roads and Streets, sections 942, 943; Elliott on Roads and Highways, section 946.

There are two cases in which relief similar to that prayed for by complainant in the case at bar has been granted. The first is that of *Memphis Street Railway Company* v. *Rapid Transit Company,* Tennessee, L. R. A. B., 1916, p. 1143. The bill charged that complainant had a franchise from the City of Memphis to operate a railway system in the city; that the defendants were engaged in operating jitneys in competition with complainant and that they made no attempt to comply with the statutes of Tennessee regulaing the business; that the jitneys were running at high rates of speed, cutting in front of complainant's cars, and racing by the cars in their efforts to reach the stopping places first in order to pick up passengers; that they often ran in front of complainant's cars, thus forcing the cars to be stopped in order to prevent accident; that they often ran dangerously close to and by complainant's cars while the cars were standing for the purpose of taking off and discharging passengers, thereby causing many very serious accidents and even deaths. The act which it was claimed was violated provided that it should be unlawful to operate without obtaining a permit which could be obtained only by the filing of a bond. The Chancellor held that the bill sets forth no cause of action. The Court of Appeals reversed him. The Court said:

"The chief contention of complainant in this case is that defendants are outlaws on the streets of Memphis, with no right to pursue their business, by reason of the fact that the city has passed no ordinance giving them

permission to operate, and because they have made no bonds, according to the provisions of Chapter 60, Acts of 1915."

The Court said (page 1148):

"It is very clear, then, that defendants have no right whatever to do business on the streets of Memphis. They are lawbreakers, subject to criminal prosecution, operating in direct violation of the statute of this state."

The Court further said:

"The contention of complainant is that, having been granted a franchise as such common carrier, it has a property right that will entitle it to restrain any person or corporation from attempting to engage in the business of common carrier of passengers on the streets of Memphis, in competition with complainant, without legislative or municipal authority. Complainant concedes that its franchise is not exclusive in the sense that a similar franchise might not be granted to another to be exercised and enjoyed in the City of Memphis; that its franchise is exclusive against all persons upon whom similar rights have not been conferred by legislative sanction."

The Court then says:

"We think this contention is well founded, and supported by the great body of authorities."

The Court then quotes many authorities which it is submitted have no application whatever, among others, the Raritan Railroad Company case in 18 N. J. E. 546, 569; *Pennsylvania R. Co.* v. *National R. Co.*, 23 N. J. E. 441; *Jersey City Gas Co.* v. *Dwight*, 29 N. J. E. 242, and the Elizabethtown case in 46 N. J. E. 118.

The first two of the cited cases involved the exercise of a strict franchise by a railroad. The third has been overruled, and the fourth, that is, the Elizabethtown case, is directly contrary to the holding of the Tennessee Court.

The Court then refers to cases involving ferries. It is conceded that the operation of a ferry has always been a strict franchise. Farnham on Water and Water Rights, Vol. 2, sec. 285. The Court finally says, page 1150:

"When a business may not be conducted as a matter of common right, but legislative authority is necessary, such authority, when conferred, is exclusive against all persons not endowed with like authority. Such rights, so bestowed by law, may not be infringed except by authority of the state, and will be protected by injunction against unlawful invasion."

It will be immediately perceived that the Tennessee Court has held that the operation of jitneys over the public streets for hire and reward is illegal unless there be express legislative authority for their operation. This position is not well founded and is not in accord with the law of this State. The streets are open for use by any person for the purpose of carrying passengers for hire and reward or otherwise, subject to reasonable regulation. In this State the right of stage-coaches to use the public streets has been recognized without express legislative permission, and the right of a public omnibus company to use the highways in competition with a street railway company has been recognized where there has been no express permission. This attitude of the Tennessee Court is made clear by a consideration of the case of *City of Memphis* v. *Tennessee, ex rel, S. B. Ryals,* 1916 B, L. R. A. 115. The Tennessee Court, however, as I stated before, said:

> "As a matter of course, the observation just made is only applicable to clear cases, as the case before us. If the franchise or license of a complainant was doubtful, an injunction would not be awarded to protect it; nor could the validity of a license or franchise possessed by a competing defendant be questioned, and its exercise restrained, in proceedings of this character." * * * "Questions upon the regularity of a charter, the validity of a franchise, and the like, are to be determined upon suit of the attorney-general or other constituted authority, and not on suit of a competing corporation."

The other case in which injunction relief has been granted is that of *Puget Sound Traction Company* v. *Grassmeyer,* Washington Supreme Court, L. R. A. 1918F, 469.

This case rests upon the Tennessee case. Speaking of the franchise of the complainant traction company, the Court said:

> "It is true the franchise is not exclusive in the sense that the sovereign power may not grant a similar right to another, but it is exclusive against anyone who assumes to exercise the privilege of carrying passengers in the absence of authority or in defiance of the laws regulating the privilege. To do so is unlawful, and since the plaintiff is injuriously affected thereby, it is entitled to injunctive relief."

I have not examined all of the cases cited by the Court on page 474 of the report. The Tennessee cases were in point. The case of *Patterson* v. *Wollman,* 38 L. R. A. 536, cited by the Washington Court, is not at all in point. In that case there was

a ferry franchise involved. As I have stated, the operation of a ferry was always a strict franchise and the North Dakota Court in the Patterson case so held. I know of no case, early or late, save the intimation contained in the Washington and Tennessee cases heretofore referred to, and an intimation perhaps by the Chief Justice of Louisiana in a case hereafter noted, which intimate that the carrying of passengers for hire and reward over the king's highways was a royal prerogative. It is because of the failure of the Washington and Tennessee Courts to draw a distinction between the exercise of a strict franchise and the conduct of a business subject to governmental regulation that has lead the two courts into the error into which it is insisted they fell.

If the law of this State was as is assumed by the Washington and Tennessee Courts many words were wasted by the eminent Judges who dealt with the Citizens' Coach Company case in that case. All that was necessary for the Court to determine was that the Citizens' Coach Company did not have a special permit or franchise or license from the State, and therefore the injunction would go against the competition.

With respect to jitneys so-called, it is insisted that they are nothing but the successor of the old stage-coach or omnibus.

The Supreme Court of Pennsylvania, in *Jitney Bus Assn.* v. *City of Wilkes-Barre,* 100 Atl. 954, said:

> "As to the right of the municipality to regulate, in the interest of the public safety, the running of jitneys, as well as all other traffic upon the public streets, we have no doubt; the only question in such case being whether the requirements of an ordinance for that purpose are reasonable, and not unduly burdensome. Regulation is not to be carried to the extent of prohibition. A jitney is an automobile, and by universal custom automobiles are permitted to use the streets of cities, as are other vehicles. The fact that the owners of jitneys derive a profit from their operation makes no difference in their legal status. Much of the traffic upon the city streets is a matter of profit directly or indirectly to those engaged therein. The public highways are for the use of those engaged in commerce or industrial pursuits, no less than for pleasure cars. But if, from the usual manner of operating certain vehicles, the public safety is endangered, the right and duty of special regulation is clear. Such regulation may very properly include, as in this case, the requirement of a bond to secure the payment of such damages as may be recovered for loss

of life, or injury to person or property occasioned by the negligent operation of the jitney, provided the bond be not made prohibitive in its nature, either by being made too large in amount, or by being unnecessarily restricted as to the sureties who may sign it."

In *New Orleans* v. *Le Blanc,* 139 La. 132, 61 So. 248, although a conviction for violating an ordinance regulating jitneys was sustained, three judges, a majority of the court, did not dissent from the language of Provost, *J.:*

"The streets belong to the public; and the jitneys, as part of the public, have the right to use them. * * * The legislature itself is powerless to interdict the use of the streets to vehicles such as commonly, in every city the world over, use them, as well might it attempt to interdict the use to pedestrians. Such a statute would be, in effect, depriving these pedestrians of liberty and property without due process of law. * * * Perhaps when automobiles first appeared they might have been excluded from the streets as being too dangerous to be allowed to travel thereon. But the time has passed when this might have been done. * * * And the fact that these jitneys use the streets for carrying on a private business brings no change in the legal situation. That is what streets are for, to be used in carrying on a private business. Everything animate and inanimate that moves upon them may (to some extent) be said to be using them for carrying on a private business. The express companies, and the breweries and the cotton presses and the wholesale grocers, all with their ponderous vehicles, use them for carrying on a private business, and they do so as a matter of right: and it is a right of which the legislature would be powerless to prevent them. * * * Summing up the foregoing, the streets belong to the public; pedestrians are entitled to use them, and so are such vehicles as customarily do so, and not as a privilege accorded to them *ex gratia* by the city; but as a matter of right, they being part of the public. Automobiles by custom prevalent the world over use the streets of cities like other vehicles and therefore have the same right to use them as pedestrians, carriages and wagons, but by reason of locomotion, their bulk and weight, and their possible speed and quickness of movement, their operation upon the streets presents special dangers to the rest of the public using the streets, and this furnishes a legal basis or justification for special regulation. The jitneys are automobiles and therefore are entitled to use the streets as matter of right, but they are automobiles used in a

peculiar way, which sets them apart in a class by themselves, a fact well recognized the country over. * * * Prohibition, however, is not regulation and if under the guise of a regulation, a measure be in fact a prohibition it transcends the municipal power."

In Kansas, the Supreme Court in *Desser* v. *Wichita,* 1916 D., L. R. A. 246, upheld an ordinance requiring the payment of a license by jitneys, but this upon the express ground that the city had the power to regulate. Notwithstanding this there was a strong dissent in which the Chief Justice concurred. Judge Porter, in his dissenting opinion, said:

"The majority opinion cites authorities to the effect that many exclusive franchises are held not to be unlawful, though creating monopolies. None of the authorities cited goes so far as to intimate that a city, under the guise of attempting to regulate one business, could add anything to the rights and privileges of another business which a utility corporation carries on under an existing franchise. * * *"

"Brown *v.* Nichols, 93 Kan. 737, L. R. A. 1915 D., 327, 145 Pac. 561. In the opinion Mr. Chief Justice Johnston said: 'The streets are provided for the public in general for purposes of travel and transportation.' (p. 739.) And cited the case of Bogue *v.* Bennett, 156 Ind. 478, 83 Am. St. Rep. 212, 60 N. E. 143, holding void a city ordinance which prohibited traction engines and vehicles not propelled by animal power from using the streets. The Indiana court used this language: 'But vehicles, whether moved by animal, steam, or other power, which do not require a specially constructed track, may be run upon the streets and alleys of a municipal corporation without first obtaining the consent of the governing body thereof.' Page 486 of 156 Ind."

"Another question asked in the majority opinion is this: 'Would the city have nothing to say' if 'a company or corporation owning motor vehicles had the facilities and the desire to occupy all the streets to the utter destruction of the street car business?' "

"The obvious answer is: Nothing whatever beyond the right to provide reasonable regulations of the new business. The city has not been made in any sense the guardian of the interests of the owners and stockholders of the street railway company, nor charged with the duty of protecting the company from competition, even though new and improved methods of transporting passengers in cities may, and possibly will in the near future, result in 'the utter destruction' of the business of street railways. In the language of Judge Cooley: 'When the

highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods; and it cannot be assumed that these will be the same from age to age, or that new means of making the way useful must be excluded merely because their introduction may tend to the inconvenience, or even to the injury, of those who continue to use the road after the same manner as formerly. A highway established for the general benefit of passengers and traffic must admit of new methods of use whenever it is found that the general benefit requires them; and, if the law should preclude the adaptation of the use to the new methods, it would defeat, in greater or less degree, the purpose for which highways are established.' Macomber *v.* Nichols, 34 Mich. 212, 22 Am. Rep. 522."

"Twenty-five years ago, when electricity was first demonstrated to be practical and economical for operating street cars, millions had been already invested in cable car systems, with miles of expensive tunnels in the center of the streets. Competing companies on nearby streets installed trolley lines. No one supposed it was the duty of the municipalities to place obstacles in the way of the public getting immediate benefit of the new and improved method of transportation, although the competition resulted in sending most of the machinery of the cable companies to the junk pile. To quote again from Judge Cooley: 'Improved methods of locomotion are perfectly admissible, if any shall be discovered, and they cannot be excluded from the existing public roads, providing their use is consistent with the present methods. A highway is a public way for the use of the public in general, for passage and traffic, without distinction. Starr *v.* Camden & A. R. Co., 24 N. J. L. 592. The restrictions upon its use are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the easement, and the inconveniences must be submitted to when they are only such as are incident to a reasonable use under impartial regulations.' Macomber *v.* Nichols, *supra.*"

"The Court should take judicial notice of the fact that the operation of jitneys, though of very recent origin, is by no means confined to cities. On the contrary, in the more densely populated places of the country, jitneys are operated between cities and in rural districts. If a city, solely in the interest of a street railway company, may prohibit jitneys from using the streets to compete with the business of the company, I can see no reason why the legislature, if it sees fit, may not protect the capital invested in interurban trolley lines,

> and, solely for that purpose, prohibit jitneys from using the public highways to carry passengers from town to town. That the legislature has not authorized a city to do this is sufficient reason why the recent Tennessee decision should not be followed; and until the cold day comes when the legislature of Kansas passes an act attempting to protect investment in street railways by giving them the exclusive right to carry passengers on public highways, or authorizing cities to give them such a monopoly of the streets, I think the courts should declare such an ordinance unreasonable, oppressive, and therefore void."

In *West* v. *City of Asbury Park,* the Supreme Court of this State, in sustaining the constitutionality of the Jitney Act, considered with care the question as to whether the provisions of the act were obnoxious to the fourteenth amendment of the Constitution of the United States. If, as indicated by the Washington and Tennessee courts, the operation of a jitney business is unlawful without express permission of the legislature there would be no need for this consideration, because if the business were unlawful without express permission the express permission could be granted upon whatever terms the legislature should see fit to impose, which seems to be the holding of the Washington and Tennessee courts. This holding of the Washington and Tennessee courts is contrary to the law of this State and is contrary to the law of Pennsylvania and to sound reason.

VI.

The decree prayed for would create a result manifestly opposed to public policy and to the public disadvantage.

A. *The policy of the State and of the times is against monopoly or exclusive franchises.*

As Van Fleet, *V.-C.,* said in *Jersey City Gaslight Company* v. *Consumers Gas Co.,* 40 N. J. E. 427, at p. 429:

> "The complainants claim a conditional monopoly. That is what their claim, plainly stated, amounts to. * * * Whenever a suitor asserts a right of this nature, as the foundation of his right to relief, he must produce, in support of his claim, a plain grant, or fail. To doubt, in such a case, is to deny."

The citizens of this State have the right to use the streets of the city, and they have the right to use the streets of the

city either with their individual conveyances or collectively, in conveyances hired by them, so long as they do not interfere in the use of the public streets with the rights of others. Public Service Railways are incorporated and are operated for private gain, but whether operated for private gain or maintained by the public it is contrary to public policy that citizens should be forced to use this particular means of conveyance. The theory of the Public Service seems to be apparently that notwithstanding that jitneys may be quicker and cheaper because the existence of the street railway is a necessity citizens should be obliged to use, to their own discomfort, street railways. If the existence of the street railways is a public necessity, and if street railways cannot be conducted in competition with other means of transportation, the remedy is not to deprive individual citizens of the privilege of using the cheaper, or what appears to them, the better means of transportation, but to take over the street railway by the government and operate it at government expense, or, if it is desirous, to leave it in private control, then to make up the deficit out of the public funds.

We have passed the time when a citizen can be directed by government or by a private corporation, assuming to act under powers delegated by government, to refrain from using a method of transportation because the private corporation or the government is conducting another means of transportation. If it is in the interest of the general public that the governmental means of transportation be maintained, let the general public pay for it.

One might as well forbid the use within the municipality of private automobiles upon the ground that if the owners had not the right to them upon the public streets they would be obliged to use the street cars. Admit the principle for one moment that the public may be compelled to use a particular thing because of government stamp, and there is no limit. But the principle is particularly obnoxious when it is extended to permit coercion of the public to the use of a thing maintained specially for private profit.

B. *The decree prayed for would result in the elimination of the jitney. The traction company is not in a position to adequately handle the traffic. If the jitney is eliminated hundreds of thousands will be obliged to either walk or stand.*

The Court of Chancery will not permit its decrees to be used to the public disadvantage.

Allen v. *Francisco Sugar Co.,* 110 Atl. 37.

Driver v. *Smith,* 89 N. J. E. 339.

Brooks v. *Cooper,* 50 N. J. E. 761.

Sternberg v. *O'Brien,* 3 Dick. 370, cited with approval in *Trenton Potteries Co.* v. *Oliphant,* 58 N. J. E. 507.

Taylor Iron and Steel Co. v. *Nicholas et al.,* 73 N. J. E. 684, at p. 687.

Vice-Chancellor Van Fleet in *Sternberg* v. *O'Brien,* 48 N. J. E. 370, at p. 372, quoted with approval Chief Justice Best in *Homer* v. *Ashford,* 3 Bing. 322, 326, as follows:

> "The law will not permit anyone to restrain a person from doing what the public welfare and his own interest require that he should do."

Conclusion.

The extent to which the complainant asks that the Court of Chancery substitute itself for the authorities to whom the enforcement of the Kates Act is delegated by law, is indicated by the contention that the bonds filed by two of these defendants in two of the municipalities are defective because they are duplicates. This illustrates the extent complainant desires the court of equity to go. It will have to supervise the form of the power of attorney, form of consent, question as to proper filing, and what not.

It is respectfully submitted that the decrees brought up should be affirmed.

The respondents in the case at bar offered certain testimony to show the inequity which would be created if a decree were granted in favor of complainant, which offer was overruled by the Court. The Court of Chancery did not consider the testimony material, and in the view it took of the case the testimony was not material. If this court takes a different view of the case from the Court of Chancery, then it is submitted that this testimony becomes extremely material, and no decree should go in favor of the complainant without giving respondents an opportunity to offer the testimony excluded by the Court of Chancery.

Respectfully submitted,

MERRITT LANE,
Of Counsel with Respondents.