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*Notice of Appeal.*

**NOTICE OF APPEAL.**

Filed April 22, 1920.

To Edward I. Berry, Esq., and Lewis Starr, Esq., Attorneys of Plaintiff.

PLEASE TAKE NOTICE that the defendant, Public Service Railway Company, appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause in favor of the plaintiff and against the defendant, Public Service Railway Company.

10

Dated April 22nd, 1920.

FRANK BERGEN,  
*Attorney of Defendant,*  
*Public Service Railway Company.*

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Service acknowledged this 22nd day of April, 1920.

EDWARD I. BERRY,  
*Attorney for Plaintiff.*

30

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**GROUND OF APPEAL.****New Jersey Court of Errors and Appeals**

10

BOROUGH OF MERCHANTVILLE,

*Plaintiff-Respondent,**vs.*

(CAMDEN &amp; SUBURBAN RAILWAY COMPANY).

and PUBLIC SERVICE RAILWAY COMPANY,

*Defendant-Appellant.**Action at Law.**Grounds of  
Appeal.*

20

The appellant, Public Service Railway Company, states the following grounds of appeal in this case:

1. The Trial Court before whom the cause was tried without a jury found for the plaintiff, the Borough of Merchantville, and against the appellant, Public Service Railway Company, instead of finding for the appellant, although requested so to do.

30

2. The Trial Court before whom the cause was tried without a jury found in favor of the plaintiff, the Borough of Merchantville, instead of finding in favor of the appellant, on one or more of the grounds which the appellant requested in writing, as he ought to have done.

3. The Trial Court found in favor of the plaintiff, the Borough of Merchantville, against the appellant, Public Service Railway Company, for cost of the paving between the rails and between the tracks and outside of the outer rails for both tracks from Center street in the Borough of Merchantville west to the borough line, instead of limiting the finding to the cost of the paving for the south track described in the ordinance on which the suit is founded, although requested so to do.

40

4. The Trial Court found in favor of the plaintiff, the Borough of Merchantville, and against the defendant, Public Service Railway Company, for the sum of \$35,827.56, when under the law and the evidence in the case any finding at all in favor of the plaintiff should have been limited to one-half of that sum.



*Summons.*

5. The finding of the Trial Court and the judgment thereon were contrary to the law and the evidence.

6. The judgment is in divers other respects contrary to law.

FRANK BERGEN,

*Attorney for Public Service Railway Company, Appellant.*

10

**SUMMONS.**

THE STATE OF NEW JERSEY to the Camden and Sub-urban Railway Company and Public Service Railway Company:  
(SEAL)

YOU ARE SUMMONED to answer the annexed complaint of the Borough of Merchantville, in an action at law in the Supreme Court, and take notice that unless you file your answer to said complaint, with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you.

20

WITNESS, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this 30th day of November, 1917.

WILLIAM C. GEBHARDT,

*Clerk.*

30

EDWARD I. BERRY,

*Attorney.*

40



*Complaint.*

# COMPLAINT.

Filed Dec. 5, 1917.

## New Jersey Supreme Court CAMDEN COUNTY.

BOROUGH OF MERCHANTVILLE,

*Plaintiff,*

*vs.*

CAMDEN & SUBURBAN RAILWAY COMPANY and  
PUBLIC SERVICE RAILWAY COMPANY,  
*Defendants.*

*Action at Law.*

*Complaint.*

The plaintiff, a municipal corporation organized under the laws of the State of New Jersey, says:

1. The defendant, Camden & Suburban Railway Company, hereafter called "Suburban Company," is a corporation organized under the General Traction Act of the State of New Jersey.

2. The defendant, Public Service Railway Company, hereafter called "Public Service Company," is a corporation organized under the General Corporation Act of the State of New Jersey.

3. Some time in the year 1900 the Suburban Company presented to the Borough Council of the plaintiff an application for permission to build, construct, operate and maintain a street railway on Maple avenue, in the said borough, according to law.

4. Pursuant to said application, Borough Council of said borough, on the 18th day of December, 1900, adopted an ordinance entitled, "An ordinance granting consent and permission to the Camden & Suburban Railway Company to build, construct, maintain and operate a street railway for passenger and mail service on the public road known as the Moorestown and Camden turnpike, and also as Maple avenue, in the Borough of Merchantville and County of Camden."

5. After the passage of said ordinance, the said Suburban Company accepted the same, as required by law, and proceeded



*Complaint.*

to lay the tracks and operate a street railway, in accordance with the terms thereof.

6. One of the provisions of said ordinance adopted December 18, 1900, is as follows:

“And be it ordained that immediately upon the building  
 “and construction of said railway, said The Camden and  
 “Suburban Railway, shall pave between the rails and be- 10  
 “tween the tracks with rubble pavement, using the stones  
 “now constituting the rubble pavement on said road, with  
 “what additional stones may be necessary, which addi-  
 “tional stones are to be of the best quality, and said pave-  
 “ment to be laid so as to make the nearest square and  
 “even-faced pavement that can be made from said stones;  
 “and that immediately, and for a distance of three feet on  
 “the outside of both the North and South tracks, said The  
 “Camden and Suburban Railway Company shall construct  
 “a Macadam pavement of not less than eight inches in  
 “depth, the lower course to be of rubble and the upper 20  
 “course to be of trap rock, and to be thoroughly com-  
 “pacted, bound and finished in a manner similar to the  
 “sixteen feet of trap rock Macadam pavement as herein-  
 “after provided, which said rubble and Macadam pave-  
 “ment (referring to the three foot pavements on the outer-  
 “most side of each track) the said Company is at all times  
 “to keep in first-class repair and condition satisfactory to  
 “Borough Council, and whenever, after five years from the  
 “passage of this ordinance, such remaining sections of the  
 “Moorestown Pike or Maple Avenue not required by this  
 “section to be paved by said The Camden and Suburban  
 “Railway Company shall be paved under the direction 30  
 “and at the expense of said Borough from the curb on  
 “each side to within three feet of the outermost rails with  
 “any other improved pavement, the said Company shall  
 “within sixty days after notice by said Council, pave be-  
 “tween the tracks and between the rails of said railway,  
 “and three feet on the outside of both North and South  
 “tracks with such other improved pavement as said Bor-  
 “ough Council shall direct, and shall keep the same in  
 “repair under the direction of said Borough Council, and  
 “that in case said Railway Company shall fail to comply  
 “with such notice, the said paving may be done by said  
 “Borough Council as aforesaid at the expense of said 40  
 “Company.”

7. After the passage of said ordinance and the acceptance thereof by the Suburban Company, the latter did pave between the rails and between the tracks with rubble pavement, using



*Complaint.*

the stones then constituting the existing rubble pavement on the road, with additional stones necessary therefor, and did also, for a distance of three feet on the outside of both north and south tracks, construct a macadam pavement, in accordance with the provisions of said ordinance.

- 10      8. On May 2, 1904, said Suburban Company, by lease duly executed and recorded in the Register's Office of Camden County in Book 285 of Deeds, page 41, leased all of its property and franchises, including the rights acquired by said ordinance, to the South Jersey Gas, Electric and Traction Company, hereafter called "Traction Company," and the said Traction Company acquired the rights conferred upon the Suburban Company by the ordinance aforesaid, and by the acceptance of said lease, became bound and obligated to perform and keep all of the promises, covenants and conditions contained in said ordinance with relation to the paving of said Maple avenue, as aforesaid.

20      9. By sundry conveyances, the rights conferred by said ordinance, and acquired by said Suburban Company and said Traction Company, were transferred and conveyed to the defendant, Public Service Company, which defendant, prior to the 15th of November, 1915, became and was obliged to keep and perform all of the terms and conditions of said ordinance in relation to and growing out of the improvement and repavement of said Maple avenue.

- 30      10. By virtue of the leases and conveyances above mentioned, all the rights acquired by the Suburban Company, by virtue of the ordinance adopted December 18, 1900, are now vested in and exercised by the said Public Service Company, which company, as between it and the said Suburban Company, is obliged to carry out and perform all the terms and conditions of said ordinance, but, so far as the rights and interests of the plaintiff are concerned, the said Suburban Company and said Public Service Company are jointly liable for, and are obliged to perform the terms and conditions of said ordinance.

- 40      11. In the month of November, 1915, the Borough Council of said borough determined to pave the entire length of Maple avenue from curb to curb in said borough, with an improved pavement, and on or about the 15th day of November, it was



*Complaint.*

agreed, between the said borough and said Public Service Company, as follows:

"The Borough of Merchantville proposes to have Maple Avenue through its entire length paved with an improved pavement, having the assistance therein of the state and county, which both make appropriations toward the same, and over which they have certain supervision. The Public Service Railway Company, as lessee, occupies a portion of said avenue with its double track street railway. There have been certain controversies between the borough and the company as to the company's paving obligations. To facilitate the improvement proposed, both borough and company have agreed that so far as the pavement is concerned from Center Street eastward, there is no dispute as to the obligation of the company to repave as is required in the ordinance granting consent to the Camden and Suburban Railway Company, dated December 18, 1900, known as the 1900 ordinance. Such paving is to be considered as done under the direction and at the expense of borough from curb to curb, notwithstanding the above recited facts. While the paving is to be from curb to curb, a portion of that only is to be solely at the expense of the borough, the remaining portion being contributed to by state and county as aforesaid.

"So far as that portion of the paving west from Center Street, dispute is still open as to the obligation of the company. The borough, in the same manner and assisted in the same way, proposes to do this paving also and claims a liability on the part of the company to contribute thereto. It is agreed that the same stipulation as to a recognition of the paving being under the direction and at the expense of the borough and from curb to curb shall apply also to this paving in any legal action which may be taken by the borough to enforce payment. In such paving the specifications are to be so drawn that on both sides of each rail in the tracks of railway there is to be laid two rows of standard granite blocks.

"When such paving, done in the manner aforesaid, is completed, it shall be deemed to have been done in accordance with the requirements named in Sect. 6 of the aforesaid ordinance."

12. The said borough had specifications prepared as to the character of said improved pavement, and caused same to be served upon the said defendants, to which was attached a notice, requiring them to pave that portion of said street for which they



*Complaint.*

were liable under the terms of said ordinance of 1900 within sixty days, as provided by the terms thereof, in accordance with said specifications, and the said defendants were also notified that upon their failure to comply with such notice, the paving would be done by said borough at the expense of the defendant, but, notwithstanding the terms of said ordinance and said notice, the said defendants have refused and neglected, within sixty days after said notice, or at any time thereafter, to pave between the tracks and between the rails, and three feet on the outside of both north and south tracks, with such improved pavement as was directed by said Borough Council.

13. Whereupon, the said plaintiff has been obliged to cause said paving to be done at the expense of said companies, and has been required to expend a large sum of money, to wit, the sum of \$49,126.78, in doing the paving for which the said defendants became obligated, pursuant to the terms of the ordinance aforesaid.

14. Plaintiff is, therefore, entitled to recover from the said defendants the cost and expense to which it has been put in doing said work, as required by the terms of said ordinance, to wit, the sum of \$49,126.78.

15. Plaintiff claims damages against the said defendants in the sum of \$55,000.

EDWARD I. BERRY,  
*Attorney of Plaintiff.*

Service of within summons and complaint acknowledged this 5th day of December, 1917.

FRANK BERGEN,  
*Attorney of Defendant.*



*Answer of Camden and Suburban Railway Company.*

**ANSWER OF CAMDEN AND SUBURBAN RAILWAY COMPANY.**

Filed Dec. 24, 1917.

Camden & Suburban Railway Company, a corporation of the State of New Jersey, one of the defendants, whose principal office is at 301 Market street, in the City of Camden, County of Camden and State of New Jersey, separately answering says that:

10

**FIRST DEFENSE.**

1. It admits the first paragraph.
2. It denies the second paragraph. Defendant, Public Service Railway Company, is a corporation duly organized under the said Traction Act, which is 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 found in pamphlet laws of that year, at page 302.

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3. It admits the third paragraph, and also the fourth, fifth, sixth, seventh and eighth paragraphs.

4. It admits the transfer and assignment, by means of a lease, of the property and franchises of this defendant, so that they became vested in Public Service Railway Company, as stated in the ninth paragraph, all of which was done under and by virtue of the provisions of the aforesaid traction act, and that any obligation that otherwise would have rested upon this defendant thereby became the obligation of Public Service Railway Company, and this defendant by law was relieved therefrom. It neither admits nor denies, inasmuch as it has no knowledge concerning the same, what obligation, if any rests upon said Public Service Railway Company growing out of the improving and repaving of Maple avenue.

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5. It admits the matters and things stated and set out in the tenth paragraph, except as to any obligation of this defendant jointly with Public Service Railway Company, and avers that under the facts as stated in the preceding paragraph the liability, if any, with regard to the matters and things stated in said com-

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*Answer of Camden and Suburban Railway Company.*

plaint, accruing to the plaintiff is limited to and against only defendant Public Service Railway Company.

6. It neither admits nor denies the matters contained in the eleventh paragraph, as it is without any knowledge thereof.

10 7. It neither admits nor denies the matters contained in the twelfth paragraph, except that it denies that any notice was served upon this defendant, and it admits that this defendant has not done any of the paving in said paragraph named.

8. It denies the thirteenth and fourteenth paragraphs.

SECOND DEFENSE.

1. The statements of the first defense are made a part of this defense.

20 2. That by reason of the provisions of the general Traction 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, the entry upon the railway tracks by Public Service Railway Company with the consent of this defendant, and a certificate of such entry bearing date October 23, 1907, which is filed in the office of the Secretary of State, this defendant is in no wise liable to the plaintiff for any of the matter and things stated in said complaint.

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THIRD DEFENSE.

1. The statements of the first defense are made a part of this defense.

2. The defendant, Public Service Railway Company, has fully paid and discharged to the plaintiff, the Borough of Merchantville, any and all lawful claims which it had or might or could have, upon or against this defendant, as to and concerning anything in said complaint named, and this defendant is thereof and  
40 therefrom fully acquitted and discharged.

FOURTH DEFENSE.

1. The statements of the first defense are made a part of this defense.



*Answer of Camden and Suburban Railway Company.*

2. All of the paving in said complaint mentioned, for which this defendant could be in anywise liable or obligated to the Borough of Merchantville, the plaintiff, is that portion thereof on said Maple avenue in said borough in the complaint named, east of Center street, payment for which was fully made and satisfied to said plaintiff by the defendant, Public Service Railway Company, and thereon there is no liability or obligation whatsoever resting upon this defendant. 10

3. That the railway tracks on said Maple avenue west of Center street to the borough line, in the said Borough of Merchantville, were and are the property of Camden Horse Railroad Company, to which the ordinance in said complaint named and referred to, and upon which plaintiff's claim is based, could not, did not, nor does it in anywise apply, so that by reason thereof no liability accrued for any supposed paving as against this defendant. 20

FIFTH DEFENSE.

1. The statements of the first defense are made a part of this defense.

2. Plaintiff, the Borough of Merchantville, did not do the paving in said complaint named, nor incur the cost therein stated, nor did it take such legal, necessary and proper steps as would or could charge this defendant in anywise for the payment to it of the sum therein demanded or any other sum whatsoever. 30

E. A. ARMSTRONG,  
*Attorney for Defendant,*  
*Camden & Suburban Railway Company.*



*Answer of Public Service Railway Company.*

**ANSWER OF PUBLIC SERVICE RAILWAY COMPANY.**

Filed Dec. 24, 1917.

10 Public Service Railway Company, a corporation of the State of New Jersey, one of the defendants, whose principal office is at 80 Park Place, in the City of Newark, County of Essex and State of New Jersey, separately answering, says that:

**FIRST DEFENSE.**

1. It admits the first paragraph.
2. It denies the second paragraph. Defendant, Public Service Railway Company, is a corporation duly organized under the said Traction Act, which is 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 found in pamphlet laws of that year, at page 302.
- 20 3. It admits the third paragraph, and also the fourth, fifth, sixth, seventh and eighth paragraphs.
4. It admits the transfer and assignment, by means of a lease, of the property and franchises of defendant, Camden & Suburban Railway Company, so that they became vested in this defendant, Public Service Railway Company, as stated in the ninth paragraph, all of which was done under and by virtue of the provisions of the aforesaid traction act, and that any obligation that otherwise would have rested upon the defendant, Camden & Suburban Railway Company, thereby became the obligation of this defendant, Public Service Railway Company, and the defendant, Camden & Suburban Railway Company, by law was relieved therefrom. It admits that the obligation, if any, of Camden & Suburban Railway Company, growing out of the improving and repaving of Maple avenue, is imposed upon this defendant.
- 30 5. It admits the matters and things stated and set out in the tenth paragraph, except as to any obligation of this defendant jointly with Camden & Suburban Railway Company, and avers that under the facts as stated in the preceding paragraph the liability, if any, with regard to the matters and things stated in said complaint, accruing to the plaintiff is limited to and against only this defendant.
- 40



*Answer of Public Service Railway Company.*

6. It neither admits no denies the matters contained in the eleventh paragraph, as it is without any knowledge thereof, except it admits the making of an agreement substantially as stated therein.

7. It admits the matters contained in the twelfth paragraph, except that it denies that any notice served upon this defendant lawfully covered anything in said ordinance contained, and it admits that this defendant has not done any of the paving in said paragraph named, but avers the truth to be that it has paid said borough in full for any paving done on said Maple avenue for which any liability by ordinance or otherwise attached to this defendant. 10

8. It denies the thirteenth and fourteenth paragraphs.

## SECOND DEFENSE.

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1. The statements of the first defense are made a part of this defense.

2. That by reason of the provisions of the general Traction 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, the entry upon the railway tracks of Camden & Suburban Railway Company with the consent of said company by this defendant, and a certificate of such entry bearing date October 23, 1907, which is filed in the office of the Secretary of State, this defendant only is liable, if any one, to the plaintiff for any of the matter and things stated in said complaint. 30

## THIRD DEFENSE.

1. The statements of the first defense are made a part of this defense.

2. This defendant, Public Service Railway Company, has fully paid and discharged to the plaintiff, the Borough of Merchantville, any and all lawful claims which it had or might, or could have, upon or against this defendant, or Camden & Suburban Railway Company, as to and concerning anything in said complaint named, and this defendant, as well as defendant, Cam- 40



*Answer of Public Service Railway Company.*

den & Suburban Railway Company, is and are thereof and therefrom fully acquitted and discharged.

## FOURTH DEFENSE.

10 1. The statements of the first defense are made a part of this defense.

2. All of the paving in said complaint mentioned, for which this defendant could be in anywise liable or obligated to the Borough of Merchantville, the plaintiff, is that portion thereof on said Maple avenue in said borough in the complaint named, east of Center street, payment for which was fully made and satisfied to said plaintiff by this defendant, and thereon there is no liability or obligation whatsoever resting upon this defendant.

20 3. That the railway tracks on said Maple avenue west of Center street to the borough line, in the said borough of Merchantville, were and are the property of Camden Horse Railroad Company, to which the ordinance in said complaint named and referred to, and upon which plaintiff's claim is based, could not, did not, nor does it in anywise apply, so that by reason thereof no liability accrued for any supposed paving as against this defendant.

## FIFTH DEFENSE.

30 1. The statements of the first defense are made a part of this defense.

2. The double track street railway on said Maple avenue mentioned in the complaint in this cause, from the borough line of the Borough of Merchantville eastward to Center street, is the railway property of The Camden Horse Railroad Company, which became and was duly incorporated under an act of the Legislature of the State of New Jersey, entitled "An act to incorporate The Camden Horse Railroad Company," approved March 23, 1866, found in Pamphlet Laws of 1866, p. 640, which act was supplemented by an act approved April 2, 1868, found in Pamphlet Laws of 1868, p. 638, and further supplemented by an act passed March 11, 1872, found in Pamphlet Laws of 1872, p. 512.

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3. This defendant, Public Service Railway Company, duly incorporated under the act entitled "An act to authorize the formation of traction companies for the construction and operation of



*Answer of Public Service Railway Company.*

street railways, or railroads operated as street railways, and to regulate the same," approved March 14, 1893, under and by virtue of the provisions of said act entered upon the said railway and the railway tracks with the consent of The Camden Horse Railroad Company, and filed a certificate of said entry in the office of the Secretary of State bearing date October 23, 1907, whereby it became possessed of said railway tracks and with the right and authority to operate said street railway. 10

4. The provisions of the said ordinance so recited in said complaint, and which is made the basis of plaintiff's claim, have no application whatsoever to the said railway herein referred to belonging to The Camden Horse Railroad Company and so operated by this defendant, and there is no obligation of The Camden Horse Railroad Company nor of this defendant to the said Borough of Merchantville for any of such paving under and by virtue of the said ordinance, or the cost thereof, or otherwise howsoever, for any matter or thing in the complaint in this cause named. 20

FRANK BERGEN,  
*Attorney for Defendant,*  
*Public Service Railway Company.*

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*Reply to Answer of Camden and Suburban Railway Company.*

**REPLY TO ANSWER OF CAMDEN & SUBURBAN RAILWAY COMPANY.**

Filed Dec. 28, 1917.

10 The plaintiff, for reply to the answer of the Camden & Suburban Railway Company, filed in this cause:

1. Admits that the defendant, Public Service Company is a corporation duly organized under the Traction Act, as referred to therein.

20 2. Denies that upon the transfer and assignment, by means of a lease, of the property and franchises of said Suburban Company, the obligation of the latter, under the ordinance referred to in the complaint, became the sole obligation of the Public Service Company, and that the Suburban Company was by law relieved therefrom.

3. Denies that the liability, with regard to the matters and things stated in the complaint, accruing to the plaintiff, is limited to and against the Public Service Company only.

4. Denies that no notice was served upon the defendant, Suburban Company.

5. Denies the facts set forth in paragraph two of the second defense.

30 6. Denies the facts set forth in paragraph two of the third defense, but admits that, since the commencement of this action, the Public Service Company has made a payment to plaintiff, supposed to cover the actual cost of the construction of the improved pavement on Maple avenue east of Center street, but plaintiff avers that the said amount, paid by the Public Service Company, does not include certain items of money paid for engineers' and inspectors' fees and interest charges for financing the said work, for which the said defendants are liable under the terms of the ordinance set forth in the complaint.

40 7. Denies the facts set forth in paragraphs two and three of the fourth defense.

8. Denies the facts set forth in paragraph two of the fifth defense.

9. Avers that on October 6, 1896, an ordinance was passed by the plaintiff, which granted permission to the Camden Horse



*Reply to Answer of Camden and Suburban Railway Company.*

Railroad Company, (hereafter called "Camden Horse"), "for  
 "the building and construction of its railway in and upon Maple  
 "avenue or the Moorestown and Camden Turnpike Road, from  
 "the line of division between the Township of Pensauken and  
 "the Borough of Merchantville, parallel with the present tracks  
 "on said Avenue or Turnpike Road, thence Eastward out the  
 "same to the line of Center Street," all in accordance with a map  
 or plan which was made part of said ordinance; said ordinance  
 also providing that the said Camden Horse should "put a sub-  
 "stantial road on the outside of each outer rail to the curb line,  
 "and the same to be put down subject to the approval of the  
 "highway committee of the Borough, and to be kept in repair  
 "for all time."

10

10. Avers that prior to the passage of the ordinance mentioned in the last preceding paragraph, the said Camden Horse owned and operated a single track road from Camden, through Merchantville, to the intersection of Maple avenue with Center street, and the said last named ordinance granted permission for the construction of another paralleling track from the west line of the borough limits to Center street.

20

11. Avers that the privileges conferred by the ordinance passed October 6, 1896, were never exercised by the Camden Horse, and on December 18, 1900, an ordinance was adopted by the Borough of Merchantville repealing the said ordinance of October 6, 1896, with the knowledge and by the consent of the duly authorized agents of the Camden Horse and the Suburban Company, which last named company, at that time, was the owner and in possession of all the property and franchises of the said Camden Horse, under a lease made by the latter to it, dated May 1, 1896, and recorded in the Register's Office of Camden County in Book 218 of Deeds, page 295, to which the plaintiff begs leave to refer.

30

12. Avers that the passage of the ordinance of December 18, 1900, referred to in the complaint, was partially predicated upon the repeal of the ordinance adopted October 6, 1896; the adoption of the first mentioned ordinance, and the repeal of the last mentioned ordinance, being a part of one general scheme and transaction with respect to the privileges to be conferred upon and exercised by the Suburban Company, as lessee of the Camden

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*Reply to Answer of Camden and Suburban Railway Company.*

Horse, under the first mentioned ordinance; the said first mentioned ordinance being adopted, and the said last mentioned ordinance being repealed at the same meeting of Borough Council.

- 10 13. Avers that from the time of the passage of the ordinance of December 18, 1900, until the bringing of this suit, the Suburban Company, and its successors, as the operators of the said railway through Merchantville, constituting both tracks along Maple avenue, from the western boundary, to the eastern boundary thereof, have constructed, operated and maintained the said railroad pursuant to the terms of the ordinance of December 18, 1900, and from time to time have complied with the provisions thereof, with relation to the said construction and operation, and the construction and maintenance of the surface of Maple avenue on both sides of both tracks both east and west of Center street.

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EDWARD I. BERRY,  
*Attorney of Plaintiff.*

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*Reply to Answer of Public Service Railway Company.*

**REPLY TO ANSWER OF PUBLIC SERVICE RAILWAY  
COMPANY.**

Filed Dec. 29, 1917.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

10

BOROUGH OF MERCHANTVILLE,

*Plaintiff,*

*vs.*

CAMDEN & SUBURBAN RAILWAY COMPANY and  
PUBLIC SERVICE RAILWAY COMPANY,

*Defendants.*

*Reply.*

20

The plaintiff, for reply to the answer of the Public Service Railway Company, filed in this cause:

1. Admits the facts stated in paragraph two of the first defense.

2. Denies that upon the transfer and assignment, by means of a lease, of the property and franchises of the Suburban Company, the obligation which otherwise would have rested upon it, thereby became the obligation of the Public Service Company, and the Suburban Company, by law, was relieved therefrom.

30

3. Denies that the liability, with regard to the matters and things stated in the complaint, accruing to the plaintiff, is limited to and against the Public Service Company only.

4. Denies that the Public Service Company has paid the plaintiff in full for all paving done on Maple avenue, for which liability, by ordinance or otherwise, attached to it.

5. Denies the facts set forth in paragraph two of the second defense.

6. Denies the facts set forth in paragraph two of the third defense, but admits that since the commencement of this action the Public Service Company has made a payment to plaintiff, supposed to cover the actual cost of construction of the improved pavement on Maple avenue, east of Center street, but plaintiff avers that said amount paid by the Public Service Company

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*Reply to Answer of Public Service Railway Company.*

does not include certain items of money paid by plaintiff for engineers' and inspectors' fees and interest charges for financing the said work, for the payment of which the defendants are liable, under the terms of the ordinance set forth in the complaint.

7. Denies the facts set forth in the second and third paragraphs of the fourth defense.

8. Denies the facts set forth in the second, third and fourth paragraphs of the fifth defense.

9. Avers that on October 6, 1896, an ordinance was passed by the plaintiff, which granted permission to the Camden Horse Railroad Company (hereafter called Camden Horse), "for the building and construction of its railway in and upon Maple Avenue or the Moorestown and Camden Turnpike Road, from the line of division between the Township of Pensauken and the Borough of Merchantville, parallel with the present tracks on said Avenue or Turnpike Road, thence Eastward out the same to the line of Center street," all in accordance with a map or plan which was made part of said ordinance; said ordinance also providing that the said Camden Horse should "put a substantial road on the outside of each outer rail to the curb line, and the same to be put down subject to the approval of the highway committee of the Borough, and to be kept in repair for all time."

10. Avers that prior to the passage of the ordinance mentioned in the last preceding paragraph, the said Camden Horse owned and operated a single track road from Camden, through Merchantville, to the intersection of Maple avenue with Center street, and the said last named ordinance granted permission for the construction of another paralleling track from the west line of the borough limits to Center street.

11. Avers that the privileges conferred by the ordinance passed October 6, 1896, were never exercised by the Camden Horse, and on December 18, 1900, an ordinance was adopted by the Borough of Merchantville repealing the said ordinance of October 6, 1896, with the knowledge and by the consent of the duly authorized agents of the Camden Horse and the Suburban Company, which last named company, at that time, was the owner and in possession of all the property and franchises of the said Camden Horse, under a lease made by the latter to it, dated



*Reply to Answer of Public Service Railway Company.*

May 1, 1896, and recorded in the Register's Office of Camden County in Book 218 of Deeds, page 295, to which the plaintiff begs leave to refer.

12. Avers that the passage of the ordinance of December 18, 1900, referred to in the complaint, was partially predicated upon the repeal of the ordinance adopted October 6, 1896; the adoption of the first mentioned ordinance, and the repeal of the last mentioned ordinance, being a part of one general scheme and transaction with respect to the privileges to be conferred upon and exercised by the Suburban Company, as lessee of the Camden Horse, under the first mentioned ordinance; the said first mentioned ordinance being adopted, and the said last mentioned ordinance being repealed at the same meeting of Borough Council.

13. Avers that from the time of the passage of the ordinance of December 18, 1900, until the bringing of this suit, the Suburban Company, and its successors, including the Public Service Company, as the operators of the said railway through Merchantville, constituting both tracks along Maple avenue, from the western boundary to the eastern boundary thereof, have constructed, operated and maintained the said railroad pursuant to the terms of the ordinance of December 18, 1900, and from time to time have complied with the provisions thereof, with relation to the said construction and operation, and the construction and maintenance of the surface of Maple avenue on both sides of both tracks both east and west of Center street.

EDWARD I. BERRY,  
*Attorney of Plaintiff.*



*Postea.*

**POSTEA.**

Filed June 3, 1920.

This case was tried by consent before Judge Frank T. Lloyd, without a jury, at the Camden Circuit, on and before March 3, 1920.

The Trial Judge rendered a general verdict against the defendant, Public Service Railway Company, in favor of the plaintiff for Thirty-five thousand eight hundred and seventy-seven dollars and fifty-six cents.

The plaintiff was non-suited as to the defendant, Camden and Suburban Railway Company.

|    |                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|----|-------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 20 | Damages \$35,877.56<br>Costs 46.60<br><hr style="width: 100px; margin: 5px auto;"/> \$35,924.16 | Whereupon it is adjudged that the plaintiff, Borough of Merchantville do recover of the defendant, Public Service Railway Company the sum of Thirty-five Thousand eight hundred and seventy-seven dollars and fifty-six cents damages and its costs which are taxed at the sum of Forty six dollars and sixty cents, making in the whole the sum of Thirty-five thousand, nine hundred and twenty four dollars and sixteen cents. |
|----|-------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

Judgment entered April 3, 1920.

WM. S. GUMMERE.

*C. J.*

I, ENOCH L. JOHNSON, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal and also a copy of the judgment entered in the above stated cause as the same remains on file and of record in my office.

(SEAL)

IN testimony whereof I have set my hand and the seal of said Court at Trenton, this twenty-first day of May, A. D. nineteen hundred and twenty.

ENOCH L. JOHNSON,  
*Clerk.*



*Stipulation of Facts.***STIPULATION.**

Filed.

The following facts are stipulated and agreed to by and between the parties hereto for the purposes of this suit:

1. That the Moorestown & Camden Turnpike Company was incorporated in 1849, P. L. of that year, page 145. 10
2. That it continued to exercise its franchises until the turnpike sold its rights to the County of Camden by deed dated November 7th, 1913.
3. The turnpike was originally located on one of the public thoroughfares of the County of Camden and was the main highway leading from Camden to Merchantville, in the County of Camden, and Moorestown and Mt. Holly, in the County of Burlington. 20
4. In 1900 Maple avenue was the principal public highway of the Borough of Merchantville and extended from the westerly boundary of the borough to the easterly boundary thereof.
5. The borough has exercised control and jurisdiction of the highway by granting franchises to one or more electric light companies to erect poles and string wires, to one or more telephone companies to erect poles and string wires, to one or more water companies to lay pipes and mains and to one or more gas companies for the same purpose. 30
6. The borough has exercised supervision and control over Maple avenue by requiring, by ordinance, the laying down of sidewalks of the abutting property owners, on both sides of the highway, and in some instances has caused the sidewalks to be laid at the expense of the abutting property owners, when the latter have refused to comply with the terms of the ordinance.
7. The water companies, electric light companies, telephone companies and gas companies have also received permission from the Turnpike Company to use the road for the operation of their respective franchises. 40
8. The borough authorities have also by a public watering cart, with the acquiescence of the Turnpike Company, sprinkled the surface of Maple avenue for the purpose of keeping down the dust.



*Stipulation of Facts.*

9. The Turnpike Company did not install, at any time, a toll gate within the limits of the borough and the users of the highway within the borough, exclusively, used the highway without the payment of toll.

10

LEWIS STARR,  
EDWARD I. BERRY,  
*Attorneys of Plaintiff.*

E. A. ARMSTRONG,  
FRANK BERGEN,  
*Attorneys of Defendants.*

**STIPULATION.**

20

The following facts are stipulated and agreed to by and between the parties hereto for the purposes of this suit:

1. Moorestown and Camden Turnpike Company was incorporated by an act approved February 28, 1849, found in Pamphlet Laws 1849, p. 145. Said act is considered in evidence.

30

2. This act authorized the company to construct a turnpike road four rods wide from the Village of Moorestown, in the County of Burlington, to the truss bridge over Cooper's Creek, in the County of Camden, on and along the public highway leading from said village to said bridge, provided that the act should not take effect until such public highway was vacated as a public highway according to law; and further provided that before said road should be constructed it should pay to the land owners all damages sustained by them, and provision was made for the assessment of such damages in case of failure to agree.

40

3. Deeds dated May 23, 1850, were made by the land owners to the Turnpike Company, and the company took possession of the land formerly a public road and then built the turnpike road thereon.

4. The company was authorized to erect gates or turnpikes across the said turnpike road, not exceeding three in number, and to collect toll from persons travelling each mile or fraction of a mile exceeding one-half.



*Stipulation of Facts.*

5. No gate or turnpike was erected within what is now the corporate limits of the Borough of Merchantville.

6. The public road was lawfully vacated, rights secured by the company from the land owners, the turnpike road built and maintained by the company, as before stated, who exercised all the franchises granted by said act on that portion thereof in the County of Camden, until such portion was acquired by the Freeholders of the County of Camden by deed dated November 7, 1913, as appears in this case. 10

7. That portion of the turnpike road within the corporate limits of the Borough of Merchantville was known in that borough by the name of Maple avenue.

8. In 1900 said turnpike road, called Maple avenue, was the principal thoroughfare of the Borough of Merchantville and extended from the westerly boundary of the borough to the easterly boundary thereof. 20

9. One or more telegraph or telephone companies did erect poles and string wires in and along Maple avenue prior to the time the said highway was taken over by the county, as permitted by the following ordinances:

(1) An ordinance to authorize the South Jersey Telegraph Co. to establish a telephone exchange in the Borough of Merchantville: (Passed September 10, 1883.)

(2) An ordinance to authorize the Delaware and Atlantic Telegraph and Telephone Company to establish and maintain a telephone exchange in the Borough of Merchantville, N. J., and for that purpose granting them the privilege to erect and maintain poles in any street, lane or alley within the limits of the borough, and to place and maintain wires thereon. (Passed June 5, 1900.) 30

(3) An ordinance granting consent and permission to the Eastern Telephone and Telegraph Company to erect poles, string wires, lines and cables and construct underground conduits in, under and along the streets, highways and other public places of the Borough of Merchantville, for the purpose of operating a telephone and telegraph exchange. (Passed March 18, 1901.) 40

10. One or more electric light companies did erect poles and string wires in Maple avenue prior to the time said highway



*Stipulation of Facts.*

was taken over by the county, as permitted by the following ordinances:

10 (1) An ordinance permitting the erection of poles in the streets of the Borough of Merchantville for the conveyance of wires furnishing arc or incandescent electric lights to the inhabitants of said borough. (Passed December 12, 1888.)

(2) An ordinance for lighting by electricity the streets, alleys and public places of the Borough of Merchantville, N. J., and authorizing the Merchantville Light, Heat and Power Co., of Merchantville, Camden County, N. J., to construct, maintain and operate an electric light, heat and power system in said Borough of Merchantville, N. J. (Passed February 2, 1900.)

20 11. One gas company did lay pipes and mains in Maple avenue, prior to the time said highway was taken over by the county, as permitted by the following ordinance:

(1) An ordinance providing for a gas supply for the Borough of Merchantville, in the County of Camden, State of New Jersey, for public and private use. (Passed January 2, 1900.)

12. One water company did lay pipes and mains in Maple avenue prior to the time said highway was taken over by the county, as permitted by an ordinance passed by the Borough Council of said borough.

30 13. No use above, upon or below the surface of said turnpike road, while the same remained such, has ever been made by any corporation for street railway, gas, water, electric, telegraph or telephone purposes, pursuant to any ordinances, except by and with the consent of the Turnpike Company.

14. The borough authorities of said borough have also, by public watering cart, with the acquiescence of the Turnpike Company, sprinkled the surface of said Maple avenue for the purpose of keeping down the dust.

40 15. Prior to the taking over of the said turnpike by the county, the said Turnpike Company permitted the borough authorities to require all persons making excavations in Maple avenue to obtain a permit therefor, as provided in "An ordinance to regulate the making of excavations in streets of the Borough of Merchantville," passed February 4, 1896.

16. The borough has passed ordinances requiring the laying of sidewalks by the abutting property owners on both sides of



*Stipulation of Facts.*

Maple avenue and has caused the sidewalks to be laid at the expense of the abutting property owners, when the latter have refused to comply with the ordinance, with the acquiescence of the Turnpike Company.

17. Prior to the time the turnpike was taken over by the county, the borough constructed a sewer system in Maple avenue under an ordinance providing for the construction of a system of sewerage and drainage for the Borough of Merchantville, passed February 5, 1907, with the acquiescence of the Turnpike Company. 10

18. Prior to the time the turnpike was taken over by the county, the borough, without any objection on the part of the Turnpike Company, lighted Maple avenue by street lamps at public expense.

By consenting hereto, the defendant does not waive the right to object to the 9th, 10th, 11th, 12th, 14th, 15th, 16th, 17th and 18th stipulations, for materiality and relevancy, which objections are herewith interposed. 20

EDWARD I. BERRY,  
*Attorney of Plaintiff.*

E. A. ARMSTRONG,  
FRANK BERGEN,  
*Attorneys of Defendants.*



*Amendment to Stipulation.***AMENDMENT TO STIPULATION.**

Filed.

It is agreed between the attorneys of the respective parties hereto that Paragraph 3 of the stipulation heretofore agreed to be eliminated therefrom and the following substituted therefor:

10     3. Under and by virtue of Section 13 of the act entitled  
 20     "An Act to incorporate the Moorestown and Camden Turnpike Company," approved February 28, 1849, several applications were made to the Honorable Thomas P. Carpenter, one of the Justices of the Supreme Court, for the appointment of Commissioners, which was done, proper proceedings had and taken by said Commissioners (all as recited in the reports hereinafter named), who made a several report for each tract of land involved, all as provided for in said section, under the hands  
 30     and seals of the said Commissioners, and which reports were filed and recorded in the office of the County Clerk of the County of Camden, as provided in said section, each bearing date the 23rd day of May, 1850, and each recorded May 28th, 1850; the place of the record of the said several reports being in Book O of Deeds, from pp. 15 to 101, inclusive. These reports embrace all of the land of said turnpike road within what are now the territorial limits of the Borough of Merchantville, possession of which land was then taken by the company, who then built the turnpike road thereon and from thence continued  
 30     to have, hold, use, occupy, possess and enjoy the said land, pursuant to the provisions of the act of incorporation as aforesaid continuously until the said road was acquired by the Freeholders of the County of Camden by deed dated November 7th, 1913. Said reports or certified copies thereof may be considered in evidence in this case.

EDWARD I. BERRY,  
*Attorney of Plaintiff.*

E. A. ARMSTRONG,  
 FRANK BERGEN,  
*Attorneys of Defendants.*



*Offer of Documentary Evidence.*

## NEW JERSEY SUPREME COURT.

## CAMDEN COUNTY CIRCUIT.

BOROUGH OF MERCHANTVILLE,

vs.

CAMDEN AND SUBURBAN RAILWAY Co., et als.,  
Defendants.

Plaintiff,

Action at Law.

Testimony.

10

Camden, N. J., July 16, 1918.

## TESTIMONY.

Before Hon. Frank T. Lloyd, Judge.

20

## Appearances:

For the plaintiff, Lewis Starr, Esq., and Edward I. Berry, Esq.

For the defendants, E. A. Armstrong, Esq., and Frank Bergen, Esq.

## PLAINTIFF'S CASE.

*Mr. Starr.* I offer in evidence, if your Honor please, a copy of the 1900 ordinance with the acceptance of the same by the Camden and Suburban.

(Admitted in evidence and marked Exhibit P. 1.)

30

*Mr. Armstrong.* My notion is that we will put in all things and if there is anything omitted we will supply it.

*Mr. Starr.* That is perfectly satisfactory.

*The Court.* What was the one just offered?

*Mr. Starr.* This is the 1900 ordinance and the acceptance under the seal of the corporation and the signatures of six of the directors.

*Mr. Bergen.* Granted to the Camden and Suburban.

40

*Mr. Starr.* The 1900 ordinance with the acceptance of the Camden and Suburban. Now, I also offer in evidence, if your Honor please, a lease made by the Camden and Suburban Railway Company to the South Jersey Electric and Traction Company. It is dated the 2d day of May, 1902, and recorded in the



*Offer of Documentary Evidence.*

Register's office of Camden County in Book 285 of Deeds, page 41. I suppose you have printed copies of those?

*Mr. Armstrong.* Yes.

*Mr. Starr.* We will furnish copies of those to your Honor.

(Lease admitted in evidence and marked Exhibit P. 2.)

- 10 *Mr. Starr.* Also a deed from the South Jersey Traction Company to the Public Service Corporation, dated July 24, 1904, recorded—

*Mr. Armstrong.* Isn't that a consent?

*Mr. Starr.* That is a deed made by the traction company to the Public Service Corporation, as I understand it. It is dated July 25, 1904, and recorded in the Register's office in Book 288 of Deeds, page 477.

(Admitted in evidence and marked Exhibit P. 3.)

- 20 *Mr. Starr.* The next is a deed from the Public Service Corporation to the Public Service Railway Company, dated September 24, 1907, and recorded in the Register's office in Deed Book 309, page 644.

(Admitted in evidence and marked Exhibit P. 4.)

*Mr. Armstrong.* They are the assignments?

- 30 *Mr. Starr.* They are assignments of leases and conveyance of all rights under the lease between the Camden Horse and the Camden and Suburban. Now, I also offer in evidence an original agreement between the Borough of Merchantville and the Public Service, dated November 15, 1915, which is the modifying arrangement with reference to the paving obligations. I have the original here and will have that marked.

(Admitted in evidence and marked Exhibit P. 5.)

*Mr. Starr.* I have a copy of the lease from the Camden Horse Railway Company to the Camden and Suburban Company, certified under the hand and seal of the Register, dated the 1st day of May, 1896, and recorded in the Register's office in Book 218, page 95, &c.

- 40 (Admitted in evidence and marked Exhibit P. 6.)

*Mr. Starr.* Now, Judge, will you kindly produce the notices which were served on the companies with reference to the paving, the contract and specifications?

*Mr. Armstrong.* If I can.



*Offer of Documentary Evidence.*

*Mr. Starr.* Is there any question but what the specifications under which this work was to be performed and copy of the contract were served?

*Mr. Armstrong.* Copy of what purports to be the contract and specifications were served.

*Mr. Starr.* On both corporations? 10

*Mr. Armstrong.* On both corporations they were served, yes.

*Mr. Starr.* Mr. Berry tells me two notices were served.

*Mr. Berry.* The two notices were served on each company, as I understand it, if the Court please—I, that the borough proposed to do the work, that notice was served in accordance with the ordinance; and then later, after the contract was let, a notice that the contract was let and the amount of the contract, with a copy of the contract and specifications, were served. 20

*Mr. Armstrong.* I suppose that is so.

*Mr. Starr.* On the Camden and Suburban and Public Service both.

*Mr. Armstrong.* On the Camden and Suburban and the Public Service, both.

*Mr. Starr.* Do you raise any question about the fact that the borough council took proper proceedings with relation to the improvement and made the contract for the improvement?

*Mr. Armstrong.* No. The notice that was served by the Camden and Suburban on the council, if you will produce that—in answer to these notices, the Camden and Suburban disclaimed and raised these points before they went on, so that there was no acquiescence on the part of the Camden and Suburban. 30

*Mr. Starr.* I think that is true.

*Mr. Armstrong.* And I was insisting that suit be brought against the Public Service.

*The Court.* The question now is whether there is any question about the notices being given under the ordinances, assuming that the ordinances were in order. 40

*Mr. Armstrong.* Notices were given, and the answer was made that liability could not and did not attach against the Camden and Suburban, but the notices were given and they went on and gave the contract and the work was done.



*Samuel P. Corliss, direct.*

*The Court.* Only those defenses set up in the reply are the ones insisted upon here?

*Mr. Armstrong.* Yes.

*The Court.* I will have that before me?

*Mr. Starr.* Yes.

10 *The Court.* Their reply to your notices?

*Mr. Starr.* We will furnish that.

*Mr. Armstrong.* I apprehend some of these things—I didn't know I was to bring these notices. I said whatever documentary things we didn't have we would supply.

SAMUEL P. CORLISS, sworn.

*By Mr. Starr.*

20 Q Mr. Corliss, do you occupy an official relation with respect to the Camden and Suburban Railway Company? A Yes, sir.

Q What is your official position? A Secretary.

Q And how long have you been secretary? A It dates from July 5, 1897. I don't know just when I became actually. I was assistant secretary at that time. Sometime in 1898.

Q You were secretary, were you not, in 1900? A Yes, sir.

Q Did you have knowledge of the manner in which the single track railway was operated from Camden to Merchantville, prior to the month of December, 1900? A Yes, insofar as the records  
30 that came to me.

Q And what was the character of the construction of the railway extending from Camden to Centre street, Merchantville, prior to the passage of the Camden and Suburban ordinance in December, 1900? A It was a single track road with turnouts from the western boundary line to the west line of Centre street.

Q And had that track been constructed by the Camden Horse Railroad Company? A That part, yes, sir.

Q And was it taken over by the Camden and Suburban under the lease which has been offered in evidence? A Yes, sir.

40 Q Now, after the passage of the 1900 ordinance and acceptance by the Camden and Suburban as shown by Exhibit P. 1, what was done with respect to the single track which had been operated before that time? A It was constructed by the Camden and Suburban Railway Company.



*Samuel P. Corliss, direct.*

Q Was the position in the street shifted? A Not that I am aware of. The details of construction, as to change of the location of the track, I am not familiar with.

Q But that single track was reconstructed, was it not, by the Camden and Suburban, or was rebuilt? A An addition to the existing turnout to the south track was constructed by the Camden and Suburban. 10

Q I am speaking now of the north track, the track in operation before the Camden and Suburban ordinance was passed. Was that rebuilt by the Camden and Suburban? A I can't answer as to that.

Q Do you know whether the position of that track was shifted in the highway? A I do not.

Q Now, with respect to the continuation of that single track toward the east, to the eastern boundary line, that was built by the Camden and Suburban, was it not? A Yes, sir. 20

Q And did the Camden and Suburban, under the ordinance of 1900, construct the southbound track, paralleling the northbound track, from one boundary of the borough to the other? A Yes, they constructed the south track in addition to the turnouts that were on the south track position and location.

Q And after the passage of the 1900 ordinance and after the acceptance of that ordinance by the Camden and Suburban, did the Camden and Suburban pave between the rails and tracks with rubble pavement? A What portion?

Q Between the rails and between the tracks? A They did, from Centre street to the eastern boundary. 30

Q Did the Camden and Suburban do any paving whatever to the western boundary? A I don't recall that. I would have to refer to the contract, probably, with the paving company, to see whether that was.

Q As a matter of fact, did the Camden and Suburban do the paving from Centre street toward the west, with reference to the rails and tracks, as provided in the 1900 ordinance?

*Mr. Armstrong.* I object to the question—

*Mr. Starr.* Strike it out. 40

Q What I want to know is what the character of the street improvement was between the rails and between the tracks as constructed by the Camden and Suburban after the passage of this ordinance? A I couldn't answer as to that except if there



*Samuel P. Corliss, direct.*

was any paving done it was done by the Camden and Suburban Railway Company.

Q Do you know whether the character of the paving was of the same character west of Centre street as it was east of Centre street? A I can't answer that because it is involved in the other question.

10 Q What? A I can't answer that. I mean to say I am not familiar with the detail of that paving.

Q Calling your attention now to that portion of the highway east of Centre street, did the Camden and Suburban put down a macadam pavement 3 feet on the outside of both tracks? A They did.

Q And also parallel both tracks with macadam pavement 8 feet wide? A Under the construction as to its relation to the Camden Horse Railway Company—

20 Q I don't care anything about that. Whether, as a fact, they put down a strip of macadam pavement 8 feet wide on both sides of the double track? A They did under the construction of the contract.

Q Did they also about the same time put down a similar pavement, macadam, 3 feet outside the rail, that entire street, on both sides of the rail, 8 feet wide, from Centre street west to the borough line? A No. That is the same question as before.

Q You can't answer that? A I am not familiar with that paving.

30 Q Well, now, let me call your attention to an interrogatory that you answered. See if this will refresh your recollection. "Did the Camden and Suburban Railway Company at any time after December 18, 1900, either by itself or through a contractor employed by it, pave Maple avenue between the rails and tracks of the double track railway operated by the Public Service Railway Company," etc., "from the easterly to the westerly boundaries thereof, with a rubble pavement?" And your answer was, "It paved between rails of the north and southbound tracks with rubble pavement for the Camden Street Railway Company," etc., "and thence to the eastern boundary, under contract with  
40 George J. Phillips." A All right, whatever I said there I testify to now, except that I didn't recall the paving of the old condition.

Q Your recollection now being refreshed, you say they did, the Camden and Suburban, whether for itself or the benefit of



*Samuel P. Corliss, direct.*

some other corporation, it did put down a rubble pavement between the rails—between the tracks—and also construct the macadam pavement 3 feet outside the double track and the 8 foot strip of macadam pavement on both sides of the rails, on Maple avenue toward the west? A Yes, I say that, because that answer was from an investigation of the records.

Q Now, can you recall whether or not there was any reconstruction or rebuilding of the single track of the Camden Horse at the time the other paralleling track was built by the Camden and Suburban? A Known as the north track? 10

Q As the north track. A I do not recall it; no.

Q Now, after the track was constructed by the Camden and Suburban, did the Camden and Suburban, from time to time, make repairs of the roadway which they put down? A They made whatever repairs were made; yes, sir.

Q And did they keep in repair the rubble pavement between the tracks and the rails as provided in the 1900 ordinance? A Yes, whatever expenditures in relation to repairs were done by the Camden and Suburban, but as to any time or anything like that of course I don't recall. 20

Q And did that repair work extend from the eastern to the western boundary, regardless of whether the original track was put down by the Camden Horse? A Yes, sir.

Q And did the Camden and Suburban also keep in repair the macadam which was built as described by the Camden and Suburban ordinance? A Between tracks and 3 feet outside. 30

Q And an 8 foot strip also. Did they keep that in repair? A I would not say as to that.

Q Mr. Corliss, in November and December, 1900, who were the officers and directors of the Camden and Suburban Railway Company, please? A In December, 1900?

Q December, 1900. A Well, I probably could call them by memory but I might make a mistake as to those of that particular time.

Q Was Mr. Scull the president? A Yes, sir.

Q And you the secretary? A Yes. 40

Q And who were the directors? A F. W. Ayer, E. A. Armstrong, Heulings Lippincott, Edward Dudley. The decease of these members I haven't exactly in mind, but B. C. Reeve and G. Genge Browning.

Q And Calvin Croll? A Calvin S. Croll.



*Samuel P. Corliss, cross.*

Q And do you know who the directors of the Camden Horse Railway Company were at that time? A Yes, sir; William S. Scull, F. W. Ayer, Mr. Armstrong, Mr. Browning and B. C. Reeve.

10 Q Was Mr. Lippincott a director of the Camden Horse? A No, sir.

*Cross examination by Mr. Armstrong.*

Q When the Camden and Suburban Railway Company, under the lease Exhibit 6 in this case, took possession of the Camden Horse Railroad Company line, was it a double track to Centre street in Merchantville? A No, sir.

Q Do you recall how many turnouts there were where the south track now is? A 5.

20 Q How did the length of those turnouts—do you know what the length of them was? A I do not.

Q Were they long or short? A I couldn't say as to that, except that the distance between the eastern boundary line and Centre street is not so extensive but what five turnouts would cover a great proportion of the distance.

Q A large proportion of the distance? A Yes.

Q Who is the owner of the street railway there from Centre street west in Merchantville? A Camden Horse Railroad Company.

30 Q Both tracks?

*Mr. Starr.* Wait a moment. It seems to me that is a conclusion which this witness may not have knowledge about and I don't want to be bound by the answer. I make the objection because it isn't shown this witness has qualified to give any accurate—

*The Court.* If there is any question about it, it must be shown by legal evidence.

40 Q You are secretary of the Camden Horse as well as the Camden and Suburban? A At this time, yes.

Q And you are acquainted with the property of the Camden Horse Railroad Company? A Yes, sir.

*Mr. Starr.* I will admit, without formal proof, but I object to the materiality of any agreement between the



*Samuel P. Corliss, re-direct—re-cross.*

Camden Horse and the Turnpike Company as having no bearing whatever on this.

*The Court.* I suppose I better receive it and know what it is.

*Mr. Armstrong.* I haven't offered it yet. I was going to prove it by him. 10

*Mr. Starr.* I waive formal proof.

*Mr. Armstrong.* I can't very well show it to him because I told him I didn't have it here.

Q Since the lease to the Camden and Suburban Railway Company, shown here, Exhibit 6, has the Camden Horse Railroad Company done anything as to the care, maintenance or maintainment of the physical property of the railroad—of this railway? A No, sir.

Q By whom was that done up to the time of the lease to the South Jersey Electric and Traction Company? A By the Camden and Suburban Railway Company. 20

Q And after the lease from the Camden and Suburban Railway Company to the South Jersey Gas, Electric and Traction Company, who has managed and cared for the railroad, the South Jersey Electric, Gas and Traction Company, the Camden and Suburban and the Public Service Railway Company? A Yes, sir.

*The Court.* What is the date of that transfer to the South Jersey Gas? 30

*The Witness.* May 2, 1904.

*Re-direct examination by Mr. Starr.*

Q Mr. Corliss, just one question. Were the moneys of the Camden and Suburban Company used to pay the expense of building the paralleling track from Centre street to the western boundary of the borough? A In the construction of the—

Q Yes. A Money was paid by the Camden and Suburban to the contractor. 40

*Re-cross examination by Mr. Armstrong.*

Q All that work was done under the provisions of the lease Exhibit 6, was it not? A Yes.



*Harry Knox Oakford, direct.*

JOHN J. ALBERTSON, affirmed.

*The Court.* What do you agree on? What is your figure?

*Mr. Starr.* The space between the tracks and between the rails and 3 feet on each side.

10

*The Court.* It will save time if they confer over it and they can put the figures right on paper.

*Mr. Starr.* We can stipulate that the county took over the Moorestown Turnpike before the improvement.

*Mr. Armstrong.* Up until this date it was part of the turnpike road of the Moorestown Turnpike Company and then the county took it over as a county road.

HARRY KNOX OAKFORD, sworn.

20

*By Mr. Starr.*

Q Mr. Oakford, are you the treasurer of the borough of Merchantville? A Yes, sir.

Q And did you make the payments to the Kelly-McFeeley Company, the contractor for the construction of the paving on Maple avenue? A I did.

Q How much money did the borough pay the contractor for that portion of paving between the tracks and the rails and 3 feet on each side of the outer rail? A I have got the—I don't remember the exact amount.

30

Q Covering the entire length of the highway from the east to the western boundary? A \$45,014.45, that was to Kelly & McFeeley.

Q And they were the contractors for the construction of the entire road? A They were the contractor; yes, sir.

Q Did the borough ever have any expense with reference to the engineer's fees and inspector's fees? A Mr. Albertson's fees and J. C. Remington, Jr., inspecting the work for the borough and the Public Service in addition. These were the estimates of Mr. Albertson and this was the charge of Mr. Remington (indicating).

40

Q Did you pay any money to Mr. Albertson as engineer for this work?

*Mr. Armstrong.* I object to that as being no part of the cost attributable to the defendants.



*Harry Knox Oakford, direct.*

*The Court.* You may put it in and I will rule it out if I think it isn't permissible.

*Mr. Starr.* That was a matter reserved by agreement. That was omitted. The amount was what?

A \$1,575.50.

Q And how much paid to Remington, Jr.? A \$837.85. 10

*Mr. Starr.* There is another dispute with reference to interest on the money which was borrowed to finance the operation and I want to prove that. That was left open, of course.

Q How did the borough finance the building of the street?

*The Court.* You can put that in. I will want to know pretty strong reasons to accept it.

*Mr. Armstrong.* These are all under our objections. 20

*Mr. Starr.* Undoubtedly.

*The Court.* I will let them come in and if I find they are not within the legal right, I will disregard them.

A 5% on \$50,000 of notes.

Q And how much was paid by way of interest? A The share that was charged up against this amount was \$3,152.46, and then we gave them credit for the same proportion of the premiums that the notes sold for. Their share, \$118.14, and the interest on the balance in bank at 3% was \$1,151.50, giving them a credit of \$1,269.64. 30

Q What was the net amount of interest which was paid by the borough with reference to this operation? A The net amount of interest that they were charged with would be the difference between \$1,269.64 and \$3,152.46, the difference between those two would be the amount that the Public Service was charged with.

Q Now, did the Public Service make a payment on account of the improvement east of Centre street? 40

*Mr. Armstrong.* No, no, don't put it in that way.

Q Well, pay money in settlement of their liability?

*Mr. Armstrong.* Of what they claim from this point.



*Harry Knox Oakford, cross.*

A \$13,506.06, which was, I think, about \$41 and some odd cents less than the amount of the paving between Centre street and the eastern boundary of the line but we accepted it with the understanding it would be all thrashed out here and whatever decision would be made—that was on account of this 49—

10 Q Now, including the amount paid Kelly-McFeeley, charging interest, engineer's and inspector's fees, what is the amount now due? A The amount now due on the statement of November 30th is \$35,804.56, and of course there is an interest charge since then.

Q Since November 30, 1917? A Which amounts to \$1,239.62.

*Cross examination by Mr. Armstrong.*

Q You said you paid \$1,575.50 to J. J. Albertson, County Engineer? A Yes, sir.

20 Q What for? A For his supervision of the work and making the estimates.

Q He was supervising it on the part of the county, was he not? A He was the county engineer

Q And doing it on the part of the county, was he not? The county contributed to this expense? A Not that I know of. The borough paid that.

Q But the borough contributed to this expense of paving? A Oh, yes.

*The Court.* The county reimbursed you?

30 *The Witness.* No, we have had no reimbursement from the county.

*The Court.* How did they contribute?

*The Witness.* They didn't contribute to the borough as far as we were concerned. This was the borough's.

*The Court.* Did they pay the contractor direct a part of the expense?

40 *The Witness.* They paid the contractor their part. We simply paid the contractor for the paving between the rails and 3 feet each side and Mr. Albertson's charge was for that part of it.

*The Court.* What do you mean by that part of it?

*The Witness.* Paving between the rails and 3 feet each side.



*Harry Knox Oakford, cross.*

Q Didn't the borough pay for any paving outside of what they are charging? A No, we haven't had the bill for it yet.

Q You paid for no paving at all, then, outside of what you are charging here against the railway? A No.

Q Well, this paving of Maple avenue was done by the State and county as well as by the borough, wasn't it? A Yes, but not this portion of it. 10

Q I am talking about the complete paving. A Yes, the general paving.

Q Who is Remington? A Remington is the borough engineer.

*The Court.* How do I understand this contract to have been made? Was it made between the contractor and the borough for the entire street width?

*Mr. Starr.* It was made between the contractor and the borough. It was made between the borough and the contractor with reference to the portion between the rails and tracks and 3 feet on each side. 20

*The Court.* Then the rest of the work was independent?

*Mr. Starr.* The rest of the work was an independent proposition between the contractor and the county. That is right, isn't it?

*Mr. Albertson.* That is my understanding of it.

*Mr. Starr.* I will put Mr. Albertson on the stand in order to be informed exactly what was done. 30

*The Court.* Did the borough have any part in the determination of the question of the necessity of the paving outside of the tracks, that is to say, of the road-bed between the curblin and the railway's obligation?

*Mr. Starr.* My understanding is it was taken over by the county and under the statute the county provides for the pavement outside of the obligation on the part of the company, then there is a contribution from the State and also from the borough, but the operation is initiated and carried through by the county because it is a county road. 40



*John J. Albertson, direct.*

JOHN J. ALBERTSON, recalled.

*By Mr. Starr.*

Q Mr. Albertson—

10        *Mr. Starr.* I might say, your Honor, we have agreed as to the measurement between the west borough line and Centre street with the Public Service engineer.

*The Court.* And what is your agreement?

*The Witness.* The total for the Belgian block was 19150.5 lineal feet, and the total yardage—

*The Court.* Can't you give it in dollars and cents and never mind the—

20        *The Witness.* The Belgian block, \$12,830.83 and the bituminous pavement \$18,397.82. There is one item here that their engineer hasn't gotten of \$238.69, which was by reason of extra asphalt ordered in the balance of the pavement and that made this apply to this part also. It was found the asphalt was too lean. The bituminous pavement was too lean and an extra supply was ordered in and that made the share on this of \$238.69.

Q Does that cover the area between the tracks, the rails and three feet on each side? A Yes, sir.

Q The entire boundary? A No, sir; the part from the west borough line to Centre street.

30        Q Have you calculated the whole? I want the whole thing. A My understanding was that this was the only part in controversy.

Q It is as a matter of fact but we would like to have the whole amount. A The summary of the whole contract is 27479 lineal feet of block pavement at 67 cents, making \$18,410.93. The bituminous pavement 10,805 and 26 yards of bituminous pavement at 2.44, making \$26,364.83. This extra asphalt was ordered in and was \$238.69, making the total contract price \$45,014.45.

40        *The Court.* Where did this extra come in, east or west of Centre street?

*The Witness.* It came in west of Centre street.

Q Now, the borough paid you money for supervising? A Yes, sir;  $3\frac{1}{2}\%$  on the total cost, or \$1,575.50. This was entirely



*John J. Albertson, cross.*

independent of the county work, and the county contract called for—covered 3 feet of gutter on, 9 feet and six-tenths, 9 feet 6 inches on each side, or 19 feet, and the county would pay for no more and had nothing to do with the part between the rails and the tracks and 3 feet outside of the track. That was entirely separate contract for which bids were asked and received March 6, 1916, the contract awarded for that strip by the borough to Kelly-McFeeley Company at a different price from what the county paid for that part outside.

10

Q There is a separate contract for the county from the 3 feet to the curb? A Yes, sir.

Q What did you do with reference to the supervision of the contract or the work under the contract with the contractor and the borough? A We gave them the line for the rails, the elevation and grading and reset the track and attended to this pavement and did all the engineering work in connection with it, for which I was paid  $3\frac{1}{2}\%$ .

20

Q Did the borough have an inspector there on the job? A Mr. Remington was there from time to time in addition to a representative—in addition to one I paid myself.

*Cross examination by Mr. Armstrong.*

Q You also supervised the county contract? A No, sir; I was the engineer but not supervisor.

Q It was under your engineering direction that the county's paving on Maple avenue, formerly the Moorestown Turnpike road, was done? A Yes, sir.

30

Q And the county did all of the work except this that is under the contract with the Kelly-McFeeley Company by the borough of Merchantville, being 3 feet outside the outer rail to the railway? A There were 2 separate contracts, one made by the county at one price, with Mr. Kelly, and another made by the borough at another price.

Q (Question repeated.) A Yes, sir.

Q And as to paving of Maple avenue, then, outside of this, what we may call, for the purposes of this case, the railway strip, the borough itself had nothing to do? A Yes, sir; they paid 10% of that cost.

40

Q But they had nothing to do with the paving at all? A Oh, yes; they were consulted as to the kind of pavement they wanted.



*Motion for Non-suit.*

Q But the contract was made with the county? A Yes, sir.

Q And the county put it down by its contractor? A Yes, sir.

Q And financed it? A Yes, sir.

10 Q And paid the contractor for it and either did get or is to get a payment from the borough of Merchantville? A Yes, sir; and also the State of New Jersey.

Q Get the usual appropriation from the State for the county road? A Yes, sir.

Q And the usual appropriation from the borough of Merchantville for the county road? A Yes, sir; 10%.

Q That is fixed by statute? A No.

20 Q Fixed by regulation? A The State's share cannot exceed 40% of the cost and the borough's share may be paid by the abutting owners or the municipality, either way.

Q But 10% must be of that? A They all do that. I think there is a law covering it. That is the usual proceeding.

Q The State pays 40% and the county and municipality together 60? A The county 50.

Q And the municipality 10? A Yes, sir.

Q And that procedure was followed here? A That is usual in our county.

30 Q Do you know whether the borough has paid? A I don't think they have paid yet. I don't know that. We have never made our final payment on the road yet.

Q And you don't know whether their payment has been by assessments or how? A No, they agreed to pay.

Q They agreed to pay, but how they are going to raise the money you don't know? A No.

*Mr. Starr.* We rest.

40 *Mr. Armstrong.* I move for a non-suit on the part of the Camden and Suburban Railway Company and on behalf of Mr. Bergen I also move for a non-suit on the part of the Public Service Railway Company. As it transpires now, the work, instead of being done by the borough with contribution from the State and county, it is the ordinary liability which may be assessed against the property owners and what not and only 10% from the borough and it is not a compliance at all with the exhibit, the agreement



*Offer of Documentary Evidence.*

between the Public Service Railway Company and the borough of Merchantville, whatever the number is.

*The Court.* It is a rather serious question, Judge Starr. I will hear the case out, though.

## DEFENDANT'S CASE.

10

*Mr. Armstrong.* I offer in evidence the charter of the Camden Horse Railway Company, dated March 23, 1866, P. L. 1866, page 640, for Exhibit D. 1; the amendment thereto of April 2, 1868, P. L. 1868, page 635, for Exhibit D. 2; the amendment of March 11, 1872, P. L. 1872, page 512, as Exhibit D. 3. I also offer in evidence an ordinance of the borough of Merchantville, passed October 6, 1896, to the Camden Horse Railroad Company, as Exhibit D. 4. I offer in evidence the entry and certificate of the Public Service Railway Company, October 23, 1907, as Exhibit D. 5. 20

*Mr. Starr.* I object to the materiality of that, if your honor, please.

*The Court.* I will receive it.

*Mr. Starr.* May I have an exception?

(Which exception is hereby allowed and sealed accordingly.)

(SEAL) 30

*Mr. Armstrong.* It is admitted on the part of both parties that this Maple avenue was a part of the turnpike road of the Moorestown and Camden Turnpike Company and so remained until 1914 or 1915, when it became a county public road, taken over by the county.

*Mr. Berry.* 1913.

*Mr. Armstrong.* Yes, 1913, '14 or '15, something like that. I offer in evidence the agreement—

*The Court.* It was done before this agreement was entered into? 40

*Mr. Armstrong.* Yes, before that agreement. I offer in evidence the agreement between the Moorestown and Camden Turnpike Company, permitting the building of



*Offer of Documentary Evidence.*

the railroad by the Camden Horse Railroad Company from the western boundary of Merchantville to Centre street.

*Mr. Starr.* I object to that on the ground of materiality also.

10 (Objection overruled.)

*Mr. Starr.* I would like to have an exception.

(Which exception is hereby allowed and sealed accordingly.)

(SEAL)

20 *Mr. Armstrong.* I offer in evidence the agreement between the Moorestown and Camden Turnpike Company and the Camden and Suburban Railway Company, for the building of the—dated November 10, 1900, for the building of a road from Centre street eastward to the borough limits.

*Mr. Starr.* I object to that as immaterial and irrelevant. (Objection overruled.)

*Mr. Starr.* An exception.

(Which exception is hereby allowed and sealed accordingly.)

(SEAL)

30 (Agreement between Camden and Moorestown Turnpike Company and the Camden Horse Railroad Company admitted in evidence and marked Exhibit D. 6.)

(Agreement between the Turnpike Company and the Camden and Suburban Railway Company admitted in evidence and marked Exhibit D. 7.)

*Mr. Armstrong.* You didn't produce my notices?

*Mr. Starr.* I haven't seen them. We will produce them.

*Mr. Berry.* There was a notice disclaiming any liability on the part of the Camden and Suburban.

40 *The Court.* I notice a reference in this agreement to section 6 of the ordinance. Was that the ordinance previously mentioned?

*Mr. Starr.* Yes.

*Mr. Armstrong.* The 1900 ordinance.



*John J. Albertson, further cross—re-direct.*

JOHN J. ALBERTSON, recalled for further cross examination.

*By Mr. Armstrong.*

Q Your computation of the cost paid by Merchantville for west of Centre street included paving 3 feet outside of the north track as well as 3 feet outside the south track, did it not? A Yes, sir. 10

Q And it included between the rails of the north track and between the tracks? A Yes, sir.

Q As well as the south track? A Yes, sir.

Q In other words, you have taken the whole of that space, being a strip equal to the width of both tracks and 3 feet on either side? A 21 feet wide.

Q Being a total of 21 feet in the center of the road? A Yes, sir.

Q And you made no deduction or abatement for the track of the Camden Horse Railroad Company, the track built by the Camden Horse Railroad Company itself previous to the lease to the Camden and Suburban? A I knew nothing of that. 20

*The Court.* I think it would be well to get the figures on it.

*Mr. Starr.* Judge Armstrong and myself will agree as to that if it becomes of importance.

*Re-direct examination by Mr. Starr.*

Q Who first took the initiative? Which municipality first took the initiative to have the road improved, the county or the borough? A The county contracted for that first. 30

Q As far as the improvement was concerned in the beginning—

*Mr. Armstrong.* I suppose that isn't material, if your Honor please.

A I think it was endorsed by a petition from the owners along the road.

*Mr. Armstrong.* Unless I find I omitted some of these papers, we rest. 40



*John W. Mickle, direct.*

# PLAINTIFF'S REBUTTAL.

JOHN W. MICKLE, sworn.

*By Mr. Starr.*

10 Q Mr. Mickle, are you the borough clerk of Merchantville?  
A I am.

Q Have you the minutes of the proceedings of the borough council of the 18th of December, 1900? A Yes, sir.

Q Produce them, please. A (Witness produces book.)

Q You have the minutes there? A Yes, sir.

20 *Mr. Starr.* I offer, if your Honor please, an ordinance which was adopted that day, an ordinance to repeal an ordinance granting permission and consent to the Camden Horse Railway Company to construct or maintain and operate a street railroad, etc., which was the 1896 ordinance.

30 *Mr. Armstrong.* I object to that on the ground that no such ordinance could be introduced, passed or considered without notice and a hearing. So far as I know, this is the first knowledge there was such an ordinance ever adopted, and as a preliminary to such an ordinance as this, under the Hudson Telephone case, the many cases followed since that by our own court and the courts of the United States, stating that as an authority such an ordinance is entirely invalid and nothing can be predicated upon it.

*The Court.* I will receive it. The effect can be dealt with as well without it as with it.

*Mr. Starr.* I offer in evidence, if your Honor please, the minutes of a meeting held on the 17th of December, 1900.

Q Won't you read the minutes, please, Mr. Mickle, for that meeting?

40 *Mr. Armstrong.* May we suggest that the whole minutes be put in?

*Mr. Starr.* If that is agreeable to Judge Armstrong, we will have copies made of the minutes of the 17th and 18th. I want to introduce in evidence the minutes of the various



*Heulings Lippincott, direct.*

meetings at which the 1900 ordinance was considered, also I will furnish copies of those to Judge Armstrong. The meeting of November 13, 1900, at which the application of the Camden and Suburban was presented—

*Mr. Armstrong.* I object to the materiality of this as there is no attack or suggestion made on this 1900 ordinance, so that the ordinance itself speaks as a municipal action. 10

*Mr. Starr.* The purpose is to show that from early in November until late in December the consideration of the 1900 ordinance was before the members of council and various meetings and conferences were had between members of council and directors of the Camden and Suburban, at which the representatives of the Camden and Suburban were present, and I purpose to show that the passage of the repealing ordinance was by virtue of an arrangement between the representatives of the Camden and Suburban and the members of council that that was to be done before the 1900 ordinance was to be adopted, and it doesn't lie in the mouth of the Camden and Suburban at this time, under those circumstances, to raise any question as to the validity of the repealing ordinance in view of the fact that they at that time were in possession of the tracks of the Camden Horse Railroad Company under the lease. 20

*The Court.* You may offer them. I will deal with them later. 30

*Mr. Armstrong.* All of these are under objection.

*Mr. Starr.* The minutes of November 13, 1900, of December 3, 1900, of December 4, 1900, December 11, 1900, December 13, 1900, December 17, 1900, and December 18, 1900. And you have the offer of the repealing ordinance of December 18, 1900.

No cross examination.

HEULINGS LIPPINCOTT, affirmed. 40

*By Mr. Starr.*

Q Mr. Lippincott, in the month of December, 1900, were you a director of the Camden and Suburban Railway Company? A Yes.



*Heulings Lippincott, direct.*

10 Q And did you appear before borough council, representing that corporation, the Camden and Suburban Company, on several occasions, with reference to the ordinance which was subsequently passed on December 18th, known as the Camden and Suburban ordinance? A I was before the borough council a great many times. I don't at this moment recall just what the object of each visit was.

Q What was your object in being there? A Representing the Camden and Suburban.

Q For the purpose of advocating the passage of the Camden and Suburban ordinance? A There was more than one ordinance passed and I don't know which one you have special reference to.

20 Q You remember there were two ordinances introduced, one granting privileges to the Camden and Suburban and another repealing an ordinance passed in 1896 granting certain privileges to the Camden Horse Railroad Company? You remember that, do you not? A No, I do not. I remember we were there for certain privileges for the Camden and Suburban but I do not remember the repealing of the ordinance.

Q You remember there was another ordinance introduced and passed? A I do not, nor I won't say just what we were there for at that time. Those things are rather vague. I had no occasion to refer to them since and I have no—

30 Q The minutes show on December 17, 1900, you were present at a meeting of the borough council and you were given the privilege of the floor to advocate the passage of the Camden and Suburban ordinance. Do you remember that? A I remember being there and having the privilege of the floor on some of those occasions.

40 Q Don't you remember on that occasion there was introduced, at your suggestion, as the representative of the Camden and Suburban Company, an ordinance to repeal the Camden Horse ordinance which had been passed on the 6th of October, 1896? A No, I do not remember that. I don't think I could have made such a suggestion because I don't think I had any business to. I think I would be exceeding my authority.

Q Then you don't remember whether— A I won't say it wasn't done. I have no recollection of it. I don't think I possibly could have advocated it.



*Charles P. Early, direct.*

Q Didn't you talk with Mr. Early, who was the borough solicitor, with relation to the passage of the 1900 ordinance? A I had several conferences with Mr. Early.

Q And you were acting in behalf of the Camden and Suburban? A Yes.

Q And you had a talk with Mr. C. P. Early, who was a member of borough council? A I don't recall him. I remember— 10

Q Remember Mr. Early sitting right there (indicating)? A Well, his face I have seen before. I would not have recognized him.

Q He was a member of borough council. Don't you remember talking with him about it? A No, I do not. That was some time ago.

Q Were you present at a meeting of borough council when the franchise ordinance in favor of the Camden and Suburban was passed? A Which ordinance do you mean? 20

Q That is the 1900 ordinance which concerned the privilege of putting down the track in Merchantville. A I think I was present.

Q At that meeting? A Yes.

Q Don't you remember at that meeting there was another ordinance passed repealing the 1896 ordinance? A No, I do not. I must say this is the first that I heard of this today. It is the first knowledge I had of it. It might have occurred but passed my mind but I have no recollection of it.

Q Who else appeared before the borough council or to your knowledge had any dealings with the members of council, representing the Camden and Suburban at that time? A I can't be positive but I think William S. Scull and G. Genge Browning were present. 30

No cross examination.

CHARLES P. EARLY, sworn.

*By Mr. Starr.*

Q Mr. Early, you live at Merchantville? A Yes, sir. 40

Q And in 1900 were you a member of borough council? A Yes.

Q Were you present on the night that the Camden and Suburban ordinance was passed, the ordinance spoken of here as



*Charles P. Early, direct.*

the franchise ordinance, adopted on December 18, 1900? A I think I was. I don't doubt that I was.

Q What say? A I have no doubt I was there. I attended all the meetings regularly.

Q Do you remember whether or not Mr. Lippincott was there? A I remember Mr. Lippincott being there quite a number of times. I don't think there was any doubt but what he was there that night.

Q Do you remember whether or not there was a repealing ordinance adopted that night?

*Mr. Armstrong.* Just wait a minute. I object to that. There can be nothing—no question of identity of time. It must be with his own knowledge.

*The Court.* I don't understand that is the purpose. I understand it is for the purpose of identifying the time and occasion.

Q What is your recollection about that, Mr. Early? A I hardly know how to answer you. Of course, we were very much interested at that time, everybody was, particularly members of council, and the representatives of the company were there and tried their best to influence council—

*The Court.* What is it?

*The Witness.* Tried their best to influence council to make up the terms, as I remember, and we were very determined that they should carry out the contract as we offered it, that is to say, that they were to do certain things. I hardly know what else to say.

Q Do you remember whether or not Mr. Lippincott was present at a time when there was a repealing ordinance passed by council?

*Mr. Armstrong.* I object to that as being entirely immaterial.

(Objection overruled.)

A I should have to depend upon the records. It is too far back for me to say just which immediate meeting, what particular meeting that was passed. There is no doubt that was passed and that I was there and Mr. Lippincott was there, I



*William Early, direct.*

haven't any doubt of it at all. We were all very much interested in it.

Q Did you have any conversation with Mr. Lippincott with relation to the matter?

*The Court.* With relation to what?

*Mr. Starr.* The passage of the ordinance to the Camden and Suburban. 10

A I can't remember anything special.

No cross examination.

WILLIAM EARLY, sworn.

*By Mr. Starr.*

Q Mr. Early, were you the borough solicitor of Merchantville in 1900? A I was. 20

Q What had you to do with reference to the negotiations which led up to the passage of the ordinance, the franchise ordinance, in favor of the Camden and Suburban on December 18, 1900? A I think I was present at all the conferences between council and their committees and the railroad.

Q Who represented the Camden and Suburban? A At those conferences?

Q Yes. A As I remember, several of them were held at Mr. Lippincott's office at the bank and at that time Mr. Lippincott was there. I think on one or more occasions Judge Armstrong was there. I can't remember—there was somebody else there and I can't remember whether Mr. Dudley, whether he had any interest in it or not. There was some other person present at Mr. Lippincott's office besides Mr. Lippincott and Mr. Armstrong, and then, I think, and I remember that there were other conferences held in the council chamber itself in which Judge Armstrong was there and Mr. Lippincott was there. 30

Q Now, the records show that on the 18th of December, 1900, there were two ordinances passed, first a repealing ordinance repealing an ordinance in favor of the Camden Horse, the 1896 ordinance, and then the franchise ordinance of 1900. Do you recall whether or not there was any discussion between the representatives of the borough and the representatives of the Camden and Suburban, at which you were present, with respect to the passage of the repealing ordinance? A Yes, there was. 40



*William Early, direct.*

Q What was that discussion?

*Mr. Armstrong.* I object to that on the same ground.

*The Court.* I suppose there could be an estoppel by communication from the company by word of mouth.

10 A May I ask, to verify my memory, whether the ordinance, the franchise ordinance, had a repealer in it?

Q It has no repealer. A To the best of my recollection, the repealing ordinance was introduced at the special instance of Judge Armstrong. My impression was that I intended to put the repealer in the new ordinance but for some reason—and I think we conferred about the matter, Judge Armstrong and I, as to the repealer, and my recollection is that he said the repealer in the new ordinance would not be effective because it would not release the guaranty under the former ordinance, which, as I  
20 remember, it was a different company.

Q Well, now, as a matter of fact, was a repealing ordinance introduced? A It was.

Q Were you present? A I think it was drawn by Judge Armstrong. I don't think I drew it.

Q Were you present at the meeting at which the franchise ordinance was passed? A I was.

Q Do you recall whether or not Mr. Lippincott was present at that meeting? A My impression is that both Mr. Lippincott and Judge Armstrong were there but I won't be positive about  
30 that.

*The Court.* Can't you be a little more certain about these things, Mr. Early?

*The Witness.* It has been 10 years ago.

*The Court.* It was 18 years ago.

*The Court.* Have you any recollection of the repeal of the old ordinance?

*The Witness.* The repeal of the old ordinance was the direct result of a conversation between the committee in my presence and Judge Armstrong's.  
40

Q And were you present at the meeting at which this repealing ordinance was passed? A I was. It was the same meeting, was it not?

Q The same meeting. A I think it was passed first, before the franchise ordinance was passed.



*William Early, cross.*

Q Was there any reason assigned by the representative of the Camden and Suburban—

*Mr. Armstrong.* Who? Who? He said I was there.

Q Either Judge Armstrong or any person representing the company—

*Mr. Armstrong.* Who said it? Not the impression on his mind but who said it? 10

Q —for the necessity of having the repealing ordinance passed?

*Mr. Armstrong.* I object unless he fixes that.

Q By Judge Armstrong or Mr. Lippincott? A By Judge Armstrong. The reason given was that it was necessary because it would relieve the former company to whom the former ordinance was granted of its duties under that ordinance, its obligations under that ordinance. 20

*The Court.* I don't understand exactly what you mean. That if the old ordinance was left intact, the new ordinance would have that effect?

*The Witness.* No, if the old ordinance was left in effect, the obligations for paving, etc., would still be obligatory on the old company, the Camden Horse, or whatever it was, and that it was necessary to have that repealed to relieve the old company from the very matters that were being taken on by the new. 30

*Cross examination by Mr. Armstrong.*

Q Mr. Early, you remember that Mr. Armstrong was the counsel for the Camden and Suburban Railway Company at that time, do you? A Yes, I know he was counsel. I was wondering whether he wasn't one of the board of directors.

Q And you are positive he was present at these meetings where this ordinance was considered? A He was present at one or more meetings. 40

Q Where this ordinance was considered? A Yes.

Q In December? A Prior to the passage of the ordinance.

Q Don't you remember, as a matter of fact, from early summer of 1900 that he wasn't before the council or any committee of it at any time? A I don't remember the dates but



*John W. Mickle, direct.*

I do remember you were before the council in this matter and then some further conferences were taken up. Wasn't that the time you left the council chamber angered at something and wrought up over something and then didn't the company think it was best to take it up in committee and not have you appear before council at all? That is my best recollection.

10 Q You are testifying. A That is my best recollection, that you appeared before council in an effort to get this ordinance through and it didn't go through and then there were conferences held at Mr. Lippincott's office between the committee of council and Mr. Lippincott, and at those conferences—I think there were 2 or 3 in number—I think you were present at one or more of them.

Q Do you recall positively? Do you say positively that I was? A Yes, I should say so.

20 Q Do you say so? A I do say so.

Q Do you say positively I was present at any council meeting in December or November, 1900? A I am not fixing the time. I say at the time of the passage of this ordinance.

Q When the repealer was introduced? A And the repealer was introduced at the time the other ordinance was introduced, and as to that it is my best recollection that you were there.

Q And you are under the impression I drew the repealing ordinance? A Yes, I am very strongly under that impression.

30 Q And you are also under the impression the repealing ordinance was introduced at the same time the Camden and Suburban was introduced or just before it? A That is true.

JOHN W. MICKLE, recalled.

*By Mr. Starr.*

Q Mr. Mickle, were you a member of council in December, 1900? A I was.

Q Member of the borough council of Merchantville? A Merchantville.

40 Q Were you present at the meeting at which the franchise ordinance which is spoken of here as the Camden and Suburban ordinance was passed? A On December 17th?

Q On December 18th? A I was.

Q Do you remember whether or not Mr. Lippincott was present at that meeting? A He was there.



*John W. Mickle, direct.*

Q And what part did he take with reference to the proceedings on that occasion? A In reference to the repealing part, he had the floor. I don't understand exactly what the circumstances were, but he spoke quite at length and the council took his remarks under consideration. I recollect perfectly well that he was there.

Q Were you present at the meeting at which the repealing ordinance was passed? A Yes.

Q Was Mr. Lippincott there at that time? A He was.

Q Did you attend any of the conferences between the members of the council and the representatives of the Camden and Suburban? A I did not.

*The Court.* Do you know what he had to say with regard to these two ordinances.

*The Witness.* In reference to the repealing of it, I just got an indistinct recollection. I think it was in reference to carrying freight or something upon the cars, I don't know what it was now, but it struck me very funny at the time. That is the only thing in reference to what he has said that has come to my memory.

*The Court.* You don't know whether his advocacy of the passage of the ordinance applied to one or both?

*The Witness.* No, I couldn't say that.

Q Mr. Holden was a member of council at that time? A Yes.

Q He is deceased? A Yes.

Q Fred Kleintz? A Yes.

Q He is deceased? A Yes.

Q And Mr. Longstreth? A Yes.

Q He is deceased? A Yes.

Q And Mr. Stewart was borough clerk at that time? A Yes.

Q He is deceased? A Yes.

Q After the ordinance of December 18, 1900, was passed, the Camden and Suburban ordinance, do you know whether or not there was any change in the location of the single track which extended from Centre street toward the west? A My recollection of it is that that track was not in the center of the road and was moved—the north track.

Q The north track was moved from the center of the road? A So as to make it in the center, That is my recollection of



*Heulings Lippincott, direct.*

it. I don't recall except my recollection is that it was moved. I know about where the turnouts were and had the south track been put along the—in the same line of those turnouts, I doubt whether there would have been enough room for a wagon to go by, but there was always room for a wagon to go by on the south side of the track after the thing was finished.

10

*Mr. Starr.* I think that is all, if your Honor please.

#### DEFENDANTS' REBUTTAL.

HEULINGS LIPPINCOTT, recalled.

*By Mr. Armstrong.*

20

Q Mr. Lippincott, in the conferences with the committees, if such were held, of the Merchantville council, followed by the meetings of the council itself and the passage of the ordinance, was Mr. Armstrong, referred to as Judge Armstrong, present and taking part? A Not at any time.

Q And conferences held at the bank with the committee and the others, was he present at any time? A Not at any time, to my recollection.

Q As a matter of fact, early in the year 1900 didn't he decline to have anything to do with Merchantville ordinances and transactions? A He did, much to my annoyance.

30

Q And can you say positively that at none of these meetings where the ordinance was considered he was present—he was not present? A I would say positively that you had not been at any of these meetings, according to my best recollection. That is my distinct recollection.

Q I understood you to say that you had no authority from the Camden Horse and exercised no authority to consent or request the passage of the repealing ordinance? A I would not have consented to it. I had no right or authority.

40

Q And so far as you have recollection, this is the first you heard of a repealing ordinance of any right granted the Camden Horse? A I would say I didn't. I will say it came to me today as a first proposition. I didn't recollect ever hearing of it before, and I can't think of under any instance, of consenting to it, as I had no right to.



*Heulings Lippincott, cross.*

Q Do you remember the location of the north track? A It is a little vague, but I think it was on the north side of the road up as far as Centre street.

Q Prepared for a second track? A Yes, prepared for a second track.

Q And the turnouts were to the south? A Yes.

10

*Cross examination by Mr. Starr.*

Q Was Judge Armstrong the attorney of the Camden and Suburban at this time? A He was at this time.

Q I suppose that you, as the representative of the Camden and Suburban, would consult Judge Armstrong with reference to the negotiations going on at Merchantville? A He was very angry over Merchantville and would have nothing to do with it.

Q You consulted him with reference to the matter? A It is not improbable that I told him what was going on.

20

Q Then he knew what was going on? A I won't say I did or I didn't. I know he was very indignant and would not participate in any proceedings.

Q He wasn't at their meetings? A I don't think he was, with relation to this ordinance. It was prior to that.

Q Well, with reference to an effort on the part of the Camden and Suburban to get the franchise? A I don't recall his being there.

Q Will you say he wasn't? A If necessary to be positive, I will say he wasn't there.

30

Q Don't you recall the Judge was dissatisfied with the attitude of some of the members of council and refused to go there any more? A I know he was dissatisfied and would not go back.

Q And wouldn't go back any more? A And wouldn't go back any more.

Q With reference to this repealing ordinance, the Camden Horse Railroad Company had never exercised its privileges under the 1896 ordinance? A I don't know. I am not part of the Camden—

40

Q How long have you been connected with the Camden and Suburban? A From the beginning, but not the Camden Horse.

Q But the Camden and Suburban got the lease from the Camden Horse in 1896? A That is right, 1896 is right.



*Heulings Lippincott, direct.*

Q And you were associated in some way with that from 1896 to 1900? A Yes.

Q And were director during all that time? A And director during all that time.

Q Don't you know that the Camden Horse never accepted the 1896 ordinance, never did any work under it? A No, I do not.

Q Don't you know as a matter of fact the reason they didn't do it was that they wouldn't consent to the paving obligations under that ordinance? A No, I have no recollection of it. It may be true. I have no recollection of it.

Q You say it may be true? A I say it is possible to be true. It was a good while ago. I have no recollection of it.

Q I read from the 1896 ordinance. The railroad company should put down substantial road on the outside of each outer rail to the curb line. A What road is this?

Q That is the 1896 ordinance to the Camden Horse, giving the right to put down the paralleling track. A From Centre street on the north side?

Q Now, you remember that, don't you, from Centre street to the westerly line of the borough? A I had no part in it.

Q Don't you remember that was one of the obligations of the Camden Horse taken over by the Camden and Suburban? A It is quite likely what occurred after they took over the management.

Q Don't you know provisions of the ordinance of 1896 were referred to in the lease? A I did not tax my mind with that detail at all.

Q And don't you know that was one of the reasons why the Camden Horse and Camden and Suburban never constructed under the 1896 ordinance, because they didn't want to pave the street, to put substantial road down to the curb line? A No, I do not.

Q And don't you remember also that was the reason why they wanted that ordinance repealed when the 1900 franchise ordinance was passed? A That is past me. If I ever knew it, I have no recollection of it.

Q You won't say, Mr. Lippincott, that you didn't know about this repealing ordinance? A I will say so far as I recollect now I had no knowledge of the repealing ordinance. I will



*Edward Ambler Armstrong, direct.*

say positively I did not consent to it, if I was present when it was passed, in my presence.

Q Do you have any recollection that it was? A No, nothing whatever. On general principles, I couldn't have consented to it and wasn't a party to it, that is my attitude toward that whole matter.

Q You were present when the ordinance was passed? A I think I was present. 10

Q When the 1900 ordinance was passed? A Yes.

Q And you spoke in favor of the ordinance? A And spoke in favor of the ordinance.

Q Don't you know as a fact that that repealing ordinance was adopted immediately before you made the speech? A No, I do not. I did not make any speech on the repealing of the ordinance, if I recollect. If I did, it was in opposition to it.

Q Did you make any speech in opposition to it? A I don't remember anything about it. 20

Q Why did you say if you did know about it you made a speech in opposition to it? A Because that would be my attitude.

*Re-direct examination by Mr. Armstrong.*

Q Mr. Dudley was the lawyer representing you when this 1900 ordinance was passed, was he not? A I think he was.

EDWARD AMBLER ARMSTRONG, sworn. 30

In 1900, and before I was a director and counsel of the Camden Horse Railroad Company, I was also a director and counsel of the Camden and Suburban Railway Company from the time of its incorporation. I had nothing to do with the proposal or the passage of the ordinance of 1900—

*Mr. Bergen.* That is the ordinance granting the right to the Camden and Suburban?

*The Witness.* Yes. Several months before, in meeting with the borough council in some other matters concerning this company, I notified the Camden and Suburban that I would not appear before or have anything to do with any legislation with the borough of Merchantville concerning this ordinance. Mr. Early is mistaken, therefore, in saying that he had conversations with me. If he 40



*Edward Ambler Armstrong, cross.*

10 did with a lawyer, it must have been with Mr. Dudley, because I was told that Mr. Dudley, one of the directors of the company, who was a counsellor-at-law, had drawn the ordinance which was afterwards passed, giving the rights to the Camden and Suburban Railway Company in Merchantville. The terms of that ordinance I was not acquainted with and did not learn until after it was passed. Mr. Early is mistaken in saying that I advocated the repeal of an ordinance to the Camden Horse Railroad Company, because until in court today I didn't know of this ordinance at all. There is a repealer contained in one ordinance and I thought in the pleadings, where it is referred to, that is what was referred to in the pleadings. There is some reference made in the pleadings and by an answer filed by the borough of Merchantville, but I did not know an attempt had been made to repeal an ordinance of 1896 to the Camden Horse. No notice was ever given to or received by the directors of the Camden Horse Railroad Company and they had no notice of it whatever.

20

*The Court.* Was the Camden and Suburban Company the company that consolidated the Camden Horse and the old South Jersey or the old West Jersey?

30

*The Witness.* No, the Camden Horse Railroad Company was leased by the Camden and Suburban Railway Company, which owned the West Jersey Traction Company and afterwards the Camden and Suburban's lease was carried over in the lease of that company to the South Jersey Traction Company, which assignment is now held by the Public Service.

*The Court.* Isn't this question rather unimportant, so far as this repealer is concerned? I suppose the Camden and Suburban has an obligation from the Public Service as to all obligations that it undertook. In that situation, does the Camden and Suburban figure at all?

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*The Witness.* If your Honor please, the Camden Horse figures in this.

*Cross examination by Mr. Starr.*

Q Now, Judge, were you ever the attorney of the Camden and Suburban? A Oh, yes.



*Edward Ambler Armstrong, cross.*

Q And you were attorney for the Camden and Suburban during all this time, 1900, while this ordinance was being passed?

A Oh, yes.

Q And did Mr. Lippincott consult with you with reference to the negotiations? A I think he did not.

Q Are you sure about that? A He did not at all with any particulars. If he told me what he was doing, my recollection of it is that he did say something about it and "I suppose you decline to hear anything about it."

10

Q You know whether it is pertinent or not, Judge. My inquiry is whether he talked to you. A So that I knew what was going on?

Q Whether you knew or not, did he tell you what was going on? A I think not.

Q Did you know anything about the terms of the ordinance? A I did not.

20

Q You say you never knew anything about this repealing ordinance until today? A That is correct.

Q Didn't you read the reply filed in this case? A I thought it was the general repealer put in another ordinance. I didn't know it referred to that.

Q Let me read you the 11th paragraph. That paragraph avers that the privileges conferred by the ordinance passed October 6, 1896, were never exercised by the Camden Horse and on December 18, 1900, an ordinance was adopted, etc., repealing the Camden Horse Railroad Company ordinance. Don't you remember that was in the answer? A I say I remember that was in the answer, but you will see how I was misled by that, because there was an ordinance passed for the Camden Horse Railroad Company April 3, 1892, authorizing, through the whole length of the borough, the building of a railroad, which was limited to six months in terms. Section 3 of the ordinance of 1896 has a repealer of all ordinances inconsistent with that and I thought the pleader was referring to that. He wasn't, of course, in the terms and dates, but that is the impression I got.

30

Q How could you get that? Could that be any plainer? A I am not complaining of its not being plain. What I had in mind was the building of the railroad from Centre street to the eastern end of the borough, which was never exercised, and that is what I thought your reference was to in that. I should

40



*William F. McAllister, direct—cross.*

not have thought so, I ought to have looked up the dates and been sure about it, so far as the information to me is concerned.

Q You knew that the ordinance of 1896 provided certain paving obligations, to put down a substantial road from the track to the curb? A I know what it said.

10 Q Did the Camden Horse or the Camden and Suburban ever do that? A I don't know what they did, because this all the time was a turnpike road and they had an agreement with the turnpike company.

Q Please answer my question, Judge. Did the Camden and Suburban or the Camden Horse ever build a substantial road from the track to the curb, under the provisions of the 1896 ordinance? A I don't know what they did as to the physical road, I don't know at all.

20 Q And wasn't that the reason for the repeal of the 1896 ordinance, that they wanted to avoid the responsibility of the paving in that ordinance? A No, no such reason ever went to the Camden Horse Railroad Company as that or any other reason for the repeal of the ordinance.

#### PLAINTIFF'S REBUTTAL.

WILLIAM F. McALLISTER, sworn.

*By Mr. Starr.*

30 Q You are the mayor of Merchantville? A Mayor of Merchantville.

Q How long have you lived there? A How long have I lived there? Since 1897.

Q Prior to the passage of the 1900 ordinance, that is the franchise ordinance of the Camden and Suburban, did either the Camden and Suburban or the Camden Horse build a road from the outermost tracks to the curb in accordance with the terms of the 1896 ordinance? A Not to my knowledge.

40 *Cross examination by Mr. Armstrong.*

Q Maple street, up to 1913, was a turnpike road owned by the Moorestown and Camden Turnpike Company? A It was taken over by the State and county about that time.

BOTH SIDES REST.



*Samuel P. Corliss, direct.*

*The Court.* When you get a transcript out, I will be glad to hear counsel then.

*Mr. Starr.* Judge Armstrong and I have an understanding that we will go over the transcript and if any formal matter has been omitted we will supply it.

*The Court.* So I understood.

10

## NEW JERSEY SUPREME COURT.

### CAMDEN COUNTY CIRCUIT.

BOROUGH OF MERCHANTVILLE,

*Plaintiff,*

*vs.*

CAMDEN AND SUBURBAN RAILWAY Co., *et als.*,  
*Defendants.*

*Action at Law.*

*Testimony.*

20

Camden, N. J., March 29, 1919.

### TESTIMONY.

Before Hon. Frank T. Lloyd, Judge.

#### Appearances:

For the plaintiff, Lewis Starr, Esq., and Edward I. Berry, Esq.

30

For the defendants, E. A. Armstrong, Esq., and Frank Bergen, Esq.

### PLAINTIFF'S CASE.

*Mr. Starr.* If your Honor please, when we took testimony in this case before, the right was reserved by both parties to re-open, and I make that application on behalf of the plaintiff.

SAMUEL P. CORLISS, sworn.

40

*By Mr. Starr.*

Q Mr. Corliss, you were served with a subpoena, were you not, to produce the maps which were presented with the petition



*John W. Mickle, direct.*

10 which the Camden and Suburban filed with the Borough of Merchantville before the ordinance of 1900 was adopted, the franchise ordinance. Have you those maps and blue prints here, or copies of them? A I was served with a subpoena and there is a statement accompanying the subpoena asking for certain papers, but I don't understand just what is wanted, because it reads "Presented by the Public Service Railway Company to the Borough Council of Merchantville" and I have nothing to do with that, of course.

Q That is a mistake. It should have been "Camden and Suburban." Have you copies of the maps presented to Borough Council at the time the petition was filed for the adoption of the 1900 franchise ordinance? A No, sir.

20 *Mr. Starr.* The petition itself and the map we have been unable to find.

*Mr. Armstrong.* Here is a copy of the petition, but there is no map attached.

*Mr. Starr.* We have a copy of that, but I want the blue print.

*Mr. Armstrong.* We appear to have no copy of it at all, and apparently it wasn't attached to this copy; that is, there is nothing to show it was, and I suppose it was not. Have you found the original petition?

30 *Mr. Starr.* We can't find it. I have a copy of the original, but we can't find the original. That is the trouble, and the petition recites that a copy of the map is attached.

Q I understand, Mr. Corliss, you have no copy of the map which was attached to the original petition filed with the Borough Council? A No, sir, I have not. I supposed they were attached to this paper, but when I came to get the paper I found they were not.

JOHN W. MICKLE, sworn.

40 *By Mr. Starr.*

Q Mr. Mickle, you are the Borough Clerk of Merchantville, are you? A I am.

Q And have you the custody of the minutes of the Borough Council? A I have.



*John W. Mickle, direct.*

Q Is that book which I hand you the minute book of the Borough Counsel?

(Examining counsel hands book to witness.)

A That is the last one.

Q Will you please turn to page 14, minutes of meeting of Borough Council held on the 5th of June, 1914? A Page what? 10

Q Page 14.

*Mr. Starr.* Now, I offer in evidence, if your Honor please, the resolution which appears at page 14, beginning as follows: "Mr. VanKirk then offered the following:" I have furnished Judge Armstrong with a copy of that, and I will either have the minute read into the record, or will introduce in evidence a copy and have it marked.

*Mr. Armstrong.* I object to this as to the materiality. There is no allegation that this was ever brought home at all to the Public Service Railway Company. 20

*The Court.* What is the purport of the resolution?

*Mr. Starr.* The point was raised by Judge Armstrong at the last hearing, on his motion to non-suit, that the proceedings which had been taken by the Borough with respect to the improvement of the road were not the proceedings which were contemplated either by the ordinance of 1900 or the modifying agreement of 1915. I propose, and this is the initial step, to show the acts of the borough and also the acts of the Board of Freeholders with relation to the improvement of the road, and I expect also to introduce testimony to show that the various stages taken by both municipalities with reference to the improvement of the road were brought to the attention of the officers of the company, the Public Service Railway Company, and it was to take care of that situation that the agreement of 1915 was made. 30

*The Court.* What is this—

*Mr. Starr.* This is the preliminary resolution. It reads as follows— 40

*The Court.* Just a moment. I assume, Judge Armstrong, that any steps that were taken in pursuance of that, whether effective finally for the purpose or not,



*John W. Mickle, direct.*

are admissible in the effort to prove that the steps contemplated by the agreement were carried out.

*Mr. Armstrong.* These are not subsequent to the agreement. They are prior.

10     *The Court.* Regardless of whether they are before or after, if they are steps looking to the improvement or change in paving that was then under contemplation and to show the Borough's participation in it, I assume they are admissible to establish the chain of circumstances which were contemplated in this agreement.

*Mr. Armstrong.* I don't understand, of course, that any unambiguous agreement or any preliminary things are either useful or may be used. Sometimes they are allowed to explain ambiguities in an agreement.

20     *The Court.* I don't understand it is for that purpose. My understanding is it is for the purpose of showing that the municipality and the company having entered into an agreement, that upon the performance of certain steps a certain amount of money should be due. Now, this as I understand, is the effort to show the performance, either theretofore or thereafter, of the steps contemplated. Is that correct?

30     *Mr. Starr.* That is the purpose, and also, if your Honor please, our contention will be that this agreement may be susceptible of one or more interpretations, and our effort will be to prove the circumstances surrounding the entire transaction so that your Honor will be placed substantially in the position the parties were in, not to alter, modify or change, but to explain the provisions of the modifying agreement of 1915. They are the two purposes for which this testimony is offered.

*The Court.* I think it is admissible for the first, and if it is admissible for any purpose, I must receive it.

40     *Mr. Armstrong.* All I have to do is, I believe, under the practice now, interpose an objection.

*The Court.* No, you must note an exception.

*Mr. Armstrong.* All right then, I ask an exception.

(Which exception is hereby allowed and sealed accordingly.)

(SEAL.)



*John W. Mickle, direct.*

*Mr. Starr.* I ask that a copy—

*The Court.* I don't decide it is not admissible for the second purpose.

*Mr. Starr.* It seems to me we ought to have the testimony in, anyhow.

*Mr. Armstrong.* I simply want to say, as I understand it, we are bound by the agreement as it stands, and that this is not admissible for either purpose suggested. I want to ask, if I may, I ask to object to all this, and save an exception to such as are admitted. 10

(Said resolution marked Exhibit P. 1, 3/29/19.)

Q Will you turn to page 65? A (Witness turns to page indicated.)

*Mr. Starr.* I introduce a minute which appears on page 65. It begins, "Mr. John J. Burleigh, Second Vice President of the Public Service"—wait a minute "the members of Council and Mr. Burleigh had an informal discussion with regard to the improvement of Maple avenue October 27, 1914." I introduce that in evidence. 20

(Said minute marked Exhibit P. 2, 3/29/19.)

*Mr. Starr.* I have copies of letters, the originals of which were lost, and Mr. Berry asked the company to furnish copies of them, and those are the copies that were furnished (indicating).

*Mr. Armstrong.* I have no means—I don't know whether I have any means or not to— 30

*Mr. Starr.* Would you have any objections to putting the copies in and then you can check them up, and if they are not accurate copies, of course, I will consent that they go out.

*Mr. Armstrong.* Not the slightest.

*Mr. Starr.* Then I introduce a letter dated July 14, 1914—

*The Court.* Gentlemen, there are these different papers. I don't want anybody to be misled. They are very different papers, very different proceedings, the two introduced, one of June 5th and the other of October 27th. One appears to be a resolution of the borough which contemplates 40



*John W. Mickle, direct.*

some official action. The other is a recital of conversations apparently had before the Council not resulting in any official—

10

*Mr. Starr.* That is important to show, if your Honor please, that Mr. Burleigh was present and the subject matter of the improvement of the road was under discussion in his presence.

*The Court.* It may be very important. I am not dealing with that phase of it.

*Mr. Starr.* It is a minute of the record kept by the municipal body, and it seems to me the fact that he was there is the best evidence of that fact, that is, the best evidence of that fact would be the record kept.

20

*The Court.* The objection isn't on that ground. The objection is not on the ground that it isn't the best evidence.

*Mr. Armstrong.* The objection is stated. Why I thought that I had covered—

*The Court.* You said you didn't think it was material, that these papers were not material.

*Mr. Armstrong.* I object to the admissibility. I was going when this was offered, to object on the ground it is a mere recital.

30

*The Court.* I don't see how it is possible to bind one of the parties to the litigation by a minute of the book.

*Mr. Starr.* I will prove that independently. I am willing to let that go out.

*Mr. Armstrong.* Mr. Burleigh is dead. I can't have him sworn.

*Mr. Starr.* I introduce the letter dated July 14, 1914, addressed "Dear Mr. Mayor," and signed "John J. Burleigh, 2nd Vice President," addressed to Hon. Alfred H. Bennett.

40

*Mr. Armstrong.* I renew the objection made before, and further, that this is incompetent and immaterial.

*The Court.* Mr. Burleigh was Vice-President of the defendant company?

*Mr. Armstrong.* Yes.



*John W. Mickle, direct.*

*The Court.* The objection is not on the ground that he was not authorized to speak.

*Mr. Armstrong.* No, no.

(Said letter marked Exhibit P. 3, 3/29/19.)

*Mr. Starr.* Now, Judge, will you furnish me with the original letter written by Mr. McAllister, Borough Clerk, to the railway company, dated October 15, 1914. I have a copy here. You have the original. 10

*Mr. Armstrong.* I don't know if I have. What is the date?

*Mr. Starr.* October 15, 1914, written by Mr. McAllister, the Borough Clerk, to the railway company.

*Mr. Armstrong.* Judge Starr sent me a notice to produce all letters written to anybody in relation to this matter, and I have tried to comply with it as much as I could. 20

*The Court.* Can't you use the copies?

*Mr. Starr.* I have copies here. We can make the same arrangement, Judge, check them up, and if they are not right they go out. Letter written by McAllister, Clerk of the Borough, to John J. Burleigh, Vice-President, dated October 15, 1914.

(Said letter marked Exhibit P. 4, 3/29/19.)

*Mr. Armstrong.* Did your Honor say I need not renew my objection to each of these? 30

*The Court.* It is a pretty hard task for the Judge to carry.

*Mr. Armstrong.* Then I object to this on the ground of its being immaterial and incompetent and on the further ground that all the relations between the parties were reduced to an agreement in writing which is made the basis of this suit.

*Mr. Bergen.* I enter the same objection on behalf of the Public Service. 40

*The Court.* Who is the letter from?

*Mr. Starr.* From the Borough Clerk to Mr. Burleigh.

*The Court.* The letter will be received, and note an exception.



*John W. Mickle, direct.*

(Which exception is hereby allowed and sealed accordingly.)

(SEAL)

*Mr. Starr.* I offer a reply written by Mr. Burleigh to Mr. McAllister.

10

(Same objection by both defendants.)

(Said letter marked Exhibit P. 5, 3/29/19.)

*Mr. Armstrong.* May I have an exception?

(Which exception is hereby allowed and sealed accordingly.)

(SEAL)

*Mr. Starr.* I also offer in evidence a letter written by Mr. Burleigh to the Borough Clerk, dated November 6, 1914.

20

(Same objection by both defendants, and exception asked.)

(Said letter marked Exhibit P. 6, 3/29/19.)

(Which exception is hereby allowed and sealed accordingly.)

(SEAL)

*Mr. Starr.* I offer as part of that letter a report signed "Franchise Bureau, by Charles N. Breder, Engineer," which was attached to the letter.

30

*Mr. Armstrong.* That is all one offer?

*Mr. Starr.* Yes.

*Mr. Armstrong.* Our objection stands, of course.

(Said report also marked Exhibit P, 6, 3/29/19.)

Q Now, Mr. Mickle, won't you turn to page 139, resolution passed by Borough Council, May 7, 1913. Do you find a resolution introduced by Mr. Moses on that page, beginning "Whereas the stone road committee—" A Right.

40

Q —"signify their intention of recommending to the Board of Freeholders," etc. A Right.

*Mr. Starr.* I offer that resolution in evidence.

*Mr. Armstrong.* I make the same objection to that as to its materiality and what I said about the agreement.



*John W. Mickle, direct.*

*Mr. Bergen.* Same objection on the part of the Public Service.

(Said resolution marked Exhibit P. 7, 3/29/19.)

*Mr. Armstrong.* I ask an exception.

(Which exception is hereby allowed and sealed accordingly.)

10

(SEAL)

Q Now, turn to page 142, minutes of May 12, 1915. A May 12, 1915.

Q Do you find a resolution offered by Mr. Moses, beginning "Owing to the request made by the Stone Road Committee," etc.? A Right.

Q That is on page 142? A 142.

*Mr. Starr.* I offer that resolution.

20

*Mr. Armstrong.* Objection.

(Said resolution marked Exhibit P. 8, 3/29/19.)

*Mr. Armstrong.* I ask an exception.

(Which exception is hereby allowed and sealed accordingly.)

(SEAL)

*Mr. Starr.* I have here a letter written by Mr. Berry to Mr. Burleigh, August 18, 1915. That is a copy. You probably have the original.

*Mr. Armstrong.* Do the same way with that.

30

*Mr. Starr.* I offer that letter in evidence. It is dated August 18, 1915, written by Mr. Berry, and addressed "Public Service Corporation, John J. Burleigh, Esq., 2nd Vice-President."

(Said letter marked Exhibit P. 9.)

*Mr. Starr.* Now, I offer in evidence Mr. Burleigh's reply to the last letter, dated August 30, 1915.

(Same objection by both defendants.)

(Said letter marked Exhibit P. 10, 3/29/19.)

40

*Mr. Armstrong.* Exception.

(Which exception is hereby allowed and sealed accordingly.)

(SEAL)



*John W. Mickle, direct.*

Q Now, will you please turn to page 187 of the minute book?

A 187?

Q Yes, and do you find there copy of the modifying agreement dated November 15, 1915, and a resolution authorizing its adoption? A Dated November 15th?

10 Q Yes.

*Mr. Starr.* I offer the minute showing the adoption of the modifying agreement of November 15.

*Mr. Armstrong.* You have already offered that agreement.

*Mr. Starr.* I know, but I prefer to have it. This is one stage of the proceedings.

20

*Mr. Armstrong.* I have no objection to the offering of the agreement, but I don't want in anywise to be bound by the minute.

*Mr. Bergen.* Made after the agreement?

*Mr. Starr.* Yes. "Mr. Smith offered the following resolution," etc.

*The Court.* Let it be received.

(Said minute marked Exhibit P. 11, 3/29/19.)

*Mr. Armstrong.* Exception.

(Which exception is hereby allowed and sealed accordingly.)

30

(SEAL)

Q Now, turn to page 204, minutes of meeting of January 18, 1916? A January 18, 1916.

Q Resolution offered by Mr. Moses, and seconded by Mr. Powers. A Right. Resolution that the Borough Engineer be instructed.

40

*Mr. Armstrong.* I object to that of course, what they were doing with relation to it. I renew the same objection.

*The Court.* I think that so far these papers have all been admissible for very limited purposes. I don't think recitals are binding or evidential against the defendants. I think they are evidential to show the steps that were being taken progressively to carry out the agreement.

*Mr. Starr.* I offer the resolution in evidence.



*John W. Mickle, direct.*

*Mr. Armstrong.* I will have to make a different objection to that, I suppose, because that postdates the agreement.

*The Court.* I have read the one of December. I don't know what this is.

*Mr. Armstrong.* This is something about making some contract about paving. 10

*Mr. Starr.* "Resolved that the Borough Engineer be instructed to prepare specifications," etc. Now, we offer that for the purpose of showing a compliance by the Borough with the terms and conditions of the agreement of November, 1915.

*Mr. Armstrong.* I object to it, on the ground that it is incompetent, improper and immaterial, not binding against the defendants, and all of this, I suppose, is being taken under my objection that this work could only be done by ordinance and there is no ordinance so far submitted showing it. 20

*Mr. Bergen.* Same objection for the Public Service.

(Said resolution marked Exhibit P. 12, 3/29/19.)

*Mr. Armstrong.* Exception.

(Which exception is hereby allowed and sealed accordingly.)

(SEAL)

Q Now, page 206, another resolution offered by Mr. Moses. Do you find the record of a resolution offered by Mr. Moses? 30

A I do.

(Said resolution marked Exhibit P. 13, 3/29/19.)

*Mr. Starr.* I suppose you want to offer an objection to that on the same ground?

*Mr. Armstrong.* Yes, incompetent, immaterial and has no connection with either of these defendants. We ask an exception.

(Which exception is hereby allowed and sealed accordingly.) 40

(SEAL)

*The Court.* You were not the Secretary when these minutes were copied in 1914?



*Fred W. George, direct.*

*The Witness.* Not in 1914, sir.  
No cross examination.

FRED W. GEORGE, sworn.

*By Mr. Starr.*

10 Q Mr. George, where do you reside? A 1445 Kenwood avenue.

Q And have you any official position in the county of Camden?  
A Yes, sir.

Q What is it? A Clerk of the Board of Chosen Freeholders.

Q How long? A Since May, 1900.

Q Will you produce the minute book, No. 10, of the proceedings of the Board of Freeholders and turn to page 368.

20 *Mr. Armstrong.* Have you them copied out?

*Mr. Starr.* I will furnish you them.

Q I call your attention to the minute with reference to the presentation of a communication from the Borough Council of Merchantville. Have you that communication here? A No, sir.

Q That petition, 1911, you showed it to me downstairs. A (Witness hands papers to examining counsel.)

Q You have produced three papers, one dated—two dated April 5, 1911, and one dated May 4, 1911. From where did you get those papers? A They were received by—I don't know whether they came by mail or handed to me.

30 Q From the records of the County of Camden? A Yes, sir.

Q I ask you whether or not those communications were received by you as Clerk of the Board of Chosen Freeholders? A Yes, sir.

Q From the Borough of Merchantville? A Yes.

*Mr. Armstrong.* 1911?

*Mr. Starr.* 1911.

40 Q With reference to the purchase of the turnpike and the improvement of the road and request that it be done.

*Mr. Armstrong.* They certainly have no possible connection, I suppose, with this case. As a matter of fact I think the road wasn't purchased for five or six years after that.



*Fred W. George, direct.*

*Mr. Starr.* It wasn't purchased until two years after 1913. My purpose is to show successive steps and the action taken by the Borough of Merchantville to have the road improved. It was finally done in the method as we have proven it.

*The Court.* I appreciate that, but how can—

10

*Mr. Starr.* Here is a communication signed by the borough clerk under the seal of the borough.

*The Court.* Yes, I have no doubt of the official communications. That isn't what I mean. Was there as early as that an intention undertaken to improve this road?

*Mr. Starr.* That is my understanding. We will prove, if your Honor please, for years the borough has been after the county to have the road improved, the road to be purchased from the Turnpike Company and improved, and that Mr. Burleigh as the Vice-President of this Company was conversant with the fact, and he was assisting in having it done and to show that what was finally done and the method by which it was accomplished was in accordance with the understanding as contemplated by the agreement.

20

*Mr. Armstrong.* I don't think Judge Starr means—it is extremely unfortunate in this case, I think—that we ever abandoned our legal rights. Mr. Burleigh was a very large property owner on this street, individually, and I am quite certain he was anxious to have this as a county road, as to that part of it, but the Public Service Railway Company wasn't and Mr. Burleigh wasn't as vice-president, because Mr. Burleigh had repeatedly said what his interest was as a citizen there and how anxious he was to have it. I have heard him say it myself.

30

*The Court.* I will disregard anything that comes into the case that doesn't appear to come from an official of the company. I will instruct the jury to disregard as much of it as is irrelevant.

40

*Mr. Armstrong.* Of course we would never enter into the agreement we did here, and I don't want to say I have foreclosed my clients by not objecting to some of these things and some of these inferences.



*Fred W. George, direct.*

10        *The Court.* Undoubtedly the parties' rights must stand upon the agreement plus whatever legal obligations there may have been anterior to them, if there were such, now relied upon, and at most I apprehend that the various communications could be held to establish but two things or tend to establish two things. One would be that the proceedings contemplated in the agreement were being carried out, and secondly that the company had cognizance, through its officials, of the various steps. You cannot, of course, alter a written paper by any other method of proof, but it has been many times held that the status of the parties may be ascertained. In fact I tried one of those cases myself in Burlington County—somebody against the Delaware Bay Railroad Company, I think it was.

20        *Mr. Starr.* May I read two paragraphs of this modifying agreement of 1915? First "The Borough of Merchantville proposes to have Maple avenue through its entire length paved with an improved pavement, having the assistance therein of the State and County, which both make appropriations for the same and over which both have certain supervision." Then the agreement provides in the last clause "When such paving, done in the manner aforesaid, is completed, it shall be deemed to have been done in accordance with the requirements of section 6 of the aforesaid ordinance." Now, section 6 of the aforesaid ordinance provided that whenever the street should be paved from curb to curb at the expense of the borough—the expense and supervision of the borough—the obligation would be incurred by the Railroad Company to include their share of the expense between the rails and three feet on each side.

30        *The Court.* I think I follow the situation. You attempt now to show it was understood between the parties this was being done in accordance with that agreement.

40        *Mr. Starr.* What was done was done in accordance with the interpretation we will ask your Honor to—I offer these resolution in evidence.

*The Court.* I will receive them. I may say, Judge Starr, I think you are getting a good ways back now. It



*Fred W. George, direct.*

seems to me it must be anterior to anything contemplated in this agreement.

(Objection by both defendants.)

(Said papers marked Exhibit P. 14, P. 15 and P. 16, 3/29/19.)

*The Court.* Isn't there a shorter way to get at this, 10  
Judge Starr? Can't you offer these papers by your memorandum instead of having them each offered separately? I understand that you are doing it in an orderly way.

*Mr. Armstrong.* When we adjourned I thought he was going to copy out all he wanted and send me copies and put them in.

Q Now, won't you turn to page 349 of the minute book, book number 11. Was a meeting held of the Board of Freeholders on 20  
the 11th of May, 1915? A Yes, sir.

Q And is there a resolution on page 349 with reference to the Moorestown and Camden Turnpike? A Yes, sir.

Q Will you kindly read that into the record?

*Mr. Starr.* I offer that resolution in evidence.

*Mr. Armstrong.* We renew the objection.

*The Court.* What is it, Judge Starr?

*Mr. Starr.* "Whereas our county engineer has prepared plans, profiles, cross-section and specifications for improving the Moorestown and Camden Turnpike"— 30

*Mr. Armstrong.* Exception.

(Which exception is hereby allowed and sealed accordingly.)

(SEAL)

*Mr. Starr.* "Whereas our county engineer has prepared plans, profiles, cross sections and specifications for improving the Moorestown and Camden Turnpike from Camden City Line to Burlington Co. line, that portion from Camden to the easterly end of Merchantville to have 40  
a concrete base surfaced with grouted Belgian block top.  
"The Merchantville authorities are not satisfied with Belgian block, but insist on a concrete base with bituminous top from the curb line to outer edge of trolley rail,



*Fred W. George, direct.*

10 also between rails. They also insist upon our conforming to the revised borough grade. Be it resolved that we direct our engineer to so modify our plans and specifications to meet the demands of the Merchantville authorities on condition that said borough accept, take over and maintain, as soon as completed, so much of said road as lays within the borough limits."

Q Now, turn to page 365. Was there a meeting of the Board of Freeholders on the 9th of June, 1915? A Second Wednesday of June, 1915, June 9th, yes, sir.

20 *Mr. Starr.* Now, I offer in evidence, if your Honor please, the resolution which begins "The Road Committee presented the following resolution, Camden, June 7, 1915," and the action taken by the Board on that report of the Stone Road Committee.

*Mr. Armstrong.* Same objection by both defendants.

*Mr. Starr.* That has incorporated in it the resolution which I introduced in evidence passed by the Borough with reference to the improvement of the road on the 12th of May.

*Mr. Armstrong.* Exception. Some of these, if your Honor please, antedate the modification agreement.

(Which exception is hereby allowed and sealed accordingly.)

30

(SEAL)

Q Turn to page 428. Was there a meeting held on the 30th of December, 1915? A Yes, sir.

*Mr. Starr.* This minute, if your Honor please, this resolution has incorporated in it a copy of the modifying agreement of November 15, 1915, the agreement between the Public Service Company and the borough of Merchantville. I offer—

40 *Mr. Armstrong.* We object. How, under the Sun, can those subsequent things have anything to do with it? The Board of Freeholders were no party to this thing in any way.

*Mr. Starr.* I think it has. I offer the resolution in evidence.



*Edward I. Berry, direct.*

*Mr. Armstrong.* Same objection for both defendants.  
(Said resolution admitted in evidence.)

Q Have you in your possession the original contract made between the County of Camden and the contractors for the improvement of the road to Merchantville? A Yes, sir.

*Mr. Starr.* I offer that contract in evidence, the contract and specifications, dated March 16, 1916. 10

*Mr. Armstrong.* Objection.

(Said paper marked Exhibit P. 17, 3/29/19.)

*Mr. Armstrong.* Exception.

(Which exception is hereby allowed and sealed accordingly)

(SEAL)

No cross examination.

20

EDWARD I. BERRY, sworn.

*By Mr. Starr.*

Q Mr. Berry, how long have you been Borough counsel for the borough of Merchantville? A Since January 1, 1911.

Q Prior to the 15th of November, 1915, in your capacity as borough solicitor or borough attorney, did you have any conferences with Mr. Burleigh, talks with him, in relation to the improvement of the turnpike road through Merchantville? A I have had very many conferences with Mr. Burleigh; as an officer of the Public Service Corporation, I might say. 30

Q For whom were you acting? A For the borough of Merchantville.

Q And in a general way, what was the subject of the conferences? A The subject of the conferences was the possibility of improving Maple avenue, which, at that time, was a county road. The method of improving it was talked over. The only practicable method seemed to us to be to have the county purchase the turnpike, turn it into a county road and then improve it by State and county aid. I meant it was a turnpike road originally. 40

Q Was that one of the matters discussed between you and Mr. Burleigh? A Yes, that was one of the matters discussed.

Q Did he make any suggestions as to the way the improvement of the road could be accomplished?



*Edward I. Berry, direct.*

*Mr. Armstrong.* Objection. I think that is entirely immaterial.

*The Court.* I think I will receive it, showing cognizance of the steps, if it does, that were being taken, and that this agreement was entered into following those steps.

10 *Mr. Armstrong.* Exception.

(Which exception is hereby allowed and sealed accordingly.)

(SEAL)

(Question repeated)

A He suggested that we have a conference with the Public Service officials in regard to getting over, if possible, the difficulties in section 6 of the ordinance, which provided that when the road should be improved at the expense and under the direction of the borough, the Public Service would be liable between the rails and tracks and on each side of them.

Q The agreement of November 15, 1915, was prepared where?

A In Judge Armstrong's office, at the Public Service Building, Newark.

Q And was it pursuant to a conference you had with Mr. Burleigh, Judge Armstrong and Mr. Bergen? A It was, yes, sir

Q Who suggested that such conference be held in Newark?

A Mr. Burleigh.

30 Q And who accompanied you to Newark? A William F. McAllister, who was then mayor of Merchantville.

Q Now, had you had a talk with Mr. Burleigh or conference with him prior to your trip to Newark? A Several of them.

Q Well, do you remember one particular one, the last conference you had with him prior to the time you went to Newark?

A The last conference at which the matter was discussed, yes, sir.

Q Do you remember who was present at that time? A I do not remember. My impression was that Mayor McAllister was with me at that time, but I am not certain about it.

40 Q What was said by you and Mr. Burleigh with reference to the status of the road at Merchantville and any matter connected with the contemplated improvement? Tell me first whether it was after or before the 12th of May, 1915? A It was after the 12th of May, 1915.



*Edward I. Berry, direct.*

Q Was it after the 9th of June, 1915? A Yes, sir; it was within two or three weeks of the time we had the conference in the Public Service office.

Q Tell us what happened on the occasion of that interview. A Mr. Burleigh and I had quite a discussion in regard to the possibility of improving the road, getting the Public Service Railway Company to pay the cost of improving between the rails and tracks and three feet on each side. At that time the Borough and the County had practically come to an agreement as to the terms on which the work was to be done, as to the method by which the work was to be done, and that—

Q Was Mr. Burleigh acquainted with that fact? A Perfectly. It was a matter of discussion between us.

Q I call your attention to the resolution which had been adopted by the borough on the 12th of May, 1915. Was that resolution the subject of discussion between yourself and Mr. Burleigh? A It was.

Q And the resolution taken by the Board of Freeholders on the 9th of June of the same year, was that a matter of discussion between yourself and Mr. Burleigh? A It was.

Q Proceed. A The discussion followed generally this line: The decks were cleared for action so far as the borough and county were concerned. The only thing that was holding us up was the question as to whether there was any liability on the part of the Public Service to pave between the rails and tracks.

Q Why was that question raised? A Because of the provisions of section 6 of the ordinance of 1900 requiring that that work should be done at the expense and under the sole direction of the borough. That was impracticable for a good many reasons. In the first place we did not feel that the borough could swing it financially.

Q Was anything said to Mr. Burleigh about that situation? A Yes, we discussed that. I might say at the same time we were talking over the idea as to whether it wouldn't be possible, in order to meet that difficulty, for the borough to actually do this work itself, that is, give a contract for the work and pay the expense, and afterwards get reimbursed from the State and county. It was thought that in order to do that legislation would be necessary and that was talked about, and Mr. Burleigh was acquainted as well with that fact, that that was under discussion, but it was not deemed practicable. The method which was



*Edward I. Berry, direct.*

practicable, as we thought, was to have the county improve that road, that being a county road, with state aid, and the question under discussion was whether the Public Service officials would not consent that if it were done in that way it would be deemed to meet the requirements of section 6 so far as they were concerned.

- 10 Q What conclusion did you and Mr. Burleigh reach upon the occasion of that interview? A At none of the interviews did we reach any conclusion. We knew about as much when we came out as when we went in, but Mr. Burleigh suggested that we get together and talk the matter over with Mr. Bergen who, I understand, is general counsel of the Public Service, and Judge Armstrong, at their office in Newark, and he suggested that he would make an appointment when he would be there. He had one day a week when he was sure to be at his office in Newark, I believe, and he said he would arrange for an appointment the following week. He attempted to arrange for that appointment, but owing to the absence of Judge Armstrong—or Mr. Bergen—he was unable to do it, and an appointment was made, I think, two weeks following that, at which time Mayor McAllister and myself went to Newark.

- 20 Q In your talk with Mr. Burleigh that you had in Camden before you went to Newark, was there anything said about what portion of the road through Merchantville the county was willing to construct? A We understood that the county or the state, I think the county, had a rule that they would not improve beyond sixteen feet of any road.

- 30 Q Was that matter discussed between you and Mr. Burleigh? A Oh, yes, that matter was discussed and was known to Mr. Burleigh.

Q Was there anything said between you and Mr. Burleigh as to whether or not the county would pave any portion of the road occupied by the tracks of the Railway Company? A The county would not do that. All these matters were matters of discussion between us at many conferences, not only one, but many.

- 40 Q Now, will you please tell us what happened on the 15th of November, 1915, when you and Mr. McAllister, representing the borough, went to Newark to have the interview with Mr. Burleigh, Judge Armstrong and Mr. Bergen? A We went to Newark on the 9 o'clock train, got there a little after eleven



*Edward I. Berry, direct.*

and went to Mr. Burleigh's office in what I understand is the Public Service Building in Newark. Mr. Burleigh got into communication with Mr. Bergen's office by telephone, and for some reason Mr. Bergen could not see us at once, so we waited in Mr. Burleigh's office for some time until word finally came down that Mr. Bergen could see us. Mr. Burleigh, Mayor McAllister and myself then went to Mr. Bergen's office and were introduced to Mr. Bergen. Mr. Burleigh then explained in considerable detail the situation as we had talked it over among ourselves.

Q What did he say about the situation, about the difficulties of the situation, if any, and the part that the county would take in the construction of the road, if any? A Well, he said, as I have already detailed in our discussions, that this was a county road, of course, that the county would only improve sixteen, feet, that they wouldn't improve any part of the space between the rails and tracks, that under the franchise granted the Public Service they would be liable to pave the portion between the rails and tracks and three feet on each side only in case the balance of the work—in case a pavement from curb to curb was laid at the direction and expense of the borough, that the borough did not feel that it could do that or that it was not practicable to do so, and he had suggested that Mayor McAllister and myself come up and have a conference with Mr. Bergen and Judge Armstrong to see if some method could not be arrived at by which the work could be proceeded with, that the matter was at a point where that was the only thing which was holding it up. Mr. Burleigh also said he was very much interested in Merchantville, lived there many years, and he was very anxious to see the street improved.

Q Was there anything said by Mr. Burleigh with reference to the action the borough had taken in conjunction with the county? A Mr. Burleigh said, as I recall it, that the county and borough had practically gotten together, that the only thing which would prevent the prosecution of the work was this difficulty with section 6 of the ordinance.

*The Court.* Did Mr. Burleigh at that time know that the contract would have to be made by the county and carried out through the county if carried out at all?

*The Witness.* He knew that was the method which was proposed to do it.



*Edward I. Berry, direct.*

Q That had been told again and talked over? A That had been a matter of discussion for some time.

10 Q What was said, if anything, or what was suggested, if anything, as a means by which the difficulty could be overcome so that the work could go ahead and still there would be no interference so far as the paving obligations of the Public Service were concerned? A I don't know that I exactly understand that question. There was a suggestion made at this conference—Judge Armstrong, I believe, stated that the Public Service  
20 wanted to help us out, they were interested in, of course, the prosperity of the towns they served, they wanted to help the borough along, it was a good thing to have the street improved, and they realized we couldn't do the work ourselves, and I think Mayor McAllister had suggested—well, we had thought it possible we could have the work done ourselves giving the contract ourselves and then secure legislation by which we could have a certain amount rebated by the state and county. Judge Armstrong remarked, well, we wouldn't get very far on that. Is that the point you wish to ask about?

Q Was there anything said at that conference with reference to what portion of the work would be let by contract by the borough and what portion by the county? A As I recall it, the idea was, the discussion was, that the work that we claimed the Public Service was liable to do would be let by us and the balance of the work would be let by the county. That is my  
30 impression; I can't say positively about that.

Q Well, now, as a result of the talk you had and the explanations made by Mr. Burleigh, what occurred? A Well, I might say further, there was some suggestion that the Public Service desire a modification of the paving there, so that they could have granite blocks laid between the rails, or on each side of the rail. They said it made a very much better road from their point of view, and we said we had no objection to that, and about that time was lunch time and we all went upstairs and got a very good dinner, came down later, to Judge Armstrong's office this time,  
40 and Judge Armstrong dictated the agreement with some suggestions from Mayor McAllister and myself.

Q When you came to the last paragraph of the agreement—I show you Exhibit P. 5— A Yes, sir.

Q At whose suggestion was that? A That was put in at my suggestion.



*Edward I. Berry, cross.*

Q What did you tell Judge Armstrong with relation to it at that time? A The agreement stopped right at the end of the "two rows of Standard Granite blocks," and I said to Judge Armstrong, "I wish you would add a clause to that agreement that when this paving is done, as it is proposed to be done, that it shall be considered to have been done in accordance with Section 6 of the ordinance." Judge Armstrong said, "That isn't necessary; the paper shows on its face just precisely what it is intended to do." And I said, "Well, if it isn't necessary I don't think it will do any harm to add it," and Judge Armstrong then added that clause, dictating it to his stenographer.

10

Q Was there anything said on that occasion prior to the time of the dictation of the agreement, or while it was being dictated, with reference to the means by which State aid could be obtained? A Prior to the agreement being dictated we are talking about it. It was discussed that the State aid could only be obtained if the road were built by the county under the existing law.

20

*The Court.* Was the first paving east of Centre street paid for by the company?

*Mr. Starr.* Yes.

*The Court.* And it was done in the same manner as the remaining portion?

*The Witness.* Precisely, no change whatever.

*Cross examination by Mr. Armstrong.*

30

Q In all your conversations with Mr. Burleigh, he expressed his anxiety, because he was a large property owner? A I don't know that he expressed it in that way. He was a large property holder. He said that he was anxious to have it done, and I always understood I was dealing with him as an officer of the Public Service and not as a private citizen.

Q He referred you each time, that is, referred the matter each time to the Public Service officials in Newark? A I can't answer as to that, I don't think we ever got any decisive word from Mr. Burleigh on any occasion.

40

Q Didn't he say he should confer with the Public Service people in Newark at practically each interview you had with him? A I know at some interviews he said he would take it up. I don't know that that was so at each interview.



*Edward I. Berry, cross.*

Q Pursuant to what was said there, you went over to Newark to the office of the Public Service Railway to bring the thing, if possible, to a conclusion? A Pursuant to the arrangement made by Mr. Burleigh that we should come over there.

10 Q And when you went over there after the interviews you speak of and the discussion of the various matters, this agreement of November 14th, this memorandum of November 15th, 1915, was drawn and executed by the officers there, wasn't it? A It was dictated by you to your stenographer. We waited until she transcribed it, and then, as I recall, it was executed and handed to us.

Q Do you remember who was called in as to the method of paving, about the block and so on? A Who was called into our conference?

Q Yes. A I don't recall, Judge.

20 Q There was a discussion with several different individuals during the progress of your talk, wasn't there? A I think, as a matter of fact, some engineer or some plans were produced, something of that sort, but I am not clear about that.

Q The method of how, you are not clear, that the method of how the work by contract, and so on was to be done was discussed then, are you? A I think I can say that I am pretty clear on that.

Q Well, as a matter of fact, it was not finally determined how that was to be done at this time? A You mean in regard to—

30 Q The method of doing the thing. A By state and county aid, oh, yes.

Q Yes, they were to be aided by the state and county, but the method by which the work was to be done was being discussed there, that is, when the legislation was referred to, wasn't it, as a possibility? A That was merely suggested as a possible means which we had previously considered, yes, sir.

40 Q Now, during all your interviews, the discussion as to the limit of liability of the Public Service Railway Company was claimed to be Centre street, wasn't it? A I think yes—well, I won't say during all our interviews because at first I understood Mr. Burleigh to claim there was no liability there at all, and at our discussion in your office you conceded that the company or whichever one was liable—that liability existed for the portion east of Centre street, I will put it.



*William F. McAllister, direct.*

Q And no liability west of Centre? A That was your contention.

Q And that has been continuously the contention? A As I understand it.

Q And that was expressed in the memorandum itself? A Yes, sir.

Q And as a matter of fact the other money has been paid? A A voucher has been paid which purports to be for that paving.

Q Now, you were present the last time this matter was before the Court? A Yes, sir.

Q When the method of how this work was to be done was revealed by the contracts here? A Yes, sir.

Q And you heard what was said then and the objection made at that time, did you? A I did.

WILLIAM F. McALLISTER, sworn.

*By Mr. Starr.*

Q Mr. McAllister, in November, 1915, were you the Mayor of— A I was.

Q Of Merchantville? A I was.

Q Prior to that time had you had any conference with Mr. Burleigh with reference to the improvement at Merchantville and the method to be employed in doing it? A I was talking to him a number of times on the street cars going to and from Camden, and he attended one session of the Borough Council while the matter was under discussion.

Q What was the subject generally, so far as the details were concerned, between you and Mr. Burleigh? A The type of paving to be laid and the method by which the improvements could be accomplished.

Q Was there anything said between you and him with relation to the difficulties which existed by reason of the paving obligation under the ordinance of 1900?

*Mr. Armstrong.* May we, if your Honor please, make a general objection to this testimony?

*The Court.* Yes, Judge, but there may be some of it admissible and some not, as I said before. Perhaps it is better that you object specifically if there is anything you think you ought to object to.



*William F. McAllister, direct.*

*Mr. Armstrong.* I object to that as incompetent and immaterial, and ask for an exception.

(Which exception is hereby allowed and sealed accordingly.)

(SEAL)

10

*Mr. Armstrong.* Possibly I ought to say as it now appears by the testimony, so far as Mr. Burleigh was concerned with the plaintiff's testimony, he referred the matter to the other officials than himself of the Public Service Railway Company in Newark, and in accordance with that testimony both this witness and the preceding one went to Newark to settle the matter, and these preliminary discussions, therefore, are, on that ground, incompetent.

20

*The Court.* I am not admitting them for the purpose of affecting the contract, nor necessarily for the purpose of clarifying it, but I think it is clearly admissible as to what was in the minds of the parties as to the method of performance, and that Mr. Burleigh was acquainted with that proposed method as an officer of the company.

30

A There was a general discussion with regard to the improvement being done in accordance with the section 6 of the ordinance of 1900 which required the borough to do it when the improvement was brought about. Mr. Burleigh was familiar with that. It was discussed at the meeting of councils which he attended.

Q Now, after the borough had adopted the resolution which is introduced in evidence, in the month of May, 1915, and the action which the county took upon that resolution in the month of June, 1915, did you talk to Mr. Burleigh about the matter before you went to Newark? A I talked with him at the meeting of council which he attended, and I think on two occasions.

40

*The Court.* That is the meeting at which this memorandum was sought to be introduced, and which I didn't think was competent?

*Mr. Starr.* That preceded the meeting. That was in 1914. That seems to have been earlier. I am speaking now between the months of June, 1915, and the month of November, 1915, before you went to Newark.



*William F. McAllister, direct.*

*The Witness.* I discussed it with Mr. Burleigh shortly before going to Newark. I can't exactly fix the time, but it is within a month or six weeks.

Q Well, now, what was said then between you and Mr. Burleigh with regard to the paving situation?

*Mr. Armstrong.* Same objection. 10

(Objection overruled.)

*Mr. Armstrong.* Exception.

(Which exception is hereby allowed and sealed accordingly.)

(SEAL)

A Mr. Burleigh was insisting upon granite blocks being laid between the rails and between the tracks, and on the outside of the rails which made a rough surface pavement to which the people objected. That was one of his contentions and we had several talks on that. The ordinance— 20

*The Court.* Judge Starr, I don't really think it is helpful to introduce all these detailed conversations. The important thing is whether Mr. Burleigh had cognizance of the proposed method.

Q Well, did Mr. Burleigh know, from your conversations with him the method which was proposed by the two resolutions the borough and the county to improve the road. 30

*The Court.* That is, had you talked with him about it?

*Mr. Armstrong.* Objection.

(Objection overruled.)

*Mr. Armstrong.* Exception.

(Which exception is hereby allowed and sealed accordingly.)

(SEAL)

A That was a matter of discussion between us, and he was familiar with that situation. 40

Q Now, you went to Newark with Mr. Berry? A I did.

Q Won't you tell what happened?

*The Court.* Are you going to dispute Mr. Berry's testimony as to what happened at Newark?



*William F. McAllister, cross—re-direct.*

*Mr. Armstrong.* No.

*The Court.* Then it will not be necessary to go into that.

10 Q In that conference was anything said with reference to the obligation which the borough would assume for that portion of the paving contracted for by the county? A Mr. Burleigh made the remark that the Borough of Merchantville is not going to do this paving; it will be done by the county and state and the borough is contributing only a small portion.

Q Was that portion mentioned? A Ten per cent.

Q That was said at the conference, was it? A Conference at Newark.

20 Q Did Mr. Burleigh at that interview say anything about the care of the road after it was improved? A That was in the granite block contention. The maintenance on the Public Service would be much greater if a smooth asphaltum surface was laid next to the rails and he insisted upon the granite blocks.

*Cross examination by Mr. Armstrong.*

Q All the time the matter of this discussion and contention between you and Mr. Burleigh was as to any liability west of Centre street, wasn't it? A That point was raised afterwards.

Q After when? A Well, there had been several discussions and the disclaiming of liability west of Centre street was not brought up at first.

30 Q When it was first brought up they said there was no liability for any? A That came up at a later conference.

(Question repeated.)

A The first time I talked with Mr. Burleigh he did not bring that matter up. That may have been brought up with Mr. Berry.

Q That was the discussion at Newark, wasn't it? A At Newark.

Q When you saw the Public Service officials there? A That was incorporated in the agreement.

40 *Re-direct examination by Mr. Starr.*

Q At Newark, when you had the conference, was anything said by Mr. Burleigh or Mr. Berry or yourself as to what portion of the road would be built by contract with the borough? A Well, there was no contract by the borough unless the Public



*William F. McAllister, re-cross.*

Service failed to carry out its obligation as stipulated in the ordinance of 1900. They were required to do that paving.

Q And in the event of their not doing the paving, the contract was to be let by whom? A It is incorporated in the franchise of 1900.

Q By the Borough of Merchantville? 10

*The Court.* That simply follows the lines of the early ordinance, doesn't it?

*The Witness.* Yes, sir.

*Re-cross examination by Mr. Armstrong.*

Q I think this has been offered, but I want to be sure that it has. I show you paper dated April 15, 1916, Public Service Railway Company, by R. E. Danforth, General Manager, and ask you whether or not that was received by the Borough of Merchantville? 20

(Examining counsel hands paper to witness.)

A To the best of my recollection, that was received, but I would have to refer to the minutes of council.

Q Something to that effect was received? A Something to that effect.

Q It was after the receipt of that you made the contract and did the work? A That is my recollection.

Q After this notice was received, all that you did was done after that notice was received? A That is my recollection. 30

*Mr. Armstrong.* I offer that.

(Said paper marked Exhibit D. 1, 3/29/19.)

*Mr. Starr.* Now, won't you produce, Judge, the notice served on you, dated March 22, 1916? I offer in evidence the notice that was served upon the two companies which brought forth the protest which has just been introduced in evidence.

(Said paper marked Exhibit P. 18, 3/29/19.) 40

*Mr. Starr.* Judge, will you agree that Merchantville and Camden are not contiguous, that Pensauken Township intervenes?

*Mr. Armstrong.* If that is a fact.



*William F. McAllister, re-cross.*

*The Court.* There is no doubt about the fact that a small portion of Pensauken Township comes in between.

*Mr. Starr.* I think that is our case.

10 *Mr. Armstrong.* I called on you for the production of any ordinance providing for the paving of this highway at the last hearing, and there was no ordinance.

*Mr. Starr.* No ordinance, as I understand it, passed by Merchantville, specifically authorizing the paving.

*Mr. Armstrong.* That, if your Honor remembers appeared at the close of the plaintiff's case, and that was one of the grounds of the motion I made.

20 *The Court.* There were two objections made before. One of them was under the original ordinance the company was not obligated as to this portion, and the other was that the contract—the work—was not carried out in accordance with the agreement. It that right?

30 *Mr. Armstrong.* I then renew my motion that I made, and I thought I had it also on the ground that this work was not authorized or done as required by law, so far as paving is concerned by the Borough of Merchantville, no ordinance as the Borough Act requires having been passed and no steps taken by which either of these defendants could be charged. I renew the motion as to the Camden and Suburban, because clearly nothing purports to have been done in the manner required by the ordinance of 1900. The evidence is that—

*The Court.* I suppose the other side won't contend that the Camden and Suburban is liable under this agreement?

*Mr. Starr.* No, we don't make any such contention. The Camden and Suburban is out of it entirely under the agreement of November 15th.

40 *Mr. Armstrong.* The provision as to all east of Centre street, as I understand, the cost there is not in controversy, but it is the interpretation of whatever obligation under the law, under the ordinance, and under this modification made by the Public Service Railway Company, may apply as to the track west of Centre street. The objections as to the legality of the



*William F. McAllister, re-cross.*

preliminary work apply, of course, to that. As a matter of fact, this was undertaken to be done in a most amicable way, and immediately after the contract was let, I believe, certainly before the work was more than commenced, the suit was immediately entered and discontinued. I have learned since that was done for some bond purpose, I don't know what, then this suit was brought on this other, and we paid, the Public Service paid, all east of Centre street, with some complaint that a suit should have been brought under all the circumstances until they had an opportunity—no demand was ever made on the Public Service for the payment of any of this money. 10

*Mr. Starr.* Have you any other testimony, Judge?

*Mr. Armstrong.* No.

BOTH SIDES REST. 20

30

40



*Requests to Find—Camden and Suburban Railway Company.*

**REQUESTS TO FIND.**

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

10

BOROUGH OF MERCHANTVILLE,

*Plaintiff,*

*vs.*

CAMDEN & SUBURBAN RAILWAY COMPANY  
and PUBLIC SERVICE RAILWAY COMPANY,  
*Defendants.*

*Action at Law.*

*Requests to Find.*

20

The defendant, Camden and Suburban Railway Company requests the Court to make the following findings:

1. The defendant, Camden and Suburban Railway Company under the facts not disputed in this case is not liable to the plaintiff for the sum for which suit is brought, or any other sum.

2. There is no liability of defendant Camden and Suburban Railway Company for any paving for which suit is brought in this case, by ordinance, contract, or otherwise.

30 3. The plaintiff has failed to show any legal liability of the Camden and Suburban Railway Company in this suit to warrant any recovery against it.

4. Any sum for which the defendant, Camden and Suburban Railway Company might have been liable in this suit has been fully paid and satisfied to the plaintiff.

E. A. ARMSTRONG,

*Attorney for Defendant, C. & S. R. C.*

40



*Requests to Find—Public Service Railway Company.*

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

BOROUGH OF MERCHANTVILLE,

*Plaintiff,*

*vs.*

CAMDEN & SUBURBAN RAILWAY COMPANY  
and PUBLIC SERVICE RAILWAY COMPANY,  
*Defendants.*

*Action at Law.*

*Requests to Find.*

10

The defendant, Public Service Railway Company, requests the Court to make the following findings:

1. The defendant, Public Service Railway Company under the facts not disputed in this case is not liable to the plaintiff for the sum for which suit is brought, or any other sum. 20

2. There is no liability of defendant, Public Service Railway Company, for any paving for which suit is brought in this case, by ordinance, contract or otherwise.

3. The plaintiff has failed to show any legal liability of the Public Service Railway Company in this suit to warrant any recovery against it.

4. Any sum for which the defendant, Public Service Railway Company might have been liable in this suit has been fully paid and satisfied to the plaintiff. 30

5. The plaintiff has no lawful claim upon the defendant, Public Service Railway Company, by any ordinance, contract or otherwise, for any paving on so-called Maple avenue, Merchantville, west of Center street.

6. The plaintiff was without lawful authority to do the paving on so-called Maple avenue, in Merchantville, and cannot recover for any cost therefor in this suit.

7. The plaintiff was without lawful authority to make and enter into the contract to do paving on so-called Maple avenue, Merchantville, the same being a county road. 40

8. The plaintiff did no paving in the manner or of the description referred to in the agreement set out in the complaint bearing date November 15th, 1915.



*Requests to Find—Public Service Railway Company.*

9. The plaintiff has failed to take necessary steps provided and required by law to do any paving on so-called Maple avenue, in Merchantville, and is not entitled to a recovery in this suit.

10 10. The paving on so-called Maple avenue, Merchantville, for which this suit was brought is not such paving, nor done at the cost, in the manner and under the direction to make liability under the ordinance referred to in the complaint in this case of December 18th, 1900.

11. The paving on so-called Maple avenue, Merchantville, for which this suit was brought is not such paving, nor done at the cost, in the manner and under the direction to make liability under the contract or agreement dated November 15th, 1915.

20 12. The obligation, if any, as to paving by the defendant, Public Service Railway Company is limited to that portion of the street railway tracks on so-called Maple avenue, Merchantville, east from the west line of Center street.

13. The borough was without authority to make any grant for a street railway to Camden and Suburban Railway Company west from Center street on so-called Maple avenue, and any attempted grant is void.

14. There is no consideration for the promise to pay for any paving of Maple avenue west from Center street.

30 15. No paving so far as applies to the space between the rails and for the limited space outside the rails as to the north track can in this suit render defendant liable.

FRANK BERGEN,  
*Attorney for Defendant, P. S. R. C.*



*Opinion.***OPINION.****NEW JERSEY SUPREME COURT.**

BOROUGH OF MERCHANTVILLE,

*vs.*CAMDEN & SUBURBAN RAILWAY CO., AND  
PUBLIC SERVICE RAILWAY CO.

10

LLOYD, J.

The present litigation involves the liability of the defendant, Public Service Railway Co., to pay for certain street paving done in and along its railway tracks within the borough limits of Merchantville. The claim of the borough rests on an ordinance of its Council, passed December 18, 1900, and duly accepted by the Camden & Suburban Co. (whose rights and obligations subsequently passed by lease to the Public Service Railway Co.) and an agreement between the borough and the Public Service Co., dated November 15, 1915. The Camden & Suburban Co. was not a party to the agreement, and as to it a non-suit will be entered.

20

In 1892 the Camden Horse R. R. Co. had located and was operating a single track road with turnouts in Merchantville as far as Centre street. On May 1st, 1896, the Camden Horse R. R. Co. leased all its properties to the Camden & Suburban Railway Co. Early in 1900 the Camden & Suburban Railway Co. presented its formal petition to the borough council for leave to double track this road, and also to extend the whole line to the eastern borough limits. The result was the passage and acceptance of the ordinance above recited.

30

Section six of this ordinance provides for paving by the Company between the rails and between the tracks and for three feet outside the tracks on either side. This appears to have been complied with. Then follows the pertinent and important provision as follows: "And whenever after five years from the passage of this ordinance such remaining sections of the Moorestown Pike or Maple avenue not required by this section to be paved by the said The Camden & Suburban Railway Co. shall be paved under the direction and at the expense of the borough from the curb on each side to within three feet of the outermost

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*Opinion.*

10 rails with any improved pavement the said company shall within sixty days after notice by said council, pave between the tracks and between the rails of said railway and three feet on the outside of both the north and south tracks with such other improved pavement as said borough shall direct, and shall keep the same in repair under the direction of said borough council, and that in case said railway company shall fail to comply with said notice the said paving may be done by the said borough council as aforesaid at the expense of said company."

That this ordinance was adopted at the instance and on the petition of the company's predecessor in title, that it was solemnly accepted and acted on by use of the privileges it contains is not open to question.

20 The paving involved was not done in strict accordance with the provisions of the ordinance, and hence the agreement of November 15, 1915 was entered into to meet this situation. When the paving was completed the Public Service Co. paid the portion east of Centre street in Merchantville, but contests its obligation to pay for that portion west of Centre street on various grounds.

30 Taking these objections up in logical sequence, it is first claimed that the agreement, which was executed November 15, 1915, and which provided that whereas Merchantville proposes to have Maple avenue paved its entire length, having the assistance of county and state, both having made appropriations toward the same, over which they have certain supervision, there had been certain controversies between the borough and company as to the latter's paving obligations, to facilitate the improvement both borough and company agreed that so far as the paving is concerned from Centre street eastward there is no dispute as to the obligation of the company to repave under the ordinance of 1900, and such paving is to be considered to be done at the expense of the borough. As to the portion west of Centre street a like stipulation is made, with the reservation that the company denies its obligation under the ordinance. Then follows this language: "When such paving, done in the manner aforesaid, is completed, it shall be deemed to have been done in accordance with the requirements named in Section 6 of the aforesaid ordinance."

40

The portions of the street not falling to the Company were then paved partly at the expense of the borough, of the state and of the county, and the part falling to the company was paved



*Opinion.*

by the borough and the bill for the amount expended under the ordinance by the borough for repaving between and along the tracks was forwarded to the company with the result above stated.

The agreement of November 15, 1915, was the result of long negotiation between the borough and the company. Both apparently were anxious to facilitate the general improvement of the borough streets, both were familiar with the negotiations with the state and county, and the company officials were fully cognizant of the precise method of handling the improvement. That the borough was the moving party and was the instrumental cause within the meaning of the agreement I have no doubt, and all the correspondence and conversations show that it was so regarded by both parties. Payment was actually made for a portion and the dispute of liability for the present paving rested wholly on other grounds. I am, therefore, constrained to hold that the agreement was actually carried out as contemplated by the parties.

It is now basically contended:

1. That the Camden Horse Railroad Company had the right to lay the second track without the borough's consent.

It is unnecessary to review the legislation under which the Camden Co. operated and built its single track to Centre street. The decision of the Court of Errors and Appeals in *W. J. Traction Co. v. Camden Horse R. R. Co.*, 8 Dick. 171, expressly holds that the Camden Co. as to inlaid trackage was subject to the Act of 1893, 144, which requires the consent of the municipality to the laying of a railroad track or extension of the same.

2. That the borough had no jurisdiction over the turnpike.

This claim I find not to be true in fact. The road was not only a turnpike, but a highway as well. It is true the turnpike company had the right to charge tolls, but it did not own the soil, nor could it deprive the borough of its police powers over the same. The evidence discloses that these powers were exercised in many ways, policing, fire protection, lighting, sidewalks, etc.

3. The turnpike company never gave consent to the Camden & Suburban to construct a street railway west of Centre street, and without that consent the borough was powerless to give its consent, also that a railroad track being already in the street the consent to the Camden & Suburban was void.



*Opinion.*

10 It does not seem to me important that the turnpike company never gave its consent to the Camden & Suburban for a track west of Centre street. It is not here objecting, its rights can be adjudicated when they properly arise. I am quite certain, however, that if its consent be necessary such consent should be inferred from the five years' acquiescence. That a second track could not be authorized while the Camden Horse Company had its track in the street might be important if that company were now objecting and had not leased all its properties, road beds, etc., to the Camden & Suburban. It is not objecting, but I apprehend is enjoying through the lease an added security for its rentals.

4. The second track west of Centre street was laid under the authority of the Camden Horse charter, although the work was done by the Camden & Suburban.

20 I find no evidence that the second track west of Centre street was laid under the authority of the charter of the Camden Horse Co. The exact contrary appears. The evidence clearly shows that the Camden & Suburban petitioned for leave to construct this track itself; that the council consented that it should, and that, as it admitted, that company actually did construct the whole addition and extension after the most formal acceptance of the council's ordinance.

5. That the laying of new track was not the construction of a new railway.

30 This may be true, but the language of the Act of 1893 prohibits the laying of any track or tracks without municipal consent.

6. That the Act of March 16, 1893, excluded turnpikes from the operation of the prior Act of 1893, and that inasmuch as a track had already been laid municipal consent was not necessary to the laying of the second track.

40 The difficulty with this proposition is with its premise. The second section of the Act of March 16, 1893, expressly requires municipal consent of a borough, *inter alia*, before the construction within its corporate limits. That such consent is not essential to the laying of a second track is equivalent to saying that a specific grant to lay one track can be made the basis for multiplying such tracks indefinitely.



*Opinion.*

7. That the borough never had jurisdiction over the turnpike prior to its taking over by the county, and was thereafter prohibited by law from exercising jurisdiction.

I do not find the law to be so. The cases in this state establish that turnpikes are highways in every sense, subject only to the right to collect tolls. Their status is learnedly discussed in the case of *State-Parker v. New Brunswick*, 3 Vr. 549. The doctrine runs through many decisions since.

10

Looking at the question broadly it seems to me to be the purpose of our legislation that street railways shall not locate themselves on the streets, roads or highways of our municipalities without the sanction of the body having generally charge of such streets, roads and highways. The defendant's predecessor in title recognized this principle and conformed its conduct accordingly.

There is, I think, another difficulty at the foundation of most of the defences set up in this case. At best, the company's rights without municipal sanction were doubtful. In that situation it entered into solemn contract for the privileges it obtained (and it admittedly obtained some) to conform its paving to that of the borough. Having accepted the ordinance in its entirety it must have accepted *cum onere*. It cannot accept the benefits and reject the burdens. That such is the rule of law is not only established in our cases, but even the portions which are *ultra vires* the borough, the company is debarred from denying. *Rutherford v. Hudson River R. R.* 73 L, 227. Any other doctrine would offend all rules of honesty and fair dealing. In this case the company applied for the privileges in their entirety; it accepted them in their entirety; it entered upon the highway and constructed its roadway; it kept all the portions falling to it in paving repair; it recognized and paid for the portion east of Centre street when the new paving was laid. I think it cannot now escape the solemn obligations its contract imposed.

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That the conditions in the ordinance were reasonable I find as a fact, and there being no legal defence to the paving charge a verdict will be rendered for the proper charges therefor. I do not, however, think the interest on a municipal loan can properly be assessed against the company. The same is true of extra supervision charges. The borough had its engineer and it was in duty bound to use his services. There is no proof that extra engi-

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*Exhibit P. 1.*

neering services were required to secure performance of the paving contract.

10 A verdict will, therefore, be rendered in favor of the plaintiff and against the Public Service Railway Company for the actual cost of paving, with interest from the time it was done. As neither is entirely clear in the evidence, I will ask counsel to stipulate the sum. Failing this, I will extract it as best I can.

**EXHIBITS.****Exhibit P. 1.**

ORDINANCE PASSED DECEMBER 18, 1900.

20 Title.

AN ORDINANCE granting consent and permission to the Camden and Suburban Railway Company to build, construct, maintain and operate a street railway for passenger and mail service, on the public road known as the Moorestown and Camden Turnpike Road, and also as Maple avenue, in the Borough of Merchantville and County of Camden.

Preamble.

30

WHEREAS, The Camden and Suburban Railway Company, a corporation and body politic, duly incorporated under the 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, made due application to the Borough Council of the Borough of Merchantville for permission to build, construct, operate and maintain a street railway on the public road known as the Moorestown and Camden Turnpike Road and also as Maple avenue, in the Borough of Merchantville and County of Camden, which petition was in due form of law, and accompanied by maps and descriptions of the route of the said railway, showing also the

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*Exhibit P. 1.*

proposed location of the rails and tracks, and the location of the poles in accordance with the route of the said railway, duly filed with the Secretary of State at Trenton, and said Borough Council having designated the time and place when and where it would consider such application and petition, and hear all persons interested for and against the same, and having designated as required by law, the time and place where notices thereof should be published and posted, and due proof being made before the Borough Council of such being published and posted, and proof having also been made that consent of the owners in writing having been given of more than one-half of the amount in lineal feet of property fronting on the Moorestown and Camden Turnpike Road, also known as Maple avenue, through which it is desired to construct said railway, which consents have been executed and acknowledged as are deeds entitled to be recorded, and had been and now are filed with the Clerk of the Borough Council; all of which matters and things have been duly and regularly proved by testimony before the Borough Council at a hearing upon such matters and the hearing having been fixed for this time, and all persons for and against the same having been heard and the matters considered, and the Borough Council being of the opinion that the prayer of the said petition should be granted, subject, however, to the restrictions and conditions herein contained, therefore:

Section 1. Be it ordained by the Borough Council of the Borough of Merchantville, in the County of Camden, that consent and permission is hereby granted to the Camden and Suburban Railway Company to build, construct, maintain and operate a double-track street railway for passenger and mail service only, on the public road known as the Moorestown and Camden Turnpike Road and also as Maple avenue, in the Borough of Merchantville, in the County of Camden, and State of New Jer-

Double track.

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*Exhibit P. 1.*

Gauge.                   sey. It shall be a double-track street railway, of the gauge of five feet, and the middle line of each track is described as follows: That is to say—

## THE NORTH TRACK—

Route.

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BEGINNING in the Turnpike Road known as the Moorestown and Camden Turnpike Road, and known also as Maple avenue, at a point distant five feet northwardly from the centre line of said road and opposite the west line of Centre street and extending thence north eighty-nine degrees ten minutes east twenty-one hundred and twenty-seven and three-tenths feet to the division line between the Borough of Merchantville and the Township of Pensauken.

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## THE SOUTH TRACK—

BEGINNING in the Turnpike Road known as the Moorestown and Camden Turnpike Road and also known as Maple avenue, at a point distant five feet southwardly from the centre line of said road and opposite the division line between the Borough of Merchantville and the Township of Pensauken, and extending thence north eighty-eight degrees and fifty-five minutes east forty-two hundred and twenty-four and seven-tenths feet to a point opposite Park avenue, thence north eighty-nine degrees ten minutes east twenty-six hundred and twenty-nine and eight-tenths feet to the division line between the Borough of Merchantville and the Township of Pensauken.

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Also the following cross-over:

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Beginning at a point in the middle line of the south track ten feet west of the west curb line of Cove Road, thence by a curve to the right, radius one hundred feet, twenty-two and four-tenths feet to a point; thence by a curve to the left, radius three hundred feet, sixty-seven and two-tenths feet to a point in the middle line of the north track.

Grade.

Crossovers, etc.

The said tracks are to be laid at the grade as established on said public road and to have a cross-over, or cross-overs; which said track with the



*Exhibit P. 1.*

curves, connections and cross-over or cross-overs and the location of the track and poles are particularly located and described on the map attached to the before mentioned petition, which is hereby referred to and made part of this ordinance.

Passenger and  
mail service  
only.

Section 2. And be it ordained that the railway herein authorized to be laid by The Camden and Suburban Railway Company, shall be used and operated for no other purpose than for the carrying of passengers and the United States mails. 10

Motive power.

Rails.

Poles.

Wires.

Section 3. And be it ordained that the motive power to be used on said railway shall be horse power and electricity; that the rails to be used shall be standard girder rails; that the trolley line poles shall be octagonal sawed poles, and shall be neatly and properly dressed and painted and so maintained to the satisfaction of said Borough Council; and that the trolley wire and the span wire shall be at least eighteen feet above the surface of the street and said poles are truly located at the points designated on the map hereinbefore referred to. 20

Equipment.

Operation.

Section 4. And be it ordained that the said railway shall be equipped with cars of modern pattern and each car shall be equipped with properly constructed headlights, fenders or guards, and heaters during the winter months, and that each car when run separately and each combination of cars when trailers are used, shall have thereon an agent, in addition to the person in charge of the motor power, to assist in the control and care of the car and passengers. 30

Construction  
regulations.

Section 5. And be it ordained that the said The Camden and Suburban Railway Company shall provide necessary barricades, red lanterns and other safety appliances that may be necessary to warn persons of danger while it shall be engaged in the construction or repair of its railway or other work required to be performed in carrying out the pro- 40



*Exhibit P. 1.*

visions of this ordinance, and shall be liable for all damages that may occur as the result of the negligence, construction and operation of the said railway or other work, and shall save the Borough of Merchantville harmless from all damages or demand that may arise therefrom.

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Paving.

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Section 6. And be it ordained that immediately upon the building and construction of said railway, said The Camden and Suburban Railway, shall pave between the rails and between the tracks with rubble-pavement on said road, with what additional stones may be necessary, which additional stones are to be of the best quality, and said pavement to be laid so as to make the nearest square and even-faced pavement that can be made from said stones; and that immediately, and for a distance of three feet on the outside of both the North and South tracks, said The Camden and Suburban Railway Company shall construct a macadam pavement of not less than eight inches in depth, the lower course to be of rubble and the upper course to be of trap rock to be thoroughly compacted, bound and finished in a manner similar to the sixteen feet of trap rock macadam pavement as hereinafter provided, which said rubble and macadam pavement (referring to the three-foot pavement on the outermost side of each track), the said Company is at all times to keep in first-class repair and condition satisfactory to Borough Council, and whenever, after five years from the passage of this ordinance, such remaining sections of the Moorestown Pike or Maple avenue not required by this section to be paved by said The Camden and Suburban Railway Company shall be paved under the direction and at the expense of said Borough from the curb on each side to within three feet of the outermost rails with any other improved pavement, the said Company shall within sixty days after notice by said Council, pave between the tracks and between the rails of said railway, and three



*Exhibit P. 1.*

feet on the outside of both North and South tracks with such other improved pavement as said Borough Council shall direct, and shall keep the same in repair under the direction of said Borough Council, and that in case said Railway Company shall fail to comply with such notice, the said paving may be done by said Borough Council as aforesaid at the expense of said Company.

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*Maintenance.*

Section 7. And be it ordained that the said The Camden and Suburban Railway Company shall at all times hereafter, keep the said railway in good condition and repair, so that the said railway shall be a good roadway for the use of vehicles and the public generally.

*Paving.*

Section 8. And be it ordained that immediately upon the building and construction of said railway the said The Camden and Suburban Railway Company shall itself lay, or cause to be laid, on either side the said tracks and at a distance of three feet from each outermost rail, a trap rock macadam pavement in accordance with the following specifications: That is to say:

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*Specifications.*

(a) The said macadam pavement is to be constructed not less than eight inches in depth, to be sixteen feet wide, and where possible to be divided into two strips eight feet in width on each side of said tracks.

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(b) The roadway to the widths designated to be excavated and built to a curvature to conform to the final surface of the road when finished. Any surplus material not needed for embankments or grades to be removed from said road.

(c) When excavation and embankments have been brought to a proper depth below the intended surface of the roadway, the same shall be rolled with a ten (10) ton roller until thoroughly solid, and when necessary water shall be applied in advance of the roller. If any depressions form under such rolling, owing to improper material or vegetable matter, the same shall be removed and good

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*Exhibit P. 1.*

earth substituted and the whole re-rolled until thoroughly solid and to the proper grade.

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(d) After the roadbed has been formed and rolled as above specified, the first layer of broken stone, consisting of three inch and two one-half inch, shall be deposited in a uniform layer and rolled to four inches, and rolled repeatedly by a ten-ton roller and thoroughly compacted. After the first rolling water to be applied in advance of the rolling.

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(e) On the first and second courses of stone a sufficient quantity of stone screenings shall be spread in a uniform layer, as a binder, and the rolling continued until the stones cease to sink or creep in front of the roller; water to be applied in advance of the roller.

(f) The second course of broken stone shall consist of one and one-half inch stone. This course to be spread in a uniform layer and rolled to a depth of two and one-half inches, and rolled repeatedly with a ten (10) ton roller until thoroughly compacted; water to be applied in advance of the roller.

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(g) When the two courses are thoroughly rolled, a coat of three-quarters inch stone and screenings is to be spread of sufficient thickness to make a smooth and uniform surface to the road, and then rolled to a depth of one and one-half inches, and repeatedly rolled until the road becomes thoroughly consolidated, hard and smooth.

(h) Any depressions formed during the rolling, or from any cause, are to be filled with three-quarters inch stone and screenings, and the roadway brought to the proper grade.

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(i) All stone to be as nearly cubical as possible, free from screenings, earth and other objectionable substances, of uniform size and the same kind and quality. The stone to be of the best trap rock, free from loam and clay.

(j) The construction of the macadam pavement as above specified to be subject to the inspection



*Exhibit P. 1.*

of, and satisfactory to, the Committee on Streets and Highways of said Borough Council, or to an inspector appointed by said Borough Council.

Fares.

Section 9. And be it ordained that but one fare, not exceeding five cents, shall be charged by the said The Camden and Suburban Railway Company for a single passenger upon the cars of the said Company, within the limits of the said Borough, and that the speed of the said cars shall not exceed eight miles per hour.

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Speed.

Sprinkling.

Section 10. And be it ordained that between May 15th the track shall be sprinkled by the said The Camden and Suburban Railway Company at such times and as often as may be necessary to lay the dust along said road.

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Headway.

Section 11. And be it ordained that a daily service shall be maintained, and all cars entering the Borough from the west shall run to the easternmost boundary of said Borough, excepting such cars as are, from accidental causes, prevented from running to the eastern boundary as aforesaid.

Poles and wires.

Section 12. And be it ordained that the stringing of wires and erecting of poles shall be done with as little interference to shade trees as possible, and that all wires shall be strung and feed wires insulated and maintained to the satisfaction of the Highway Committee of said Borough Council.

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Construction and operation regulations.

Section 13. And be it ordained that the railway tracks to be laid under the provisions of this ordinance by the said The Camden and Suburban Railway Company shall not be laid on said Moorestown Pike or Maple avenue to approach within fifty feet the easterly boundary of the said Borough of Merchantville, nor shall the said railway company run any of its cars over the railway authorized by this ordinance to be laid, until the said Company shall have received from the Highway Committee of said Borough an approval in writing

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*Exhibit P. 1.*

signed by the members of said Highway Committee, approving the building of the macadam pavement in accordance with the specification set forth in this ordinance, and of the compliance by said company with the stipulations and conditions of this ordinance.

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Right to cross  
tracks by other  
companies.

Section 14. And be it ordained that any other Company authorized by said Borough Council to lay its tracks on any roads, streets or highways of the said Borough, shall have the right to cross the tracks of the said The Camden and Suburban Railway Company at any angle of not less than fifty degrees, provided such other Company shall pay the expense of the construction and maintenance of such crossing.

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Acceptance.

Section 15. And be it ordained that no poles, tracks, wires or other appliances for the operation of said railway shall be erected until said The Camden and Suburban Railway Company shall file with the clerk of the Borough of Merchantville, a written acceptance of this ordinance, which said acceptance shall be filed as aforesaid within thirty days after the date of the passage of this ordinance, and all work on said roadway, including the laying of tracks and the construction of roadbeds as herein specified shall be completed on or before the first day of October, Nineteen Hundred and One.

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Time for com-  
pletion.

Binding  
successors.

Section 16. And be it ordained that the provisions of this ordinance, so far as they relate to the construction and operation of the said street railway, and of said rubble and macadam road, shall be binding not only upon the said The Camden and Suburban Railway Company, but upon its successors and assigns, and any other person or company operating thereunder.

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Expenses.

Section 17. And be it ordained that the said The Camden and Suburban Railway Company shall



*Exhibits P. 2, P. 3. P. 4.*

pay all the expense of the repairing, printing and publication of this ordinance.

Date effective.

Section 18. And be it ordained that this ordinance shall take effect immediately upon its acceptance by The Camden and Suburban Railway Company.

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Passed at a regular meeting of the Borough Council of the Borough of Merchantville held December 18th, A. D. 1900.

F. S. WALTON,  
*Mayor.*

Attest:

W. B. STUART,  
*Borough Clerk.*

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#### **Exhibit P. 2.**

Lease of Camden & Suburban Railway Company to South Jersey Gas, Electric & Traction Company, dated May 2, 1904, and recorded in the Register's Office of Camden County in Book 285 of Deeds, p. 41, &c. Lease for 999 years.

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#### **Exhibit P. 3.**

Assignment of lease by South Jersey Gas, Electric & Traction Company to Public Service Corporation of New Jersey, dated December 22, 1905, and recorded in Book 301, p. 283, Camden County Register's Office.

#### **Exhibit P. 4.**

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Assignment of lease, Public Service Corporation of New Jersey to Public Service Railway Company, dated September 24, 1907, and recorded in the register's office of Camden County in Book 319 of Deeds, p. 646.



*Exhibit P. 5.*

**Exhibit P. 5.**

(Agreement of Nov. 15, 1915.)

10 The Borough of Merchantville proposes to have Maple avenue  
through its entire length paved with an improved pavement,  
having the assistance therein of the state and county, which both  
make appropriations toward the same, and over which they have  
certain supervision. The Public Service Railway Company, as  
lessee, occupies a portion of said avenue with its double track  
street railway. There have been certain controversies between  
the borough and the company as to the company's paving obli-  
gations. To facilitate the improvement proposed, both borough  
and company have agreed that so far as the pavement is con-  
cerned from Centre street eastward, there is no dispute as to  
20 the obligation of the company to repave as is required in the  
ordinance granting consent to the Camden and Suburban Railway  
Company, dated December 18, 1900, known as the 1900 ordinance.  
Such paving is to be considered as done under the direction and  
at the expense of borough from curb to curb, notwithstanding  
the above recited facts. While the paving is to be from curb to  
curb, a portion of that only is to be solely at the expense of the  
borough, the remaining portion being contributed to by state and  
county as aforesaid.

30 So far as that portion of the paving west from Centre street,  
dispute is still open as to the obligation of the company. The  
borough, in the same manner and assisted in the same way, pro-  
poses to do this paving also and claims a liability on the part  
of the company to contribute thereto. It is agreed that the same  
stipulation as to a recognition of the paving being under the  
direction and at the expense of the borough and from curb to curb  
shall apply also to this paving in any legal action which may be  
taken by the borough to enforce payment. In such paving the  
specifications are to be so drawn that on both sides of each rail  
in the tracks of railway there is to be laid two rows of standard  
granite blocks.

40 When such paving, done in the manner aforesaid, is completed,  
it shall be deemed to have been done in accordance with the re-  
quirements named in Sect. 6 of the aforesaid ordinance.

Dated November 15, 1915.

THE BOROUGH OF MERCHANTVILLE,

By W. F. McALLISTER,

(SEAL)

*Mayor.*



*Exhibit P. 6.*

Attest:

JOHN W. MICKLE,  
*Clerk.*

PUBLIC SERVICE RAILWAY COMPANY,

By J. J. BURLEIGH,  
*Vice President.*

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(SEAL)

Attest:

E. W. HINE,  
*Secretary.*

**Exhibit P. 6.**

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Lease—Camden Horse Railroad Company to Camden & Suburban Railway Company, dated May 1, 1896, recorded in Register of Deeds Office of Camden County in Book 218 of Deeds, page 95 &c., for 99 years, and afterwards extended to 999 years. It provides, among other things, as follows:

ELEVENTH. Whenever the said Suburban Company shall desire any extension of the railway so as aforesaid demised or any branches or double tracking thereof, or the building or construction of any lines within the present corporate limits of the City of Camden, or the extension of tracks on the River road in the Town of Stockton from State street to Cooper avenue, it shall and will give the Camden Company written notification thereof, whereupon it shall be the duty of the Camden Company to exercise its corporate rights and privileges and to apply for and ask to obtain such additional grants and rights as may be necessary for such work and make and execute such papers as may be necessary on account thereof, all however at the expense of the said Suburban Company; and such building and construction shall be done by said Suburban Company; that the roads, lines, extensions, branches and the like, shall be and become the property of the Camden Company, but demised in and by this present indenture however. Immediately upon the completion of any such work which are new lines or extensions, it shall be the duty of the

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*Exhibit D. 4.*

10 said parties to immediately fix and determine the true cost thereof and the said Camden Company shall thereupon make and execute some paper or instrument in writing as may be advised to be proper in the premises, whereby there shall be certified to the Suburban Company, its successors and assigns, that it, the said Camden Company, its successors and assign, shall and will, within two years after the termination of the term hereby granted or the sooner termination of this lease as herein provided, pay such cost thereof to the said Suburban Company, its successors and assigns, together with interest thereon from the date of such termination.

**Exhibit D. 4.**

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**ORDINANCE PASSED OCTOBER 6, 1896.**

Title.

AN ORDINANCE, granted permission and consent to the Camden Horse Railroad Company to construct, maintain and operate a street railroad upon Maple avenue or the Moorestown and Camden Turnpike Road in the Borough of Merchantville.

Preamble.

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WHEREAS, The Camden Horse Railroad Company, a corporation and body politic of the State of New Jersey, having applied to this Council for permission to build, construct, operate and maintain a street railroad on Maple avenue or the Moorestown and Camden Turnpike Road, in the Borough of Merchantville, by petition filed with the Borough Clerk, accompanied by a map and description of the route of the said railway, showing also the proposed location of rails and tracks and the location of poles, and having filed with the Clerk of this Council, the Borough Clerk of the Borough of Merchantville, the consent in writing of the owners of at least one-half in amount in lineal feet of property fronting on the said street or road, through and upon which permis-

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*Exhibit D. 4.*

sion to construct, operate and maintain its street railroad is desired, which consents are executed and acknowledged as are deeds entitled to be recorded, all of which had been duly proven before this Council, and it having also been proved before this Council that the notice has been duly given in manner required by law and this Council by posting and publishing the same, of the hearing of this petition and application, and that this is the time which has been fixed for the hearing of all persons for and against the same, and all such persons having been heard and Council being of the opinion that such application should be granted, therefore be it ordained as follows: 10

Route.

SECTION 1. BE IT ORDAINED BY THE COMMON COUNCIL OF THE BOROUGH OF MERCHANTVILLE, that the consent and permission is hereby given to the said Camden Horse Railroad Company for the building and constructing of its railway in and upon Maple avenue or the Moorestown and Camden Turnpike Road, from the line of division between the township of Pensauken and the Borough of Merchantville, parallel with the present tracks on said avenue or turnpike road: Thence eastward out the same to the line of Centre street in accordance with the map or plan on file with said petition, which is hereby made a part of this ordinance. The said railroad to be a single track of the gauge of five feet and to be so constructed that the middle line of the track herein authorized shall be five feet southward from the middle line of said turnpike road, giving a clear space of five feet between the two tracks, so that when the tracks hereby authorized are constructed and completed, the said The Camden Horse Railroad Company, may then operate and maintain a double-track street railway, from the limits of the Borough of Merchantville eastward on said Maple avenue, or said Turnpike Road, to Centre street, and that the railroad com- 20 30 40

Single track.

Gauge.

Location  
of track.

Double track.



*Exhibit D. 7.*

### Paving.

pany shall put a substantial road on the outside of each outer rail to the curb line, the same to be put down subject to the approval of the Highway Committee of the Borough, and to be kept in repair for all time.

10 Expenses.

Section 2. AND BE IT FURTHER ORDAINED THAT THE SAID CAMDEN HORSE RAILROAD COMPANY shall pay the expenses of the publication of this ordinance.

Repealer.

Section 3. AND BE IT FURTHER ORDAINED THAT ALL ordinances and parts of ordinances and consents inconsistent herewith, be and the same are hereby repealed, revoked and annulled, and that this ordinance shall take effect immediately.

Date effective.

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Passed at a regular meeting of the Common Council held October 6th, A. D. 1896.

J. E. VANKIRK,  
*Burgess.*

Attested:

W. B. STEWART,  
*Clerk of Council.*

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## Exhibit D. 7.

THIS AGREEMENT made this thirtieth day of March in the year of our Lord one thousand eight hundred and ninety-two between THE MOORESTOWN AND CAMDEN TURNPIKE COMPANY, a corporation and body politic of the State of New Jersey, hereinafter called the Turnpike Company, of the first part, and THE CAMDEN HORSE RAILROAD COMPANY, a like corporation, hereinafter called the Railroad Company, of the second part.

WHEREAS, the said Railroad Company under and by virtue of its charter is desirous of extending its line over the road and highway of the said Turnpike Company, continuing the same



*Exhibit D. 7.*

from its present terminus on said Turnpike, to the road leading from the turnpike road to the Pensauken Station on the Camden and Burlington County Railroad, or some portion of that distance, and desires the said Turnpike Company to assent and consent thereto; and the said Turnpike Company for and in consideration of the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, and of the covenants and agreements hereinafter mentioned and contained on the part of the said Railroad Company to be kept and performed having agreed to suffer and permit the said Railroad Company to so extend their lines over the said road or turnpike, and to use and operate the same under and subject to the agreements, restrictions, requirements and limitations hereinafter contained. 10

NOW THIS AGREEMENT WITNESSETH, that the said parties hereto, in consideration of the premises, have mutually bargained, covenanted and agreed and by these presents do mutually bargain covenant and agree to and with each other, as follows, viz.: 20

FIRST. That the said Railroad Company shall and may forthwith enter upon the Turnpike Road of the said Turnpike Company and construct thereon a single track railroad of the same width, and similar character and description as to rail and construction (so far as the surface is concerned, excepting that the rail may be heavier, if it is so desired), as the present railroad now constructed on the said Turnpike and on Market street in the City of Camden; and that the said track of the said road shall be constructed on the north side of the said Turnpike Road so that the middle line thereof shall be five feet distant from the middle line of the Turnpike Road. The said road shall have no more than three turnouts to the mile, which shall go to the south of said road. The said tracks are to be laid down and constructed and also to be paved by the said Railroad Company and in such a manner as to make a smooth and even surface with the said Turnpike Road, so that persons with their teams, wagon, carts and carriages can drive on and off and over and along the same with ease and convenience; and said tracks and the rails thereof and the pavement inside the track and between the rails and in the turnouts at all times to be kept in such proper order and condition as aforesaid, to the entire satisfaction of the said Turnpike Company. And if the said tracks or the pavement as aforesaid shall not be kept in good order and satisfactory condition as aforesaid, that then the said 30 40



*Exhibit D. 6.*

Turnpike Company may give written notice to the said Railroad Company of its failure to keep said tracks or said pavement in good and satisfactory condition specifying in what particulars the same is not satisfactory and requiring said Railroad Company forthwith to repair the same; and in case the said Railroad Company shall not within five days commence such repair and  
 10 diligently prosecute the same, the said Turnpike Company shall and may have the option to make such repair at the cost and expense of the said Railroad Company; or to stop the cars from running on the said road until such repair is made and to remove the said railway tracks or any part thereof; provided that the rails in no case shall be removed until after five days from the time notice shall be given by the Turnpike Company for stopping the running of the said cars on said road, because of the neglect and failure of the Railroad Company, after the notice  
 20 aforesaid, to commence and prosecute the repairs required by the aforesaid notice.

**Exhibit D 6.**

This supplemental agreement made this Sixteenth Day of June in the year of our Lord one thousand eight hundred and ninety-six, between THE MOORESTOWN AND CAMDEN  
 30 TURNPIKE COMPANY, a corporation created under and by virtue of an act of the legislature of the State of New Jersey, hereafter called the Turnpike Company, party of the first part, and THE CAMDEN HORSE RAILROAD COMPANY, a like corporation, hereafter called the Railroad Company, party of the second part, WITNESSETH:

WHEREAS, in and by a certain agreement between the parties hereto, bearing date on the thirtieth day of March, A. D. eighteen hundred and ninety-two, the party of the first part hereto did agree to permit the party of the second part hereto to construct and extend its street railroad on and along the  
 40 Turnpike road of the said party of the first part, from its junction with the Westfield and Camden Turnpike to the road leading from its said Turnpike road to the Pensauken Station of the Camden and Burlington County Railroad, subject to certain agreements, restrictions, requirements and limitations therein contained.



*Exhibit D. 6.*

AND WHEREAS, the said Railroad Company has constructed and operated under the said agreement a single track railroad on and along the said turnpike road from the Westfield and Camden Turnpike junction to Centre street in the Borough of Merchantville.

AND WHEREAS, the said Railroad Company is now desirous of modifying the said agreement so as to permit the said Railroad Company to construct and operate a double track railroad on and along the said Turnpike Road, instead and in place of the single track railroad heretofore constructed and operated by it, pursuant to the said agreement.

NOW THIS AGREEMENT WITNESSETH, that the parties hereto in consideration of the premises, have mutually bargained, covenanted and agreed and by these presents do mutually bargain, covenant and agree to and with each other, as follows viz:—

FIRST. That for and in consideration of the sum of one dollar to it in hand paid, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the said Turnpike Company consents that the said Railroad Company shall and may forthwith enter upon the Turnpike Road of the said Turnpike Company, and construct thereon a double track railroad, from the said junction with the Westfield Turnpike to the present terminus of the single track road at Centre street in the Borough of Merchantville, in the place and stead of the single track road now constructed thereon, in manner following, that is to say: The tracks of the said railroad shall be constructed in the middle of the said Turnpike Road, and there shall be a distance of five feet between the inside rails of the two tracks; each track shall be so constructed as to leave full five feet in the clear, between the flanges of the rails, so as to properly accommodate an ordinary farm wagon, and the rails used in constructing the said tracks shall be rails known as the "Standard girder rails" and shall have at least two and seven-eighths inches of flanges or surface, for wagons to run upon; excepting and provided, however, that where the said railroad passes through or by the toll-gate or turnpike of the said Turnpike Company, there shall be but one track so located as to conform to the location of the toll-house and convenience of the toll-gatherer. And the said party of the second part agrees to put down and construct the said railroad tracks in such a manner as to make a smooth and even

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*Exhibit D. 6.*

surface with the said Turnpike Road, so that persons with their teams, wagons, carts and carriages can drive on and over the same with ease and convenience, and to pave and keep paved with assorted rouble pavement, the space between the tracks and the spaces between the rails of the two tracks, and three feet  
10 in addition on either side along the outside rails of the two tracks, making in all a total width of twenty-one feet of stone pavement, and to keep the said tracks and the rails thereof, and the pavement inside the tracks, and between the rails and outside the track as aforesaid, at all times, in good and proper order and condition to the entire satisfaction of the said Turnpike Company. And if the said tracks or the pavement as aforesaid, shall not be kept in good order and satisfactory condition as aforesaid, that then the said Turnpike Company may give  
20 notice to the said Railroad Company, in writing, of its failure to keep said tracks or said pavement in good and satisfactory condition, specifying in what particulars the same are not satisfactory, and requiring said Railroad Company forthwith to repair the same; and in case the said Railroad Company shall not, within five days, commence such repair, and diligently prosecute the same, the said Turnpike Company shall and may make such repair at the cost and expense of the said Railroad Company, or stop the cars from running on the said road until such repair is made; and may also remove the said railway  
30 track or any part thereof. Provided that the rails in no case shall be removed until after five days from the time notice shall be given by the said Turnpike Company, for stopping the running of said cars on said road because of the neglect and failure of the said Railroad Company, after the notice aforesaid, to commence and prosecute the repairs required by the aforesaid notice.



*Exhibit D. 7.***Exhibit D. 7 (a).**

THIS AGREEMENT, made this tenth day of November, A. D. nineteen hundred (1900), between THE MOORESTOWN AND CAMDEN TURNPIKE COMPANY, a corporation created under and by virtue of an act of the Legislature of the State of New Jersey, hereinafter called the Turnpike Company, party of the first part, and the CAMDEN AND SUBURBAN RAILWAY COMPANY, also a corporation created and existing under and by virtue of the laws of the State of New Jersey, hereinafter called the Railway Company, party of the second part, WITNESSETH: 10

WHEREAS, the said Railway Company is now managing and operating all that certain line of trolley road, heretofore built and constructed by The Camden Horse Railroad Company, on and along the line of the Turnpike Road of the said Turnpike Company, from the bridge over Cooper's Creek to Centre street, in the Borough of Merchantville. 20

AND WHEREAS, the said Railway Company is desirous of extending the said trolley line over and along the said Turnpike Road from said present terminus at Centre street, to Moorestown, in the County of Burlington, and desires the said Turnpike Company to assent and consent thereto; and the said Turnpike Company for and in consideration of the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, and of the covenants and agreements hereinafter mentioned and contained on the part of the said Railway Company, to be kept and performed, have agreed to suffer and permit the said Railway Company to extend the said trolley line, as hereinafter provided, and to use and operate the same under and subject to the agreements, restrictions, requirements and limitations hereinafter contained: 30

NOW THIS AGREEMENT WITNESSETH, that the said parties hereto in consideration of the premises, have mutually bargained, covenanted and agreed and by these presents do mutually bargain, covenant and agree to and with each other, as follows, viz: 40

The said Turnpike Company consents that the said Railway Company shall and may forthwith enter upon the Turnpike Road of the said Turnpike Company and construct thereon an extension of the aforesaid trolley road from the present terminus at Centre street in Merchantville, to Moorestown, in manner



*Exhibit D. 7.*

following, that is to say: From the present terminus at Centre street to the Cove Road the tracks of the said trolley road shall be constructed in the middle of the said Turnpike Road and there shall be a distance of five feet between the inside rails of the two tracks, each track shall be so constructed as to leave full five feet in the clear, between the flanges of the rails, so as to properly accommodate an ordinary farm wagon. The rails used in constructing the said tracks shall be rails known as "seven inch girder rails, long lengths." From the Cove road to Moorestown the said Railway Company shall and may construct a single track trolley road of the same width and similar character and description as to rail and construction as the aforesaid double track road from Centre street to Cove road, above specified. The said trolley road from Cove road to Moorestown shall be built and constructed on and along the north side of the said turnpike road, so that the rail or track nearest to the center of the road shall be eleven feet in the clear from the said center of the Turnpike Road. The measurements are to be made from the center of the said Turnpike Road as it is now located or actually exists.

## REPEALING ORDINANCE OF 1900.

Ord. #87.

Presented December 17, 1900.

30 Passed December 18, 1900.

An Ordinance to repeal "An ordinance granting permission and consent to the Camden Horse Railroad Company, to construct, maintain and operate a street railroad upon Maple street, or the Moorestown and Camden Turnpike Road in the Borough of Merchantville."

40 Sec. 1. Be it ordained by the Council of the Borough of Merchantville, that "An ordinance granting permission and consent to the Camden Horse Railroad Company, to construct, maintain and operate a street railroad upon Maple street, or the Moorestown and Camden Turnpike Road in the Borough of Merchantville, "passed at a regular meeting of the Common Council of the Borough of Merchantville, held October 6th, 1896, be and the same is hereby repealed, revoked and annulled and that this ordinance shall take effect immediately:



*Exhibit P. 1.*

Passed at a regular meeting of the Borough Council of the  
Borough of Merchantville held December 18, 1900.

F. S. WALTON,  
*Mayor.*

Attest:

W. B. STEWART,  
*Clerk.*

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**Exhibit P. 1.****EXTRACT MINUTES OF BOROUGH COUNCIL**

June 5, 1914.

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Mr. VanKirk then offered the following:

RESOLVED that it is the sense of Borough Council after considering the Borough Engineers estimate of cost; that Maple avenue from Borough line to Borough line should be improved with a modern improved pavement consisting of a concrete road with or without a bitumen top and that the Borough hereby authorizes said improvement and agrees to pay for a five foot strip from Borough line to Borough line and also to pay for 10% of such portion as may be constructed by the State and County, said pavement not to cost in excess of One Dollar and Fifty Cents (\$1.50) per square yard.

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Approved,

(signed) ALFRED K. BENNETT,  
*Mayor.*

Attest:

W. F. McALLISTER,  
Boro. Clerk.

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*Exhibits P. 2, P. 3.*

**Exhibit P. 2.**

Oct. 27, 1914.

10 The members of Council and Mr. Burleigh had an informal discussion in regard to improvement of Maple avenue. As the Public Service Railway Co., lessee of the Camden and Suburban Railway Company is required under their franchise to do a certain portion of the paving the ordinance granting the franchise was read and discussed. Mr. Burleigh was under the impression that the paving obligations of the Company were less than the ordinance called for, but after several sections were read agreed to take the matter up with the officials of his company and communicate with Council at an early date.

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**Exhibit P. 3.**

July 14, 1914.

Dear Mr. Mayor:

Replying to your inquiry. The paving obligation of the Railway in Merchantville is under two ordinances,—really, I suppose, under three. The first two are to the Camden Horse Railroad Co.: One dated April 5, 1892. Under that a single track of railroad was laid and the Company had power to go to the borough limit, but did not and stopped at Centre street. The only provision as to paving there is:

30 “Sec. 1. \* \* \* and that the street and avenues of said Borough along which the said railroad track shall be laid shall be placed in as good repair and condition after the completion of said tracks as the same now are.

The second ordinance, dated October 6, 1896, allowed the Camden Horse Railroad Company to double track as far as Centre street, and that contained the following provision:

40 “Sec. 1. \* \* \* and that the railroad company shall put a substantial road on the outside of each outer rail to the curb line, the same to be put down subject to the approval of the Highway Committee of the Borough, and to be kept in repair for all time.”



*Exhibit P. 3.*

The Third Ordinance was to the Camden and Suburban Railway Company, passed December 18, 1900, and the effective part of that ordinance is as follows:

"Section 6. And be it ordained that immediately upon the building and construction of said railway, said The Camden and Suburban Railway shall pave between the rails and between the tracks with rubble-pavement on said road, with what additional stones may be necessary, which additional stones are to be of the best quality, and said pavement to be laid so as to make the nearest square and even-faced pavement that can be made from said stones; and that immediately, and for a distance of three feet on the outside of both and north and south tracks, said The Camden and Suburban Railway Company shall construct a macadam pavement of not less than eight inches in depth, the lower course to be of rubble and the upper course to be of trap rock to be thoroughly compacted, bound and finished in a manner similar to the sixteen feet of trap rock macadam pavement as hereinafter provided, which said rubble and macadam pavement (referring to the three-foot pavement on the outermost side of each track), the said Company is at all times to keep in first-class repair and condition satisfactory to the Borough Council, and whenever, after five years from the passage of this ordinance, such remaining sections of the Moorestown Pike or Maple avenue not required by this section to be paved by said The Camden and Suburban Railway Company shall be paved under the direction and at the expense of said borough from the curb on each side to within three feet of the outermost rails with any other improved pavement, the said Company shall within sixty days after notice by said Council, pave between the tracks and between the rails of said railway, and three feet on the outside of both North and South tracks with such other improved pavement as said Borough Council shall direct, and shall keep the same in repair under the direction of said Borough Council, and that in case said Railway Company shall fail to comply with such notice, the said paving may be done by said Borough Council as aforesaid at the expense of said Company."

Our requirements, therefore, are such as are laid in the second ordinance of the Camden Horse Railroad Company for all that part of Maple avenue west of Centre street, and on the Cam-



*Exhibit P. 4.*

den and Suburban Railway Company for all that part of Maple avenue lying east of Centre street.

Truly yours,

JOHN J. BURLEIGH,  
*Second Vice President.*

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HON. ALFRED H. BENNETT,  
Merchantville, N. J.

**Exhibit P. 4.**

Merchantville, N. J.,  
Oct. 15, 1914.

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The Public Service Railway Company,  
Mr. John J. Burleigh, Vice President,  
Camden, N. J.

Gentlemen:

In accordance with a resolution adopted by Borough Council I am directed to write to you concerning that section of the Moorestown & Camden Turnpike Road passing through Merchantville and known as Maple avenue and along which your tracks are laid.

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Arrangements are about completed for the permanent improvement of this roadway with an improved pavement, in the cost of which the State and County will share with the Borough. The present deplorable condition of this road calls for as early action as possible and the Borough Council is planning to have the work started as soon as practicable next Spring, and desires to know if the Public Service Railway Company is ready to adjust its tracks where they have been allowed to get away from the established grade, and also if the Company will pave its portion of the roadway or will agree to pay for its share of

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the improved pavement, viz: between the tracks and between the rails of said railway, and three feet on the outside of both north and south tracks from the Borough lien on the west to the Borough line on the east end of Maple avenue, which tracks were laid under an ordinance granting a franchise to the Cam-



*Exhibit P. 5.*

den and Suburban Railway Company and under which ordinance your Company is now operating.

As a pavement of this kind should be laid from the curb to the car track in one operation an assurance from you that you will do your part as indicated above will enable the Borough to proceed with the least possible delay.

Your early reply will be appreciated. The desirability of this improvement need hardly be mentioned; it means the building up of a splendid section of Camden County in which your Company is doing business.

Very respectfully yours,

W. F. McALLISTER,  
*Borough Clerk.*

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**Exhibit P. 5.**

October 26, 1914.

W. F. McAllister, Esq.,  
Borough Clerk of the Borough of Merchantville,  
Merchantville, New Jersey.

Dear Sir:

I have your favor under date of October 15th, 1914.

Public Service Railway Company, as lessee, on Maple avenue, in Merchantville, has two separate obligations: one that of the Camden Horse Railroad Company, extending from the western boundary line of the Borough to Center street, in which there is no repaving obligation; and the other that of the Camden & Suburban Railway Company extending from Center street eastward to the Borough line, in which there is a repaving obligation.

This Company will, of course, conform to the ordinance requirements of those two companies. You apparently refer only to the Camden & Suburban Railway Company obligation. We will, of course, see that our tracks are properly maintained at the established grade. I apprehend there will be no difficulty in having our Company agree to permit the Borough to do the work which the Company would be required to do and pay to the Borough the cost thereof. This, of course, would be sub-

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*Exhibit P. 6.*

ject to detailed negotiations. There is at present a very great money stringency which may be even worse next year, so that any contemplated improvements for that time must of course be subject to conditions at the time.

Truly yours,

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JOHN J. BURLEIGH,  
2nd Vice President.

**Exhibit P. 6.**

PUBLIC SERVICE RAILWAY CO.,  
Newark, N. J.,

20

November 6, 1914.

Office of the 2nd Vice Prest.  
Mr. W. F. McAllister,  
Borough Clerk,  
Merchantville, New Jersey.

Dear Sir:

30

Since my interview with the Borough Council relative to the repaving obligations resting upon this Company by reason of its lease of the Camden Horse Railroad and the Camden & Suburban Railway, I have had the several franchises carefully examined and enclose herewith a copy of the report made to me by the Franchise Bureau officials, confirmed by our Assistant General Counsel, which fully confirms my understanding of the situation as conveyed to you in my letter of October 26th, which letter I am returning herewith.

40

In connection with the inquiry of His Honor, The Mayor, as to the feature of Section 6 of the 1900 ordinance referring to the paving being done "at the expense of the Borough," you are advised that no advantage will be taken by this Company by reason of a division of your expense with the County and State.

This, I believe, covers the questions raised at the conference.

Truly yours,

J. J. BURLEIGH,  
2nd Vice President.



*Exhibit P. 6.*

Newark, N. J., Oct. 31, 1914.

To the Second Vice President:  
 Assistant General Counsel:

In the matter of street  
 railway franchises in  
 the Borough of Merchantville.

} REPORT.

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Ordinance passed April 5, 1892 (Vol. 3, p. 541) authorized The Camden Horse Railroad Company to erect poles, etc., and lay and operate street railroads in certain streets of the Borough with electric motors or horse power; one street of which was the Moorestown and Camden Turnpike and permission was given to lay and operate a street railroad with necessary turn-outs "from one limit to the other of said borough," provided "that the privileges of this ordinance shall be taken advantage of within six months from date, and a continuous daily service maintained over the whole route, and if the same or the service on any portion shall be discontinued for six months, then this ordinance so far as applies to the abandoned portion shall be considered void."

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Ordinance passed October 6, 1896 (Vol. 3, p. 543) granted permission and consent to The Camden Horse Railroad Company to construct, etc., a second track in the Turnpike from the westerly boundary line of the borough to Centre street, "so that when the tracks hereby authorized are constructed and completed, the said The Camden Horse Railroad Company, may then operate and maintain a double-track street railway, from the limits of the Borough of Merchantville eastward on said Maple avenue, or said Turnpike road, to Centre street." At the same time "all ordinances and parts of ordinances and consents inconsistent herewith," were repealed, revoked and annulled.

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\* \* \* \* \*

Ordinance passed December 18, 1900 (Vol. 3, p. 546) granted consent and permission to The Camden and Suburban Railway Company to construct, etc., a street railway in the Turnpike, being described as "a double-track street railway." However, each track is described separately, as follows: The North Track is described as beginning opposite the west line of Center street and extending thence northeastwardly to the division line be-

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*Exhibit P. 6.*

10    between the Borough of Merchantville and the Township of Pensauken. The South Track is described as extending from a point opposite the division line between the Borough of Merchantville and the Township of Pensauken and extending thence northeastwardly, in two courses, a distance of 6854.5' to the division line between the Borough of Merchantville and the Township of Pensauken. The ordinance also provides for the construction of one cross-over between the said north and south tracks.

\*   \*   \*   \*   \*   \*

The 1892 ordinance contains only a restoration paving obligation.

The 1896 ordinance contains only construction and maintenance paving obligations.

20    The 1900 ordinance contains construction, maintenance and repaving paving obligations, the repaving obligation reading as follows:

30    "Section 6. \* \* \* and whenever, after five years from the passage of this ordinance, such remaining sections of the Moorestown Pike or Maple avenue not required by this section to be paved by said The Camden and Suburban Railway Company shall be paved under the direction and at the expense of said Borough from the curb on each side to within three feet of the outermost rails with any other improved pavement, the said Company shall within sixty days after notice by said Council, pave between the tracks and between the rails of said railway, and three feet on the outside of both North and South tracks with such other improved pavement as said Borough Council shall direct, and shall keep the same in repair under the direction of said Borough Council, and that in case said Railway Company shall fail to comply with such notice, the said paving may be done by said Borough Council as aforesaid at the expense of said Company."

FRANCHISE BUREAU,  
By Chas. M. Breder, Engineer.



*Exhibit P. 7.*

**Exhibit P. 7.**

May 7, 1915.

After a thorough discussion of the proposition in which all the members present took part, Mr. Mosés introduced the following:

WHEREAS, the Stone Road Committee of the County Board of Freeholders have signified their intention of recommending to the Board of Freeholders at the next meeting to be held on May 12th, 1915, the improvement of the Moorestown and Camden Turnpike road, so called, which passes through Merchantville, and is there known as Maple avenue, and the said Stone Road Committee has asked the Borough Council of Merchantville the kind of road desired in Merchantville, and what action the Borough will take in regard to said improvement and what part of the expense the Borough will bear; therefore, be it

RESOLVED by the Council of the Borough of Merchantville that it is the sense of Borough Council that Maple avenue should be improved by laying a pavement consisting of a concrete base six inches deep composed of a mixture of the best materials in the proportion of one part Portland cement, three parts clean, sharp sand and five parts hard, broken stone; the said concrete base to have a rough surface by partly embedding one and one-half inch stone on the top before the cement has its initial set, said stone being for the purpose of bonding the upper bituminous concrete course. The concrete base to be covered with a course of bituminous concrete two and one-half inches deep thoroughly compacted, making a pavement of eight and one-half inches in depth when finished, said bituminous concrete to be composed of one inch stone thoroughly coated with standard Trinidad or Bermudez asphalt applied hot on the job, and the said bituminous concrete to be placed on the concrete base and rolled to a depth of two and one-half inches, and to present a true and even surface, to conform to the grades established. The surface then to be treated to a hot application of heavy Trinidad or Bermudez liquid asphalt, and a coating of clean three-eighths inch screenings sufficient to take up the surplus asphalt and to close the voids in the bituminous concrete and to present a smooth and even surface, rolled to the satisfaction of the authorities in charge when finished.



*Exhibit P. 7.*

BE IT FURTHER RESOLVED, that the Borough of Merchantville agrees to pay ten per cent. of the cost of constructing that portion of said improved pavement sixteen feet in width of the road aforesaid to be constructed by the State and County and also to pay the balance of cost of such additional paving necessary to carry said pavement from curb to curb as is not contributed by the State of New Jersey and by the Public Service Railway Company, lessees of the Camden and Suburban Railway Company under their franchise with the Borough of Merchantville. And the County shall assign to the Borough all its rights in said Road obtained from the Turnpike Company.

BE IT FURTHER RESOLVED, that this resolution is adopted in consideration of such pavement being laid at a grade to conform to grades established by the Borough for the purpose of properly taking away surface water, and that the entire width of said pavement shall be constructed under the supervision of the Borough Inspector, acting in conjunction with the County Engineer and State Inspector.

BE IT FURTHER RESOLVED, that upon the completion of said improvement as aforesaid, the Borough will agree to take over from the County said improved road and thereafter maintain it as a street of said Borough.

Approved,

W. F. McALLISTER,

*Mayor.*

Attest:

JNO. W. MICKLE,  
*Borough Clerk.*

Approved as to outline of specifications.

J. C. REMINGTON,

*Borough Eng.*

May 8th, 1915.



*Exhibit P. 8.*

Mr. Smith moved that the resolution be adopted subject to the approval of the specifications for said road by the Borough Engineer. Motion seconded by Mr. Powers and put to a vote. The Roll Call: Ayes, Messrs. Haig, Manypenny, Moses, Powers and Smith (5). Noes, none. It was then approved by the Mayer.

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On motion by Mr. Haig Council adjourned.

EDWARD I. BERRY,  
*Acting Borough Clerk.*

Date May 7, 1915.

**Exhibit P. 8.**

May 12, 1915.

20

Mr. Moses moved that minutes of special meeting held May 7th, 1915, be approved as read, being duly seconded, the motion was put by the chair and carried.

Owing to a request made by the Stone Road Committee of the Board of Freeholders, Mr. Haig moved that the resolution passed at special meeting held May 7th, 1915, regarding the improvement of Maple avenue be re-considered, motion seconded by Mr. Manypenny and carried. After careful discussion the following motion was made by Mr. Moses duly seconded and carried—That the Resolution aforesaid be amended as follows: On page 140, paragraph 2, 6th line, strike out the words “exclusive of that portion required to be paved by” and insert the words “and by” after New Jersey (6th line), so as to read “State of New Jersey and by the Public Service Railway Company, &c., and at the end of the paragraph, insert the words “and the County shall assign to the Borough all its rights in said Road obtained from the Turnpike Company” also strike out the 3rd paragraph entirely, and in the 4th paragraph, 5th line (page 140) strike out the words “Engineer and Inspectors,” and the words on the 6th line “and Inspectors of the County” and add the word “Inspector” after the word Borough on 5th line, and the word “County” before Engineer on the 6th line, and add the words “and State Inspector” after Engineer on 6th line, so that the last portion of paragraph shall read “Under

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*Exhibit P. 9.*

the supervision of the Borough Inspector acting in conjunction with the County Engineer and State Inspectors." On roll call the amendments were adopted unanimously, motion being made by Mr. Smith, seconded by Mr. Haig.

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**Exhibit P. 9.**

Camden, N. J., August 18, 1915.

Public Service Corporation,  
John J. Burleigh, Esq., 2nd Vice Pres.,  
Camden, N. J.

Dear Sir:

20 Sometime ago you had some correspondence with the Borough authorities of Merchantville relative to the repaving obligations of the Camden and Suburban Railway Company on Maple avenue, Merchantville, N. J. I have examined this correspondence and the ordinances under which the trolley tracks were placed on Maple Ave. and your letters of July 14th, 1914, to Mr. Bennett and of October 26, 1914, and November 6th, 1914, to Mr. McAllister. In this correspondence you take the position that the repaving obligations contained in the ordinance of December 18th, 1900, apply only to the portion of Maple Ave. east of Centre street, I think that a more careful examination of the ordinance of 1900 and consideration of the situation as it then existed will demon-  
30 strate that this position is entirely untenable.

When this ordinance was passed the situation at Merchantville was that the trolley company had under the franchise of 1892 placed a single track trolley line on the west end of Maple Ave. as far as Centre street. There had been passed an ordinance (Oct. 6, 1896) under which the trolley company could have double tracked its line through the borough. Evidently the paving obligations under this ordinance were unsatisfactory to the  
40 trolley company for nothing was done thereunder. In this situation on December 18, 1900, the accepted ordinance of 1896 was repealed at the request of the company and a new ordinance was passed under which another track was uthorized to the south of the single track then existing as far as Centre street and double tracks were authorized from Centre street to the east



*Exhibit P. 9.*

end of the town. This ordinance prescribed certain paving obligations which were that between the rails and tracks and for three feet outside thereof a rubble pavement was to be constructed and maintained at the expense of the trolley company and outside of the three feet a macadam pavement sixteen feet wide to be divided into two strips, eight feet in width, on each side of said tracks was to be constructed at the expense of the trolley company. In maintaining these paving obligations (see Sections 6 & 8 of the ordinance in question) no distinction is made between the new tracks authorized and the old single track existing, but the paving obligation refers only to "said tracks" and under this ordinance as a matter of fact, the trolley company did pave with rubble between the rails and between the tracks and for three feet outside thereof for the whole length of Maple Avenue within the borough and did lay macadam pavements eight feet wide on each side of the double tracks the whole length of the Borough. 10 20

I feel that this situation has been overlooked by you in your correspondence because it seems to me to be entirely inconsistent to now take a position with regard to a subsequent paving obligation which was not taken by your company at the time the ordinance in question was passed or the provisions of it first put in force. This seems so obvious to me that I am inclined to think that the exact situation existing at the time the ordinance of 1900 was passed and the precise terms thereof cannot have been properly called to your attention. I trust that you will again take the matter up and advise me whether or not you do not agree with my construction of your obligations. 30

Yours very truly,

E. I. BERRY.



*Exhibit P. 10.*

**Exhibit P. 10.**

**PUBLIC SERVICE RAILWAY CO.**

Newark, N. J., August 30, 1915.

10 Office of the  
2nd Vice President

Dear Sir:

I am familiar with the ordinance to which you refer but you have confused Camden Horse Railroad Company with Camden and Suburban Railway Company. The railroad from the westerly limits of the borough to Centre street, both tracks, belongs to Camden Horse Railroad Company and is subject to the obligations of that company.

Truly yours,

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J. J. BURLEIGH,  
*Second Vice President.*

EDWARD I. BERRY, Esq.,  
Counsellor-at-law,  
547 Federal Street,  
Camden, N. J.

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*Exhibit P. 11.*

**Exhibit P. 11.**

Solicitor Berry reported that he accompanied the Mayor to the offices of the Public Service Railway Co., at Newark, N. J., he submitted a memorandum executed by the officials of the above named Company for the consideration of the Borough Council, this memorandum was read, on motion by Mr. Haig, it was ordered to be received and spread upon the minutes: 10

**MEMORANDUM**

The Borough of Merchantville  
and  
Public Service Railway Company

Dated November 15, 1915.

The Borough of Merchantville proposes to have Maple avenue through its entire length paved with an improved pavement, having the assistance therein of the State and county, which both make appropriations toward the same and over which they have certain supervision. The Public Service Railway Company, as lessee, occupies a portion of said avenue with its double track street railway. There have been certain controversies between the borough and the company as to the company's paving obligations. To facilitate the improvement proposed, both borough and company have agreed that so far as the pavement is concerned from Centre street eastward, there is no dispute as to the obligation of the company to repave as is required in the ordinance granting consent to the Camden and Suburban Railway Company, dated December 18, 1900, known as the 1900 ordinance. Such paving is to be considered as done under the direction and at the expense of borough from curb to curb, notwithstanding the above recited facts. While the paving is to be from curb to curb, a portion of that only is to be solely at the expense of the borough, the remaining portion being contributed to by state and county as aforesaid. 20 30

So far as that portion of the paving west from Centre street, dispute is still open as to the obligation of the company. The borough, in the same manner and assisted in the same way, proposes to do this paving also and claims a liability on the part of the company to contribute thereto. It is agreed that 40



*Exhibit P. 11.*

10 the same stipulation as to a recognition of the paving being under the direction and at the expense of the borough and from curb to curb shall apply also to this paving in any legal action which may be taken by the borough to enforce payment. In such paving the specifications are to be so drawn that on both sides of each rail in the tracks of railway there is to be laid two rows of standard granite blocks.

When such paving, done in the manner aforesaid, is completed, it shall be deemed to have been done in accordance with the requirements named in Sec. 6 of the aforesaid ordinance.

Dated November 15, 1915.

THE BOROUGH OF MERCHANTVILLE,

By *W. F. McAllister, Mayor.*

(Borough Seal)

20 Attest:

JNO. W. MICKLE,  
*Clerk.*

PUBLIC SERVICE RAILWAY COMPANY,

By *J. J. Burleigh, Vice President.*

(Public Service Rail-  
way Company Seal)

30 Attest:

Signed but not legible.

*Secretary.*



*Exhibit P. 12.*

Mr. Smith offered the following resolution, which was seconded by Mr. Haig and on roll call unanimously adopted and approved by the Mayor—RESOLVED that the Mayor and Clerk be and are hereby authorized to assent to the memorandum of the Public Service Railway Co., annexed hereto, by executing the same on behalf of Borough.

Approved:

10

W. F. McALLISTER,  
*Mayor.*

Attest:

JNO. W. MICKLE,  
*Borough Clerk.*

Dated November 16th, 1915.

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**Exhibit P. 12.**

The following resolution was offered by Mr. Moses, seconded by Mr. Powers, on roll call same was unanimously adopted and approved by the Mayor:

RESOLVED, that the Borough Engineer be instructed to prepare specifications in conjunction with the Camden County Engineer for the Borough's share of the work of improving Maple avenue, and the Borough Clerk be and he is hereby authorized and directed to prepare notices that bids for said work will be received by the Borough Clerk until February 7th, 1916, at 10 o'clock A. M.; and said Clerk is further directed to publish said notices in at least two newspapers circulating in Camden County for at least two weeks before said date, and in such other papers or periodicals as he deems for the best interests of the Borough.

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Approved:

W. F. McALLISTER,  
*Mayor.*

40

Attest:

JNO. W. MICKLE,  
*Borough Clerk.*

Dated January 18, 1916.



*Exhibits P. 13, P. 14.*

**Exhibit P. 13.**

10 Mr. Moses offered the following resolution which was seconded by Mr. Manypenny and on roll call unanimously adopted and approved by the Mayor—RESOLVED that the specifications submitted by the Borough Engineer and the County Engineer for the paving between the rails and tracks and three feet on each side thereof of the street railway on Maple avenue be approved by Council and filed with the Borough Clerk.

Approved:

W. F. Mc ALLISTER,  
*Mayor.*

Attest:

20 JNO. W. MICKLE,  
*Borough Clerk.*

Dated January 24th, 1916.

**Exhibit P. 14.**

Camden County, N. J., April 5th, 1911.

To the Camden County Board of Chosen Freeholders:

Gentlemen:

30 I am instructed to submit to your Honorable Body the following action of the Borough Council of Merchantville:

RESOLVED, That the Board of Freeholders of the County of Camden be and they are hereby petitioned to purchase *to purchase* that portion of the Camden and Moorestown Turnpike lying within the County limits and to improve the roadbed thereof and that the Borough of Merchantville hereby pledges and agrees to pay one-tenth of the cost of said improvement to that portion of said Turnpike lying within the limits of said Borough of Merchantville.

40 Passed unanimously.

(Seal)

Attest:

W. B. STEWART,  
*Borough Clerk.*



*Exhibit P. 15.*

**Exhibit P. 15.**

Camden County, N. J., April 5th, 1911.

To the Board of Freeholders of Camden County.

Gentlemen:

I am directed to submit the following: (SEAL)

10

RESOLVED, that the Clerk be and is hereby directed to inform the Board of Chosen Freeholders of the County of Camden that the citizens of this Borough are demanding of Council immediate relief from inconveniences due to the intolerable condition of the Moorestown Turnpike.

That Council feels some action must be taken and being informed that the Board of Freeholders has the matter under consideration we respectfully ask if the Board will give assurance of prompt action that we in turn may assure the citizens that the Freeholders recognize the justice of their complaint and that the Board is actively looking after the interest of the taxpayers of their district in regard to this matter.

20

Carried. (SEAL)

Attest:

W. B. STEWART,  
*Borough Clerk.*

30

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*Exhibits P. 16, P. 17, P. 17a.*

**Exhibit P. 16.**

Camden, N. J., May 4, 1911.

The County Board of Chosen Freeholders.

Gentlemen:

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The following action by the Borough Council of Merchantville was passed unanimously on May 2/11.

RESOLVED, that the Board of Freeholders be requested to purchase and improve the Camden and Moorestown Turnpike, and that the Borough Council hereby pledges itself to be responsible for one-tenth of the purchase price of that portion of said Turnpike lying within the Borough limits as well as one-tenth of the cost of improving the same.

Passed unanimously.

20

Attest:

W. B. STEWART,  
*Borough Clerk.*

**Exhibit P. 17.**

30

Contract between County of Camden and contractors for improvement of road to Merchantville, and specifications, dated March 16, 1916.

**Exhibit P. 17 (a).**

To Camden and Suburban Railway Company and Public Service Railway Company, Lessee, or Whom It May Concern:

40

You are hereby notified that the Moorestown Pike or Maple avenue throughout the extent of said road in the Borough of Merchantville is about to be paved under the direction and at the expense of said Borough from the curb on each side to within three feet of the outermost rails of the tracks used by the Public Service Railway Company, lessee of Camden and Suburban Railway Company, on said road, with a pavement consisting



*Exhibit P. 17a.*

of a concrete base and interlocking stone, with a bituminous concrete top, as per specifications, a copy of which is served herewith, and that in accordance with the provisions of an ordinance of the Borough of Merchantville entitled "An ordinance granting consent and permission to the Camden and Suburban Railway Company to build, construct, maintain and operate a street railway for passengers and mail service, on the public road known as the Moorestown and Camden Turnpike Road, and also as Maple avenue, in the Borough of Merchantville and County of Camden," passed December 18, 1900, and the agreement dated November 15, 1915, between said Borough and your companies, you will be required within sixty days from this notice to pave between the tracks and between the rails of said railway, and three feet on the outside of both north and south tracks with a pavement of the same composition and laid under the said specifications as refer to the pavement on the remaining portions of said street and to keep the same in repair under the direction of Borough Council, and that in case either or both of your companies shall fail to comply with this notice, such paving shall be done by the Borough Council at the expense of your companies or such one as may be liable therefor.

Dated, February 1st, 1916.

BOROUGH OF MERCHANTVILLE,

By W. F. McALLISTER,

*Mayor.* 30

Attest:

(SEAL)

JNO. W. MICKLE,  
*Secretary.*

It is admitted that the above notice, with a copy of specifications, was this day served on Public Service Railway Company.

Dated, February 3, 1916.

E. A. ARMSTRONG,  
*Ass't Gen. Counsel.* 40



*Exhibit P. 18.*

**Exhibit P. 18.**

To Camden and Suburban Railway Company and Public Service  
Railway Company, Lessee, or Whom It May Concern:

In pursuance of a resolution of the Council of the Borough of  
10 Merchantville adopted this day,

You are hereby notified that the Borough of Merchantville  
has advertised for bids for the paving between the rails and  
tracks and three feet on each side of said tracks on Maple ave-  
nue, Merchantville, New Jersey, with a pavement consisting of  
a concrete base and interlocking stone with a bitumionous  
concrete top as per specifications heretofore served upon you;  
that in pursuance of said advertisement bids for said work were  
received on Monday, March 6, 1916; that Kelly-McFeeley Com-  
20 pany was the lowest bidder for said work, their bid being as  
follows: For the portion between the westerly borough line and  
Center street, \$29,164.60; for the portion between Center street  
and the easterly borough line, \$14,283.14; for the whole extent  
of said work in the Borough of Merchantville, \$43,447.74.

You are further notified that unless you pave between the  
tracks and between the rails of your railroad and three feet on  
the outside of both north and south tracks with a pavement as  
aforesaid in accordance with the notice heretofore served upon  
you within sixty days from the time of the service of said notice  
said work will be awarded to Kelly-McFeeley Company in ac-  
30 cordanace with their bid as aforesaid, at the expense of your  
companies or such one as shall be liable therefor, in accordance  
with the terms of the ordinances referred to in said notice so  
heretofore served.

Dated, March 22, 1916.

W. F. McALLISTER,  
*Mayor.*

Attest:

40 (SEAL)

JNO. W. MICKLE,  
*Borough Clerk.*



*Exhibit D. 1.*

**Exhibit D. 1.**

TO THE BOROUGH COUNCIL OF THE BOROUGH OF MERCHANTVILLE:

PLEASE TAKE NOTICE that Public Service Railway Company, the lessee in possession and operation of the street railway on Maple avenue on the highway known as Moorestown & Camden Turnpike Company road, called Maple avenue, in the Borough of Merchantville, asserts that it is not liable to do the paving or pay for the cost thereof, as claimed by you, on said highway, and that any steps, proceedings or contracts which you may let or undertake, or any costs or expenses you incur, will be entirely at your own risk. 10

Very respectfully yours,

PUBLIC SERVICE RAILWAY COMPANY,

By R. E. DANFORTH,  
*General Manager.* 20

Dated, April 15th, 1916.

30

40



CHAPTER I

TO THE HONORABLE SENATE OF THE STATE OF MASSACHUSETTS  
I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the proposed amendment to the constitution of the Commonwealth, and in reply to inform you that the same has been referred to the committee on the subject, and that they have the honor to report to you that they are in favor of the same.

REPORT OF THE COMMITTEE ON THE PROPOSED AMENDMENT TO THE CONSTITUTION

THE COMMITTEE ON THE PROPOSED AMENDMENT TO THE CONSTITUTION OF THE COMMONWEALTH, created by the act of the Legislature of 1870, and continued by the acts of 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, and 1900, have the honor to report to you that they are in favor of the proposed amendment to the constitution of the Commonwealth, and that they have the honor to recommend its adoption.



*Exhibit D. 8.*

**Exhibit D. 8.**

Ordinance Passed April 5, 1892.

An Ordinance authorizing and permitting the Camden Horse Railroad Company to erect poles, run wires and lay and operate street railroads along certain streets, with electric motors or horse power, in the Borough of Merchantville. 10

Sec. 1. Be it ordained by the Common Council of the Borough of Merchantville that permission be and the same is hereby granted to the Camden Horse Railroad Company to lay and operate a street railroad in the Borough of Merchantville in accordance and to conform with the Borough grade, along the Moorestown and Camden Turnpike road from one limit to the other of said borough, and also northward on Centre street from said turnpike road to the Borough limits, with the necessary turnouts; and to erect along the curb line of said streets, on both sides thereof, all necessary poles for the carrying of electric wires to supply electricity to run and operate electric motors to propel street cars; provided, however, that the trolley wires shall be at least twenty feet above the surface of the street; and the poles shall be of such size and length, and be placed in such position as directed by and to the satisfaction of the Committee on Streets and Highways of said Borough; and that the streets and avenues of said Borough along which the said railroad track shall be laid shall be placed in as good repair and condition after the completion of said tracks as the same now are; and provided further that the privileges of this ordinance shall be taken advantage of within six months from date, and a continuous daily service maintained over the whole route, and if the same or the service on any portion shall be discontinued for six months, then this ordinance so far as applies to the abandoned portion shall be considered void. 20 30

Sec. 2. And be it enacted that this ordinance shall take effect immediately.

Passed at a regular stated meeting of the Common Council held April 5th, 1892. 40



*Minutes of Borough Council.***Acceptance of P. 1.**

A majority of the Directors of Camden and Suburban Railway Company accepted ordinance of December 18, 1900, (P. 1.) in writing, as required by statute.

10

**Minutes of Borough Council of Merchantville as offered July 16, 1918. Transcript, p. 49.**

Merchantville, N. J., Nov. 13, 1900.

An adjourned regular meeting of Council met tonight, the Mayor F. S. Walton, presiding. \* \* \*

A petition of the Camden and Suburban Railway Company was read and on motion of Mr. Holman, received and ordered to be entered upon the minutes as follows:

20

To the Honorable, the Borough Council of the Borough of Merchantville, in the County of Camden.

30

The petition of the Camden and Suburban Railway Company, together with a majority of the Board of Directors of said Company, respectfully shows unto your honorable body that your petitioner Company, the said Camden and Suburban Railway Company, became and was duly 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 14th, 1893, by a certificate duly filed on the fourteenth day of April, eighteen hundred and ninety-six, in the office of the Secretary of State and that said Company has located a new route or line of street railway known as the Merchantville Extension, and filed a description and map thereof in the office of the Secretary of State, showing the courses and distances and termini thereof (copy of said map being hereto attached and made a part hereof) in words as follows: that is to say—

40

Description of a new route or line of railway, showing the termini thereof, situate in the Borough of Merchantville, in the County of Camden and State of New Jersey.

The said railway is a double track street railway; the gauge of each track being five feet and the middle line of each track is described as follows, that is to say—



*Minutes of Borough Council.*

The North Track—Beginning in the Turnpike road known as Moorestown and Camden Turnpike road and also known as Maple avenue at a point distant five feet northwardly from the center line of said road and opposite the west line of Centre street and extending thence north eighty-nine degrees ten minutes east twenty-one hundred and twenty-seven and three-tenths feet to a division line between the Borough of Merchantville and the Township of Pensauken.

10

The South Track—Beginning in the Turnpike road known as the Moorestown and Camden Turnpike road and also known as Maple avenue at a point distant five feet southwardly from the center line of said road and opposite the division line between the Borough of Merchantville and the Township of Pensauken, and extending thence north eighty-eight degrees fifty-five minutes east forty-two hundred and twenty-four and seven-tenths feet to a point opposite Park avenue, thence north eighty-nine degrees ten minutes east twenty-six hundred and twenty-nine and eight-tenths feet to a division line between the Borough of Merchantville and the Township of Pensauken.

20

Also the following crossover: Beginning at a point in the middle line of the south track ten feet west of the west curb line of Cove road, thence by a curve to the right radius one hundred feet, twenty-two and four-tenths feet to a point; thence by a curve to the left, radius three hundred feet, sixty-seven and two-tenths feet to a point in the middle line of the north track.

That your petitioner has obtained the consent in (writing) of the owners of more than one-half of lineal feet of property fronting on Maple avenue, or the Moorestown and Camden Turnpike road in the Borough of Merchantville, through and upon which permission to construct, operate and maintain a street railway is asked; which consents are executed and acknowledged as are deeds entitled to be recorded, and are to be filed with the Clerk of this Board.

30

The said map hereto annexed and made a part hereof, shows the proposed location of rails or tracks and the location of poles of said street railway hereinbefore described; that the motive power to be used on said railway is electricity and horse.

40

Your petitioner therefore prays that your honorable body will fix the time, give the notice, afford the hearing and grant permission to your petitioner to build, construct, operate and maintain the street railway on said Maple avenue or Moorestown



*Minutes of Borough Council.*

and Camden Turnpike road, in the Borough of Merchantville, in the County of Camden, according to law.

And your petitioner as in duty bound will ever pray, &c.

10 IN WITNESS WHEREOF, the said The Camden and Suburban Railway Company hath hereto set the common and corporate seal and caused these presents to be signed by William S. Scull, its President, and attested by Samuel T. Corliss, its Secretary; and this petition has also been signed by a majority of the Board of Directors of the said The Camden Suburban Railway Company.

Dated this thirteenth day of November A. D. nineteen hundred,

THE CAMDEN AND SUBURBAN  
RAILWAY COMPANY,

(Signed) By WM. S. SCULL, *President.*

20 Attest:

S. T. CORLISS, *Secretary.*

Directors:

WILLIAM S. SCULL,  
HEULINGS LIPPINCOTT,  
G. GENGE BROWNING,  
BENJ. C. REEVE,  
F. W. AYER,  
EDWARD DUDLEY.

30

*Resolution of Mr. Holman.*

RESOLVED, That upon the petition of the Camden and Suburban Railway Company and a majority of the Board of Directors of said company for consent and permission to construct, operate and maintain a street railway on the road known as the Moorestown and Camden Turnpike Road also known as Maple avenue, in the Borough of Merchantville, County of Camden and State of New Jersey, that the Clerk of this Borough give  
40 at least fourteen days public notice of such application in the forms hereto attached, that this Council will meet on Monday, the 3rd day of December instant, at the hour of eight o'clock in the evening, in Council Chamber, in the Borough of Merchantville, in the County and State aforesaid, to hear such application and all persons interested for or against the same by publica-



*Minutes of Borough Council.*

tion in the "Merchantville Review," a newspaper published at and circulated in the Borough of Merchantville, and by posting the same at the Post Office, at Pancoast's Hotel, in front of the Council Chamber, at Longstreth's Real Estate Agency and on trolley line pole at southwest corner of Maple avenue and Centre street, the same being five of the most public places in said Borough and that said meeting be fixed for the time and place above named. *Carried.*

10

## NOTICE.

Take Notice that the Camden and Suburban Railway Company and a majority of the Board of Directors thereof, have presented to the Borough Council of the Borough of Merchantville, a petition filed with the Clerk of said Borough of the thirteenth day of November, nineteen hundred, praying for permission to construct, operate and maintain a double track street railway of the gauge of five feet on the road known as the Moorestown and Camden Turnpike road and also known as Maple avenue in connection with other tracks on said road from the Borough limits on the West to the Borough limits on the East.

20

The motive power to be used on said railway is electricity and horse. Said Borough Council has fixed Monday the third day of December, A. D. 1900, at the hour of eight o'clock in the evening as the time, and the Council Chamber in the Borough of Merchantville as the place, when and where it will consider said application and petition and give a hearing upon the matters, and grant or refuse such application. Notice whereof is hereby given as required by law. By order of the Borough Council of the Borough of Merchantville. Dated November 13, 1900."

30

Merchantville, N. J., December 3rd, 1900.

An adjourned regular meeting of the Common Council held this date the Mayor F. S. Walton presiding. On motion of Mr. Holman the petition of the Camden & Suburban Railway Company was read, received and ordered to be entered upon the minutes. *Carried.* \*See page 465 already entered.

40

The resolution adopted on the 13th of November, 1900, fixing this as the time and place of meeting for a hearing on the application of the Camden & Suburban Railway Company for per-



*Minutes of Borough Council.*

mission to construct, operate and maintain a double track street railway on the Moorestown and Camden Turnpike road or Maple avenue was taken up, and read by the Clerk.

10 On motion it was resolved to call for proofs. Wm. Linderman being called and duly sworn, testified that he had posted several notices like the one attached to the resolution adopted by Council November 13th, throughout the Borough of Merchantville on the 15th day of November, and that one of the said notices was posted in each of the following places, that is to say, at the Post Office, at Pancoast's Hotel, in front of the Council Chamber, at Longstreth's Real Estate Agency and on trolley line pole southwest corner, Maple avenue and Centre street, and that the said notices were signed by W. B. Stewart, Borough Clerk.

20 W. B. Stewart, being sworn, testified that he delivered said notices to Wm. Linderman for posting.

Wm. H. Lewis, on being sworn, stated that he was the editor of the Merchantville Review, the paper designated in the resolution of Council for advertising the notice; that the notice, a copy of which was attached to the resolution adopted by Council November 13, 1900, that it was published in the Merchantville Review the 17th and 24th days of November and on the 1st day of December, 1900, said paper being published weekly on Saturdays.

30 Mr. Holman offered the following resolution, which was unanimously adopted: *Resolved*, That the notice required by resolution of Council adopted on November 13, 1900, is hereby adjudged and declared, to have been posted and published for the times and at the places and in the paper designated by said resolution.

W. B. Stewart, Borough Clerk, testified that there had been filed with him consents in writing of owners of property fronting on said Turnpike road or Maple Ave. (which consents were duly acknowledged) for the building by the said company of its railway; which consents he presented and laid before Council.

40 H. F. Haines, being conscientiously scrupulous of taking an oath, being duly affirmed, testified that he is a practical surveyor or engineer; that he had measured the route of railway designated in the petition now before Council; and that he also measured the frontage of property owners on said street and had carefully inspected the consents on file and had prepared a



*Minutes of Borough Council.*

map showing the consents and that considerable more than one-half in amount of lineal feet of the owners of property fronting said street had consented to the building and construction of the railway applied for.

That said consents were acknowledged as are deeds entitled to be recorded.

Whereupon Mr. Holman offered the following resolution which was unanimously adopted. *Resolved*, and it is hereby adopted, That the consents in writing acknowledged as are deeds entitled to be recorded, have been given and are filed with the Borough Clerk, who is Clerk of this Council, consenting to the building and operation of the street railway line by the Camden and Suburban Railway Company, described in the application and petition now before Council.

At this juncture the Mayor called upon the citizens present to make known anything they desired to say upon the matter now before Council. Mr. Isaac Ferris, Jr., also Mr. Howard Carrow, spoke, both gentlemen protesting against the use of rubble being allowed on the proposed work.

There being no others present desiring to speak, Mr. Holman offered the following resolution which was unanimously adopted:

*Resolved*, That the hearing of the application and petition of the Camden and Suburban Railway Company to construct, operate and maintain a street railway on the Moorestown and Camden Turnpike road or Maple avenue, in the Borough of Merchantville, County of Camden, State of New Jersey, be adjourned until Tuesday evening, December 4th, 1900, at 8:00 P. M., in the Council Chamber in said Borough.

On motion adjourned.

Attest:

W. B. STEWART,  
*Borough Clerk*



*Minutes of Borough Council.*

Merchantville, N. J., Dec. 4, 1900.

Regular meeting of the Common Council met to-night. The Mayor, F. S. Walton, in the chair. Present—Messrs. Early, Holman, Kleinz, Longstreth, MacCallum and Mickle (6), absent, none.

- 10 The resolution calling the citizens to be present for or against the trolley question was read and approved and the public hearing of the citizens began with Mr. Cunningham, who protested against rubble pavement being laid on the street; he was followed in his remarks by Mr. Weikel and Dr. Lawrence, Mr. Weikel favoring a percentage of gross receipts being paid by the Trolley Company for the franchise. Dr. Lawrence against rubble being used.

- No other citizens caring to speak, Mr. Holman offered the following resolution, which was adopted: *Resolved*, That the  
 20 hearing of the application and petition of the Camden and Suburban Railway Company to construct, operate and maintain a street railway on the Moorestown and Camden Turnpike road or Maple avenue, in the Borough of Merchantville, County of Camden, State of New Jersey, be adjourned until Monday evening, December 17, 1900, at 8:00 o'clock P. M., in the Council Chamber of said Borough. *Carried.* \* \* \*

Mr. Early moved that Council resolved itself into a committee of the whole. *Carried.*

- The President, Mr. Holman, in the chair, who explained fully  
 30 the position of his Committee on the trolley question and then the proposed ordinance was carefully discussed by sections along with the Borough Solicitor, and each section unanimously agreed upon by all the members. On motion the Committee rose and reported progress.



*Minutes of Borough Council.*

Merchantville, N. J., Dec. 11th, 1900.

A special meeting of Common Council met to-night, the Mayor, F. S. Walton, presiding.

The meeting was called by the Mayor to give the Camden and Suburban Railway Company the opportunity to present their case on the double track road proposed and matters of interest relating to the same. 10

Present—Messrs. Early, Holman, Kleinz, Longstreth and Mickle (5); absent, Mr. MacCallum (1).

The call for the meeting read and approved. After which, Mr. Walton invited the representative of the Trolley Company to make known their wishes. Mr. H. Lippincott and C. Crowell were present.

Mr. Lippincott explained briefly the object of their presence and discussed with Council the sections of the proposed ordinance. The Trolley Company being very desirous to eliminate the forfeiture clause and some other features for which they will endeavor to have the road macadamed eleven feet each side of the track; quite a lengthy discussion ensued with no definite conclusion, the representatives departed, leaving Council still in session and discussing the matter; it being late, an adjournment was moved by Mr. Holman until Thursday, December 13, 1900, at 8 o'clock P. M., to further consider the matter. *Carried.* 20

Merchantville, N. J., Dec. 13, 1900. 30

An adjourned special meeting held to-night as per resolution passed on 11th inst. The Mayor, F. S. Walton, presiding. Present—Messrs. Early, Holman, Kleinz, Longstreth and Mickle (5). Absent—Mr. McCallum (1).

The Trolley Ordinance was taken up and discussed, after which Mr. Holman moved that the ordinance and changes as agreed upon and amended be referred to the Borough Solicitor to put in proper shape and return to the Highway Committee. *Carried.*

After a further discussion on details the following resolution was passed: That it is the sense of this Council that the ordinance for the Camden and Suburban Railway Company consider this evening contains the minimum of considerations that Council will accept. *Carried* by the following vote: Yeas—Messrs. Early, Holman, Kleinz, Longstreth and Mickle (5). Nays—None. *I was so ordered.* 40



*Minutes of Borough Council.*

Merchantville, N. J., Dec. 17, 1900.

An adjourned regular meeting of Council met to-night pursuant to a resolution passed December 4th, 1900, to give public hearing to the petition of the Camden and Suburban Railway Company. Present—Messrs. Early, Holman, Kleinz, Longstreth  
 10 and Mickle (5). Absent—Mr. MacCallum (1).

The call for this meeting was read. Minutes of last meeting read and approved.

An ordinance rescinding an ordinance to the Camden Horse Railroad passed October 6, 1896, was presented and put on its first reading and then laid over until next meeting for second reading.

The Camden and Suburban Ordinance read.

The public hearing was declared open by the Mayor.

Mr. Armbruster taking the floor and speaking in favor of  
 20 granting the ordinance with modifications.

No other citizen accepting invitation to speak the representatives of the Trolley Company was requested to present their side of the matter. Mr. Lippincott for the Camden and Suburban Railway Company, accepted the invitation and discussed the objectionable features of the proposed ordinance, asking a modification of the same, particularly the five-year and forfeiture clauses. Mr. Maccomb, relative to wires and their injury to trees.

Rev. I. Mench Chambers also spoke on behalf of the citizens  
 30 and in favor of the ordinance as presented. After which Mr. Holman took the floor in behalf of the ordinances, defining the position of Council in urging it in its present condition as read. Mr. Holman moved that the ordinance be now taken up on its first reading. *Carried.* The ordinance read by the Clerk and Sec. 7 Article "G" amended by Mr. Holman to read one and one-half inches, striking out 1¼ inches. *Carried as amended.*  
 \* \* \*

On motion of Mr. Holman the public hearing of the Camden  
 40 and Suburban Railway Company petition and ordinance was adjourned until our next regular meeting. *Carried unanimously.*



*Minutes of Borough Council.*

Merchantville, N. J., Dec. 18, 1900.

Regular meeting of the Borough Council held to-night, the Mayor F. S. Walton, presiding. Present—Messrs. Early, Holman, Kleinz, Longstreth and Mickle (5). Absent—Mr. MacCallum (1).

Pursuant to a resolution regularly passed December 17th, 1900, the adjourned public hearing of the application and petition of the Camden and Suburban Railway Company to construct and operate a double track street railway on the Moorestown and Camden Turnpike road or Maple avenue, in the Borough of Merchantville, was opened up by the Mayor, and all citizens desiring to speak upon the matter were invited to do so. 10

The resolution or call being read, Mr. Holman moved to take up first the Repeal Ordinance on its second reading. *Carried.* The Ordinance was read and adopted as read.

Mr. Longstreth moved to take up the Repeal Ordinance on the third and final reading by its title. *Carried.* The title read as follows: "An ordinance to repeal An Ordinance granting permission and consent to the Camden Horse Railroad Company to construct, maintain and operate a street railroad upon Maple street or the Moorestown and Camden Turnpike road in the Borough of Merchantville." The ordinance was adopted by the following vote: Yeas—Messrs. Early, Holman, Kleinz, Longstreth and Mickle (5). Nays—None, so ordered. 20

On motion of Mr. Holman the proposed ordinance for the Camden and Suburban Railway Company was now taken up and read for the purpose of the public hearing. The ordinance was read by the Clerk. Citizens present not caring to speak on motion of Mr. Holman, the representatives of the Trolley Company who were present were invited to present their views. 30

Mr. Heulings Lippincott, Treasurer of the Camden and Suburban Railway Company, took the floor and asked that a modification of some of the objectionable features be allowed, particularly the forfeiture clause feature and for doing so the Camden and Suburban Railway Company would concede to pave eleven feet on each side of the proposed tracks, making 22 feet of macadam instead of 16 feet, as originally proposed. Whereupon Mr. Holman explained relative to a conference held with the Suburban Company and read the Borough Solicitor's opinion on the questionable point, and of abolishing the forfeiture clause. After which Mr. Holman moved to place the ordinance upon its second reading by sections. *Carried.* 40



*Minutes of Borough Council.*

The title read and adopted and read.

The preamble read, amended and adopted as amended.

Sec. 1. Read, amended and adopted as amended.

Sec. 2. Read, and adopted as read.

Sec. 3. Read, and adopted as read.

10

Sec. 4. Read, and adopted as read.

Sec. 5. Read, and adopted as read.

Sec. 6. Read, and adopted as read.

Sec. 7. Read, amended and adopted as amended.

Sec. 8. Read, amended and adopted as amended.

Sec. 9. Read, and adopted as read.

Sec. 10. Read, and amended and adopted as amended.

Sec. 11. Read, and adopted as read.

Sec. 12. Read, and amended and adopted as amended.

Ses. 13. Read, discussed and finally adopted as read.

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Sec. 14. Read, and adopted as read.

Sec. 15. Read, and amended and adopted as amended.

Sec. 16. Read, and on motion stricken out.

Sec. 17. Read, and on motion adopted as Sec. 16.

Sec. 18. Read and on motion adopted as Sec. 17.

Sec. 18. Added and adopted as read.

On motion of Mr. Longstreth the ordinance was now taken up by its title for a third and final reading. *Carried.*

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The title read as follows: "An Ordinance granting consent and permission to the Camden and Suburban Railway Company to build, construct, maintain and operate a street railway for passenger and mail service, on the public road known as the Moorestown and Camden Turnpike road and also as Maple avenue, in the Borough of Merchantville and Coutny of Camden."

The Ordinance was adopted unanimously on the following call of roll: Yeas—Messrs. Early, Holman, Kleinz, Longstreth and Mickle (5). Nays—None. It was so ordered.



*Minutes of Camden County Board of Freeholders.*

**Extracts from Minutes of Camden County Board of Freeholders, June 9, 1915 (Minute Book 11, p. 365):**

The Road Committee presented the following resolution:

Camden June 7th, 1915.

WHEREAS, Our County Engineer has plans prepared for the improving the Moorestown Turnpike two months ago which were submitted to the Merchantville Borough authorities who insist upon a bituminous surface through their Borough in place of a Belgian Block. Also that we modify our profile to meet their grades to be revised by their Borough Engineer and the work be performed in accordance with their following resolution dated May 7th, 1915, and amended May 12th, 1915, as follows:

Copy of a resolution adopted by Merchantville Borough Council relative to the improvement of Maple avenue. Resolution adopted May 7th, and amended at the request of the County of Camden on May 12th, 1915.

WHEREAS, The Stone Road Committee of the Board of Freeholders have signified their intention of recommending to the Board of Freeholders at the next meeting to be held on May 12th, 1915, the improvement of the Moorestown and Camden Turnpike road, so called, which passes through Merchantville, and is there known as Maple avenue; and the said Stone Road Committee has asked the Borough Council of Merchantville the kind of road desired in Merchantville, and what action the Borough will take in regard to said improvement, and what part of the expense the Borough will bear; therefore, be it *Resolved*, by the Council of the Borough of Merchantville that it is the sense of Borough Council that Maple avenue should be improved by laying a pavement consisting of a concrete base six inches deep composed of a mixture of the best materials in the proportions of one part Portland cement, three parts clean sharp sand and five parts hard broken stone; the said concrete base to have a rough surface by partly imbedding one and one-half inch stone on the top before the cement has its initial set, said stone being for the purpose of bonding the upper bituminous concrete course. The concrete base to be covered with a course of bituminous concrete two and one-half inches deep thoroughly compacted, making a pavement of eight and one-half inches in depth when finished; said bituminous concrete to be composed of one-inch stone thoroughly coated with standard Trinidad or Bermudez

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*Minutes of Camden County Board of Freeholders.*

asphalt applied hot on the job, and the said bituminous concrete to be placed on the concrete base and rolled to a depth of two and one-half inches, and to present a true and even surface to conform to the grades established. The surface then to be treated to a hot application of heavy Trinidad or Bermudez liquid asphalt, and a coating of clean three-eighths inch screening sufficient to take up the surplus asphalt and to close the voids in the bituminous concrete and to present a smooth and even surface, rolled to the satisfaction of the authorities in charge when finished.

*Be it Further Resolved*, That the Borough of Merchantville agrees to pay ten per cent. of the cost of constructing that portion of said improved pavement sixteen feet in width of the road aforesaid to be constructed by the State and County, and also to pay balance of cost of such additional paving necessary to carry said pavement from curb to curb as is not contributed by the State of New Jersey, and by the Public Service Railway Company, lessees of the Camden & Suburban Railway Company under their franchise with the Borough of Merchantville, and the County shall assign to the Borough all its rights in said road obtained from the Turnpike Company.

*Be it Further Resolved*, that this resolution is adopted in consideration of such pavement being laid at grade to conform to grades established by the Borough for the purpose of properly taking away surface water, and that the entire width of said pavement shall be constructed under the supervision of the Borough Inspector acting in conjunction with the County Engineer and State Inspectors. *Be it Further Resolved*, That upon the completion of said improvement, the Borough will agree to take over from the County said improved road and thereafter maintain it as a street of said Borough.

Approved,

W. F. McALLISTER,

*Mayor.*

Attest:

JNO. W. MICKLE,

*Borough Clerk.*

Correct Copy.

Attest:

W. F. McALLISTER,

*Mayor.*



*Minutes of Camden County Board of Freeholders.*

*Be it Resolved*, That we accept their proposition as above set forth so far as it applies to that portion of said road within the Borough of Merchantville, and further provided that no patent rights are infringed in their type of road.

*Bt it Further Resolved*, that we defer any further action until they furnish us with the necessary profile, and plans showing their revised grades as set up in their resolution of May 12th, 1915. E. E. Stafford, Paul N. Litchfield, Robert Cain, Thomas W. Binker, Road Committee. 10

Mr. Fries moved the adoption of the resolution, which motion being duly seconded was adopted by the following vote: Arnold, Binker, Cain, Cheesman, Fries, Gercke, Gomersall, Hatch, Hamilton, Klostermann, Leeson, Litchfield, Merrick, Monroe, Pennock, Pine, Prickett, Rodan, Simpson, Stafford, Walker, Walton, Weaver, Wood, Prentice, Director. (25).

October 13, 1915. (Minute Book II, p. 404.) 20

The Road Committee presented the following resolution: *Be it Resolved*, That we approve the accompanying plans and specification for improving the Moorestown and Camden Turnpike and forward same to the State Road Department for its approval, and when this is obtained then our Director be ordered to advertise for bids—Thomas W. Binker, Paul N. Litchfield, Robert Cain, Albert Sharp.

Mr. Monroe moved the adoption of the resolution, which motion being duly seconded was adopted by the following vote: Arnold, Biner, Cain, Fries, Gomersall, Hatch, Hamilton, Klostermann, Leeson, Litchfield, Merrick, Monroe, Pennock, Pine, Prickett, Rodan, Simpson, Sharp, Walker, Walter, Weaver, Wood, Prentice, Director. (23) 30

December 30, 1915. (Minute Book II, p. 428.)

The Road Committee presented the following resolutions:

WHEREAS, The Merchantville Borough authorities have submitted the accompanying proposition in writing which materially changes our plans and quantities on the Moorestown Pike;

*Be it Resolved*, That we spread the agreement of which the accompanying is a copy upon our minutes. 40

*Be it Further Resolved*, That we rescind the resolution approving the plans and specifications for improving the Moorestown Pike passed at our meeting held on..... (In pencil, "See page 404, J. J. A.)—E. E. Stafford, Albert Sharp, Paul N. Litchfield, Robert Cain.



*Minutes of Camden County Board of Freeholders.**Merchantville Agreement as to P. S. Liability.*

The Borough of Merchantville proposes to have Maple avenue through its entire length paved with an improved pavement, having the assistance therein of the State and County, which both make appropriations toward the same, and over which they  
 10 have certain supervisions. The Public Service Railway Company, as lessee, occupies a portion of said avenue with its double track street railway. There have been certain controversies between the Borough and the Company as to the Company's paving obligations. To facilitate the improvement proposed both Borough and Company have agreed that so far as the pavement is concerned from Centre street eastward, there is no dispute as to the obligation of the Company to repave as is required in the ordinance granting consent to the Camden & Suburban Railway Company, dated December 18, 1900, known as the 1900  
 20 ordinance. Such paving is to be considered as done under the direction and at the expense of Borough from curb to curb, notwithstanding the above recited facts. While the paving is to be from curb to curb, a portion of that only is to be solely at the expense of the Borough, the remaining portion being contributed to by State and County as aforesaid. So far as that portion of the paving west from Centre street, dispute is still open as to the obligation of the Company. The Borough, in the same manner and assisted in the same way, proposes to do this paving, also claims a liability on the part of the Company  
 30 to contribute thereto. It is agreed that the same stipulation as to a recognition of the paving being done under the direction and at the expense of the Borough and from curb to curb shall apply also to this paving in any legal action which may be taken by the Borough to enforce payment. In such paving the specifications are to be so drawn that on both sides of each rail in the tracks of the railway there is to be laid two rows of standard granite blocks. When such paving, done, in the manner aforesaid, is completed, it shall be deemed to have been done in accordance with the requirements named in Sect. 6 of the aforesaid  
 40 ordinance.

Dated November 15, 1915.

THE BOROUGH OF MERCHANTVILLE,

By W. F. McALLISTER, *Mayor.*



*Minutes of Camden County Board of Freeholders.*

Attest:

JNO. W. MICKLE, *Clerk.*

## PUBLIC SERVICE RAILWAY COMPANY,

By J. J. BURLEIGH, *Vice-President.*

Attest:

10

(Signed, but writing not plain.)

*Secretary.*

Mr. Litchfield moved the adoption of the resolution, which motion being duly seconded was adopted by the following vote: Arbold, Binker, Cain, Fitzgerald, Fries, Gereke, Gomersall, Hatch, Hamilton, Leeson, Litchfield, Merrick, Monroe, Penn, Prickett, Rodan, Sharp, Stafford, Walker, Walton, Weaver, Wood, Prentice, Director. (23)

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*Be it Resolved:*

1. That the drawings and specifications submitted by the engineer of this body for the construction of Moorestown Turnpike in the County of Camden, beginning at Camden City Line, extending through Merchantville and ending at the Burlington County line be and the same are hereby approved.

2. That the said engineer be and he is hereby directed to present the same drawings and specifications to the State Commissioner of Public Roads for his approval.

3. That immediately upon said approval and not later than thirty (30) days after the date thereof the Clerk of this body be and hereby is directed to advertise for bids once a week for three successive weeks in Camden Post-Telegram, The Camden Daily Courier, also the Engineering News of New York, papers printed in this county and in the State of New Jersey and New York.

30

4. That said advertisement shall read as follows:

(Copy of advertisement.)

Mr. Litchfield moved the adoption of the resolution, which motion being duly seconded was adopted by the following vote: Arnold, Binker, Cain, Fitzgerald, Fries, Gereke, Gomersall, Hatch, Hamilton, Leeson, Litchfield, Merrick, Monroe, Pine, Prickett Rodan, Sharp, Stafford, Walker, Walton, Weaver, Wood, Prentice, Director. (23)

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NEW JERSEY COURT OF ERRORS AND  
APPEALS.

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BOROUGH OF MERCHANT-  
VILLE,

*Plaintiff-Respondent,*

(CAMDEN AND SUBURBAN  
RAILWAY COMPANY) and  
PUBLIC SERVICE RAILWAY  
COMPANY,

*Defendant-Appellant.*

} On Appeal from the  
Supreme Court.

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BRIEF OF PLAINTIFF-RESPONDENT.

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STATEMENT OF THE CASE.

This appeal brings up for review the judgment entered in the Supreme Court in favor of the plaintiff, Borough of Merchantville, and against the defendant, Public Service Railway Company, for \$35,924.16 on April 3, 1920.

Suit was brought to recover the cost of improving a portion of the surface of the entire length of Maple Avenue, in Merchantville, which the defendant, as the successor of the Camden & Suburban Railway Company, was obliged to improve, under the terms of an ordinance adopted December 18, 1900.

Maple Avenue, in said borough, extends substantially east and west, between the borough limits, and



is intersected by Centre Street. The suit was brought to recover the expense of paving between the rails and tracks of defendant and three feet on each side thereof, both east and west of Center Street, but that portion east thereof was paid for before judgment was entered. The case was tried before his Honor, Judge Lloyd, without a jury.

In the following brief we have used the word "Suburban" to designate the Camden & Suburban Railway Company, and the words "Public Service" to designate Public Service Company.

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### **ISSUE AS MADE BY THE PLEADINGS.**

The complaint (C. p. 4) sets forth the adoption of the ordinance of December 18, 1900, granting to the Suburban certain privileges in the public road known as the Moorestown and Camden Turnpike and Maple Avenue in Merchantville.

The paving obligations contained in Section 6 of the ordinance are stated in full and the allegation is made that after the passage of the ordinance the Suburban accepted the same and proceeded to lay the tracks and operate the street railway in accordance with the terms thereof, which is admitted in the answer.

The complaint also alleges that the Suburban did comply with the original paving requirements of the ordinance in the manner as specified therein, which allegation is also admitted in the answer.

The complaint then sets out the fact that by virtue of sundry conveyances, the rights of the Suburban in the highway were acquired by the Public Service, all of which is admitted in the answer, quali-



fied, however, by the denial of any liability on the part of the Public Service to perform the repaving obligations to the extent as averred in the complaint.

Then follows an allegation that in the month of November, 1915, the borough determined to pave the entire width of the highway from curb to curb with a improved pavement, in connection with which is mentioned the supplemental agreement made November 15, of that year, set out in full. The complaint charges that the borough called upon the Public Service to pave that portion of the street for which it was liable under the terms of the ordinance and that upon its failure so to do, the paving was done by the borough at the expense of the Public Service, in accordance with the ordinance and notice, as given therefor, at a cost of nearly \$50,000. Complaint concludes with an allegation that the borough is entitled to recover from the defendants such costs and expenses as it incurred, in accordance with the terms of the ordinance.

The answer of the Public Service (C. p. 12) admits that the obligation, if any, of the Suburban, growing out of the improving and repaving of Maple Avenue has been imposed upon and must be undertaken by it.

The answer also avers that the Public Service has paid to the borough in full for any paving done on Maple Avenue, for which any liability, by ordinance or otherwise, attached to it.

The answer further admits that

“all the paving in said complaint mentioned, for  
“which this defendant could be in anywise liable or obligated to the Borough of Merchantville, the plaintiff, is that portion thereof on  
“said Maple Avenue, in said borough, in the  
“complaint named, east of Centre Street, pay-



“ment for which was fully made and satisfied to  
“the plaintiff by this defendant and thereon  
“there is no liability or obligation whatever  
“resting upon this defendant.”

The answer further alleges that the railroad tracks on Maple Avenue, west of Centre Street, to the borough line, were and are the property of the Camden Horse Railroad Company and that the ordinance in the complaint named could not, did not, nor does not apply to any such supposed paving against the defendant.

The answer further sets out the acts of the Legislature and supplements thereto, whereby the Camden Horse was incorporated, and that the Public Service, pursuant to the Traction Act of 1893, entered upon the railway of the Camden Horse and thereby became possessed of the said railway tracks with right and authority to operate the same and alleges that the provisions of the ordinance recited in the complaint have no application whatever to the railway belonging to the Camden Horse and there is no obligation of the Camden Horse or of the Public Service, for any such paving by virtue of the ordinance or cost thereof, or otherwise, howsoever, for any matter or thing in the complaint named.

The reply of the plaintiff to the said answer (C. p. 19) denies that the Public Service has paid in full for all paving done on Maple Avenue, for which liability attached to it. It also denies the material defenses set up in the answer. It sets forth an ordinance of October 6, 1896, granting permission to the Camden Horse to build its railway on Maple Avenue from the line of division between Pensauken Township and the borough, parallel with the then present tracks, eastward to the line of Centre



Street with the obligation to put a substantial road on the outside of each outer rail to the curb line, subject to the approval of the highway committee of the borough and to be kept in repair for all time.

The reply also avers that the Camden Horse, at the passage of the ordinance last mentioned, owned and operated a single track laid from Camden through Merchantville to Centre Street and that the last mentioned ordinance granted permission for the construction of the paralleling track from the west line of the borough limits to said Centre Street.

It also avers that the privileges conferred by the ordinance, dated October 6, 1896, were never exercised by the Camden Horse and that said ordinance was on December 18, 1900, repealed with the knowledge and consent of both the Camden Horse and the Suburban, which latter company was then the lessee and in the possession and operation of the property and franchises of the Camden Horse under a lease theretofore made.

The reply also avers that the passage of the franchise ordinance of 1900 was partially predicated upon the repeal of the ordinance of 1896, and that the adoption of the first mentioned ordinance and the repeal of the latter ordinance, were incidents of one general scheme and transaction with respect to the privileges to be conferred upon and exercised by the Suburban as the lessee of the Camden Horse, under the first mentioned ordinance, which ordinance and the repealing ordinance were both adopted at the same meeting of the Borough Council.

The reply also avers that from the passage of the franchise ordinance of 1900, until the time of bringing this suit, the Suburban and its successors, including the Public Service, in possession and operation of the railway through Merchantville, consti-



tuting both tracks on Maple Avenue between the western and the eastern boundaries thereof, have constructed, operated and maintained the railway pursuant to the terms of the ordinance of 1900, and from time to time have complied with the provisions thereof, with relation to such construction, operation and maintenance of the surface of said highway, on both sides of said tracks throughout the entire length thereof.

The Public Service did not file any rejoinder to the reply above referred to.

It will be perceived, therefore, that the issue made by the pleadings is whether or not the Public Service is called upon to bear any of the expense of improving the highway in question, so far as such obligation relates to the space between the tracks and rails and three feet on each side thereof, from the western borough limit to Centre Street.

The answer admits liability for such expense as applied to the paving from Centre Street to the eastern boundary of the borough. In fact, such indebtedness has been settled with the exception of the items of interest, engineer's and inspector's fees, the determination of which, by agreement, has been reserved for further consideration.



**ARGUMENT.**

**Chronological History of the Franchise Rights  
Vested in the Suburban in Maple Avenue, When  
the Ordinance of 1900 Was Passed.**

Prior to May 1, 1896, Camden Horse Railway Co., hereafter called Camden Horse, owned and operated a single track railway from Camden to Centre Street, Merchantville.

The Camden Horse was incorporated by special Act of the Legislature, passed March 23, 1866, P. L. of that year, page 640. This act empowered the company to build and operate a railroad on certain streets within the City of Camden only.

A supplement to the charter approved April 2, 1896, was likewise confined to other streets in the City of Camden, which supplement, in our judgment, has no bearing upon this controversy.

By another amendment passed March 11, 1872, P. L. of that year, page 512, the Camden Horse was authorized and empowered "to build, maintain and "use a railroad or railroads on any public road or "highway in the City of Camden or any public road "or highway extending from said city into the Coun- "ty of Camden."

On April 5, 1892, an ordinance was passed by Merchantville, authorizing and permitting the Camden Horse to erect poles, run wires and lay and operate a street railway in Merchantville along the said turnpike from one limit to the other of the borough and northward on Centre Street from the turnpike road to the borough limits, with necessary turnouts,



etc., with the proviso that the said privileges should be taken advantage of within six months from date and a continuous daily service maintained over the whole route and if the same or service on any portion be discontinued for six months, the ordinance should, so far as it applied to the abandoned portion, be considered void (see C. p. 49 ).

Apparently under the authority of the above, the single track railway was built.

On October 6, 1896, another ordinance was passed granting permission to the Camden Horse to maintain and operate a street railway on Maple Avenue from the line of the division between Pensauken Township and said borough parallel with the present tracks; thence eastward out the same to the line of Centre Street, so that when the said tracks thus authorized were completed, they would constitute a double track street railway from the limits of the borough eastward to Centre Street (C. p. 116).

The paving requirement contained in this ordinance, was, "that the railroad company shall put a "substantial road on the outside of each outer rail "to the curb line \* \* \* \* subject to the approval of "the highway committee of the borough, and to be "kept in repair for all time."

The contention of the borough is that the Camden Horse never accepted the provisions of this ordinance and neither constructed nor operated a street railway in accordance with the terms thereof. Furthermore, that the ordinance of 1896 was repealed on December 18, 1900, at the same time when the Franchise Ordinance of 1900, to the Suburban was adopted (C. p. 124).

In the meantime, the rights of the Camden Horse based either upon legislative grant or ordinance, were being transferred by various leases and as-



signments and finally on May 1, 1896, became vested in the Suburban.

The next franchise ordinance, in chronological order is the one passed December 18, 1900, for the benefit of the Suburban, which is the subject-matter of this controversy.

**The Suburban Exercised the Rights Conferred by the 1900 Ordinance, With Respect to the Construction and Operation of that Portion of its Railroad West of Centre Street.**

Admittedly, the Public Service occupies the same position, with respect to this situation, as did the Suburban originally, and if the latter look advantage of any rights under the 1900 ordinance, the burdens imposed by such ordinance must now be borne by the former.

Under the charter of the Camden Horse and until the passage of the supplement of 1872, it had no authority whatever to construct a railway outside of the limits of Camden.

The supplement of 1872 gave power to build and operate a railroad or railroads on any public road or highway extending from Camden in the County of Camden.

The authority granted by this act was not exercised in Merchantville, until the adoption of the ordinance of 1892, which permitted the construction of a street railway on Maple Avenue its entire length, with a proviso that the privileges conferred should be taken advantage of within six months from the date thereof, and a continuous daily service maintained over the whole route, and if the same, or service on any portion, should be discontinued for



six months, the ordinance should be considered void, so far as it applied to the abandoned portion.

Under the charter rights of the Camden Horse and as authorized by the last mentioned ordinance, the single track was built to Centre Street. The right to build a parallelling track, or to extend its lines eastward of Centre Street, if granted at all by the ordinance, expired at the end of six months after the adoption of the same.

Where a franchise is granted upon the condition that it shall be void unless it is exercised within a stated time, it is held to be *ipso facto* forfeited upon failure to perform the condition.

*Thompson on Corporations*, p. 2887, Note 165;

*In re Brooklyn &c. Railway*, 77 N. E. 994; 36 Cyc. p. 1372, Note 83;

*Oakland vs. Oakland*, 45 Cal. 365;

*Los Angeles vs. Los Angeles*, 92 Pac. 490;

*Maine vs. Maine*, 43 Atl. 113;

*Ulmer vs. Lime Rock*, 57 Atl. 1001;

*Commonwealth vs. Lykens Water Co.*, 2 Atl. 63;

*Mill Creek Township vs. Erie, etc.*, 58 Atl. 613;

*North Jersey Street Railway vs. Orange*, 58 Eq., 83;

*Louisville Trust Co. vs. Cincinnati*, 77 Fed. 292;

*Beech on Corporations*, p. 45;

*Morawitz Corporations*, p. 1018.

Having taken advantage of its charter rights and the ordinance of 1892, to the extent only of building a single track from Camden to Centre Street, the Camden Horse leased all of its property to the Sub-



urban on May 1, 1896 (C. p. 115), and the latter company, realizing the necessity of further municipal action for improvements, caused an application to be made to the borough in the name of the Camden Horse for the passage of a further ordinance to permit it to build a parallelling track from the western boundary to Centre Street (C. p. 116).

This ordinance was adopted October 6, 1896, and in addition to permitting the double track, it provided that the company should put a substantial road on the outer side of each outer rail to the curb line, to be kept in repair for all time. This paving requirement unquestionably applied to the original track built in 1892, as well as to the additional track to construct, for which the application was granted on the latter date, for the reason that a substantial road from the outer side of each outer rail, to the curb, would include the entire width of the highway from curb to curb.

The provisions of the ordinance of 1896 were never accepted by either the Camden Horse or the Suburban and the parallelling track was never constructed under the terms of the ordinance.

On May 1, 1896, the Camden Horse leased to the Suburban all its property and assets including franchises and privileges to use and operate its street railway system for the term of ninety-nine years from April 1, 1896 (C. p. 115).

By the terms of the lease, the Suburban assumed all paving obligations imposed upon the Camden Horse and gave the latter full indemnification against any responsibility therefor.

The 11th paragraph of the lease provided that whenever the Suburban should desire any extension of the railroads demised or branches or double track-ing thereof, it should be the duty of the Camden



Horse to exercise its corporate rights and privileges and to apply and ask for additional grants as might be necessary and to make and execute such papers on account thereof at the expense of the Suburban and such branches and extensions should become the property of the Camden Horse, but demised in and covered by the said lease (C. p. 115).

Manifestly the application of the Camden Horse for additional privileges granted by the borough in 1896, was induced by the provisions of the lease above referred to, and the same, if granted and accepted, were to be exercised by the Suburban, pursuant to the terms of the lease.

By the ordinance of 1896, if accepted, the Camden Horse or its lessee, the Suburban, could operate and maintain a double track street railway within the limits of the borough, eastward on Maple Avenue to Centre Street, including the existing track.

Before the passage of the 1896 ordinance, regardless of the charter rights of the Camden Horse, the latter company could not have laid an additional paralleling track or extended its railway system eastward of Centre Street without permission of Borough Council, because of the provisions of the Act of March 8, 1893, P. L. of that year, p. 130, which provided that

“hereafter it shall be unlawful for any street  
“or horse railroad company organized under  
“the act, entitled ‘An act to provide for the in-  
“corporation of horse or street railway com-  
“panies and to regulate same,’ approved April  
“6, 1886, or any special or local act authorizing  
“or incorporating any street or horse railroad  
“company to lay or construct any railroad  
“track or tracks, or any extension of the same,  
“through or along any street of any municipal-  
“ity of this state, without first obtaining the



“consent of Common Council, Board of Alder-  
“man, Board of Public Works, or other govern-  
“ing body having the control of public streets,  
“avenues or roads of such municipality, or  
“along the streets of which municipality said  
“railroad company desires or intends to con-  
“struct its said railroad.”

The next section of the act provides for a forfeiture of the charter of any such company in case of any attempt to construct in violation of terms of the first section.

In the case of *West Jersey Traction Company vs. Camden Horse Railroad Company*, 53 Eq. 163, decided March Term, 1895, the charter rights of the latter corporation and the limitations thereof by the Act of March 8, 1893, were considered by the Court of Errors, and it was held, with respect to Stockton Township, which was involved in the litigation arising in that case, that after March 9, 1893, the Camden Horse could not lawfully construct a railroad on State Street, in that township without the consent of the township authorities, it being within the reserved power of the Legislature thus to modify the franchise, which depended wholly upon a repealable statute and under which no property rights had been acquired.

It is unnecessary in the case sub judice to define what rights the Camden Horse possessed to construct tracks on Maple Avenue in Merchantville, as one of the roads leading from the City of Camden into the County of Camden, prior to the passage of the Act of 1893. While it may have possessed the power to lay tracks and operate the same as a horse road, it could not erect poles, and wires, along the public highways and use electricity even in 1892,



without the consent of the municipal authorities.

Undoubtedly the ordinance of 1892 granting authority to erect poles, run wires and lay and operate a railroad with electric motors or horse power, was intended to meet this situation and under such ordinance, the single track was laid to Centre Street. Manifestly, the Camden Horse possessed no authority to build an additional track, paralleling the existing single track, after March 8, 1893, without the consent of the municipal authorities, because the act last mentioned made it unlawful to lay or construct any railroad track or tracks or any extension of the same through or along any street of the municipality without first obtaining the prescribed consent. It is perfectly apparent, therefore, that it was necessary for either the Camden Horse or the Suburban, if it desired to lay an additional track in 1896, to obtain the consent of the municipality and, without doubt, the ordinance of 1896 was applied for in order to comply with the provisions of the Act of March 8, 1893, as well as to meet the decision of the Court of Appeals handed down March Term, 1895.

After the passage of the ordinance of 1896, nothing was done by either the Camden Horse or the Suburban with reference to the street railway system in Merchantville, until 1900, when an application was made for the privileges which were subsequently granted in the ordinance of that year. The additional track was not laid and the paving obligations, set out in the 1896 ordinance, were not fulfilled. There can be no question that one of the reasons why the additional track was not built under the 1896 ordinance, was the paving requirement which the Suburban evidently conceived imposed too much of a burden to assume, and, therefore, it was



perfectly logical and reasonable that, if there was to be any change in the contractual relation between the municipality and the Suburban, the paving obligations should be adjusted to meet new conditions. On the same day that the ordinance of 1900 was adopted, the 1896 ordinance was repealed.

By a comparison of the 1900 ordinance with the ordinance of 1896, so far as the paving liability in each is concerned, it will appear that they are not the same. The 1896 ordinance required the construction and maintenance of a substantial road on the outside of each outer rail to the curb line. The 1900 ordinance provided that the Suburban should pave between the rails and tracks with rubble pavement and for a distance of three feet outside of both tracks with macadam, which macadam should also be extended on the outside of the three feet strip, for sixteen feet, or two strips of eight feet wide, on each side of the tracks.

These paving requirements were incompatible both for construction and maintenance and there was every reason, therefore, why both the municipal authorities and the representatives of the Suburban would desire municipal legislation to correct the apparent inconsistency by the repeal of the 1896 ordinance. That the ordinance was repealed is proved beyond question. Furthermore, we contend that the repealer was part of a general scheme to clarify the street railway situation as it existed in 1900, which contemplated the passage of the ordinance of that year to provide a comprehensive plan for construction and operation in Merchantville.

In addition to the inferences which irresistibly arise from the circumstances surrounding the adoption of the 1900 ordinance and the repeal of the 1896 ordinance, Mr. Early testifies positively that the



latter ordinance was repealed in accordance with an understanding with the representatives of the Suburban Company when the former ordinance was passed. Therefore, the fact that the repeal of this ordinance was assented to was not left to conjecture. There is positive proof in the case that the repealer was adopted as incidental to the passage of the other ordinance (C. p. 53, *et seq.*).

It is utterly inconceivable that upon the many occasions when various representatives of the Suburban appeared in council meetings, to advocate the passage of the franchise ordinance of 1900, the pending and adoption of the repealing ordinance was not brought to their attention or could have been overlooked. The negotiations, with respect to the adoption of the franchise ordinance, covered a period of weeks, and it is unbelievable that the repealing ordinance could have been introduced, considered and adopted without the knowledge at least, of the representatives of the Suburban, which company at that time, was the lessee and in full operation of the property of the Camden Horse. The fact that no objection was interposed and no steps were taken to review the action of the municipal authorities in passing the repealing ordinance, is conclusive evidence, to our minds, that such repealer was with the consent of the Suburban and adopted so that there could be but one ordinance **granting rights and imposing duties** with respect to the street railway system in Merchantville.

If the agents of the Suburban consented to or were advised of the determination of Borough Council to repeal the 1896 ordinance, we now contend that both the Camden Horse and the Suburban, as well as their successor, the Public Service, the defendant in this action, are all estopped from setting up any



infirmity in the proceedings by which the repeal was accomplished. Certainly, no property rights were involved because there is no proof that the Camden Horse ever exercised any of the privileges conferred by the ordinance.

Under ordinary conditions, undoubtedly, such ordinance, which granted rights to the Camden Horse, could not be repealed without notice, but manifestly no formal notice was necessary to give validity to the repealer, in view of the circumstances under which the latter was adopted.

Furthermore, it has been held in New Jersey repeatedly that an ordinance which a municipal corporation has the power to pass, cannot be attacked collaterally.

*McMillen on Corporations* Vol. 2, Sec. 798;  
*Camden vs. Mulford*, 26 L. 49;  
28 *Cyc.* 377;  
37 *Cyc.* 1109.

There being no proof that either the Camden Horse or the Suburban exercised any of the privileges conferred by the 1896 ordinance, and it also being established that such ordinance was repealed at the time the 1900 ordinance was adopted, under the circumstances as indicated, we contend there is no foundation whatever for the claim now made by the Public Service that any construction or operation since 1900 in Maple Avenue, can be predicated upon the 1896 ordinance. To the contrary, it is conclusively established that any rights or privileges exercised in said highway since 1900 must be founded upon the ordinance in favor of the Suburban adopted that year.

It was intimated, at the trial, that the municipal authorities acted surreptitiously in adopting the re-



pealing ordinance and that the representatives of the Public Service and its predecessors in title, did not know until the time of the trial that a repealer had been passed. In a letter written by Mr. Berry to Mr. Burleigh, the latter was informed, before the supplemental agreement of 1915 was executed, that neither the Camden Horse, nor its successors, possessed any rights under the 1896 ordinance, because it had been repealed (C. p. 136).

Claim was made below that under the authority of *State vs. Hoboken*, 30 L. page 225, the Camden Horse had the right to construct its railway on the turnpike and operate with electricity by the grant given in its charter and the consent of the turnpike company.

*State vs. Hoboken*, 30 L., 225.

In the Hoboken case, the company which denied the right of the municipal authorities to prescribe regulations with reference to the operation of the railway succeeded to the authority possessed by the turnpike company to construct and operate a street railway pursuant to legislative grant under supplement to the turnpike company's charter, approved March 5, 1858.

In 1860 the railway company leased from the turnpike company such franchise, and the rails had been laid by the railway company, under authority not only of its own charter but that of the turnpike company and the lease from the latter. The Court held, therefore, that by the lease from the turnpike company, the railway company acquired the right to lay rails independently of any ordinance and consent of the municipal authorities. This case was decided long before the enactment of general legislation prohibiting the promiscuous construction and operation of street railways without municipal consent.



The distinction between the Hoboken case and the one under consideration is manifest. The Moorestown Turnpike by its charter had no authority whatever to construct or operate a street railway. The power claimed in the Hoboken case was based not only upon the charter of the street railway company, but upon the legislative grant possessed by the turnpike company to construct and operate such railway. Furthermore, we contend that the Camden Horse, notwithstanding the consent obtained from the turnpike company, possessed no right to use electricity in the operation of its road, without the consent of the borough authorities, even if the authority to use the electricity was expressly conferred by the agreement with the turnpike company.

We also take issue with the contention that

“as the Borough of Merchantville did not have  
“charge of the turnpike, its consent was not  
“made necessary by statute.”

The Act of 1886, Comp. Stat., p. 4991, Sec. 8, provides that any street railway company may use electricity, etc., instead of horses,

“provided it shall have first obtained the con-  
“sent of the Township Committee or municipal  
“authorities having charge of the public streets  
“or highways, on which it was proposed to use  
“such motors or grip cables, which consent may  
“be granted by ordinance.”

Based upon the authorities, referred to with particularity in another part of this brief, we urge the point that the borough authorities did have charge of Maple Avenue, notwithstanding the fact that a turnpike was being operated thereover. Without



doubt, the necessity of such municipal consent was recognized by the persons identified with the Camden Horse in 1892 and for that reason the ordinance passed April 5, 1892, was secured. This ordinance, while it conferred upon the Camden Horse the power to lay and operate a street railway along the turnpike from one limit of the borough to the other, and also on Centre Street, with necessary turnouts, and to erect poles and to supply electricity and to operate electric motors, contained the provision that the privileges should be taken advantage of within six months. Under this ordinance, a single track only, with turnouts, was constructed and operated. By such construction, the company exhausted the authority conferred thereby and no further tracks could have been laid lawfully after the expiration of the six months' limitation, without municipal consent, as expressly required by the Act of March 9, 1893 (Comp. Stat. 5017, Sec. 86).

The Act of 1886, above referred to, would prohibit the use of electricity on any additional track, even if the consent of the turnpike company would have been sufficient to permit the Camden Horse to ultimately construct a double track.

Therefore, it is manifest that under the statutes above mentioned any additional work, other than that contemplated or constructed, pursuant to the 1892 ordinance, without the limited time as provided thereby, required municipal consent and approval.

The Act of 1893 (Comp. Stat. 4992, Sec. 9), provides that municipal authorities "having charge and control of any streets, etc., may, when they deem it proper, authorize the use of poles and wires and prescribe the location and manner of placing the same and also the manner of stringing the wires."



We contend that this statute did not confer upon the Camden Horse, in conjunction with the consent from the turnpike company, the authority to either erect poles or string wires without the consent of the municipal authorities.

We further take issue with the claim of the defendant, that under the provision of Section 10 of the said Act of 1893 (Comp. Stat. 4992), the Camden Horse had the right to use electricity by consent of the turnpike company alone. The consent referred to in Section 10 is not that of the turnpike company but of the municipality and does not, in any way, modify the prior statute prohibiting the use of electricity without the consent of the municipal authorities "having charge of the public streets or highways," as conferred by the Act of 1896.

The agreement with the turnpike company was insufficient to permit the use of electricity or the placing of poles or stringing of wires without municipal consent.

Assuming that in 1892 the Camden Horse did possess the right to lay its tracks on the turnpike, pursuant to the agreement with the turnpike company, we urge, based upon the acts of the Legislature, above referred to, that it could not have operated its road by electricity and used wires suspended from poles, without municipal consent and that it was for the purpose of conferring upon the company such authority that the ordinance of 1892 was passed.

It was also contended below that the borough had no jurisdiction over the turnpike to grant consent to location of railway or to the use of electricity prior to March 16, 1893, nor had the municipality jurisdiction at any time over the turnpike to authorize or require the paving thereof.



The Act of March 16, 1893 (Comp. Stat. 5038, Sec. 138), confers authority upon any street railway company to construct and operate a street railway on the roadbed of a turnpike in counties of the second class in this state.

Section 3 provides that in case the turnpike lies within the boundaries of any borough, etc., in whole or in part, it shall be necessary for the street railway company to be first authorized by ordinance or resolution of the municipal authorities before the construction of the railway within the limits of such borough.

Section 4 requires that after the municipal authorities shall locate the tracks, the company shall, in all respects, conform to the law concerning horse and street railways.

It seems to us that this statute is an additional bit of legislation, which prohibited the placing of any tracks on the turnpike, other than those authorized by the ordinance of 1892, notwithstanding consent therefor might have been obtained from the turnpike company. Consequently, if Merchantville possessed that jurisdiction, municipal consent was required for all construction or operation which occurred subsequently to 1892.

The case of *Hudson vs. Linden* (80 L., 158), referred particularly to the Telephone Act of 1873 and the amendment subsequently adopted. The decision of the Court that a township had no right to designate a telephone route on a county road, over which it had no control, was based upon the Act of 1905, referred to in the opinion, which expressly vested jurisdiction over county roads in the Board of Freeholders. Such jurisdiction, therefore, was expressly removed from the dominion of other municipalities of the county.

cc  
Hudson vs. Linden  
3 Eq 418-422



Furthermore, the Act of 1909 (P. L. 290), is an amendment to the General Telegraph Act, and by clear and explicit language expressly confers upon the county authorities jurisdiction over a county road. The situation, so far as the turnpike is concerned, is radically different, as will be demonstrated by the authorities hereinafter referred to. A turnpike road is a public road and the municipality through which it runs has certain control and jurisdiction over the same. The status of a county road and a turnpike is not at all analogous so far as this question is concerned.

We also take issue with the contention that the borough had no authority whatever to pave any part of the turnpike or authorize or require the street railway company to do so, and our contention with reference to this point is supported by authorities hereafter referred to.

Counsel for defendant seemed to be of the opinion that the construction of turnouts beside the single track was equivalent to the construction of an additional parallelling track. In our judgment there is no foundation whatever for this argument. A parallelling track is used for the purpose of propelling cars in a continuous and unbroken line between the termini, and the operation thereof manifestly imposes upon the highway a greater burden than do mere turnouts. We further assert that the consent for a parallelling track was necessary, regardless of the existence of the turnouts.

*Metlar vs. Middlesex*, (72 L., 524) is cited by defendant, in support of the proposition that the substitution of a second track for five turnouts is not the construction of a railway on a turnpike or even an extension of a railway previously laid thereon. The decision in the Metlar case was with reference



to the right of eminent domain, whereby the traction company sought to condemn an additional strip of land alongside of another strip leased from the New Brunswick Traction Company. The statute under which it attempted to exercise this power provided that it should be lawful for the company to take so much land or material as might be necessary for the construction of any railway built under the provisions of the act, either as an extension of the line of an existing railroad or a new line not exceeding sixty feet in width.

Mr. Justice Read held that the word "extension" of an existing railroad conveyed the idea of a prolongation of a road from one of its termini. That the word "extension" was equivalent to "expansion" and, when predicated of space, may mean lateral as well as longitudinal enlargement. He also held that it was impossible to assign to the word "extension," used in this connection, a meaning equivalent to a lateral expansion without resorting to a forced and unnatural construction of the statutory language in favor of the grantee of the right to condemn. He also held that the additional strip could not be characterized as a new line.

It will be observed that the Act of March 8, 1893 (Comp. Stat. 5017, Sec. 86), provides that it shall be unlawful for any street railway "to lay  
"or construct any railroad track or tracks or  
"any extension of the same through or along  
"any street of any municipality of this State  
"without first obtaining the consent of Common Council, \* \* \* having control of public  
"streets, avenues and roads of said municipality  
"or along the streets of which municipality said  
"railroad company desires or intends to construct its said railroad."



There is a marked difference between the language of the statute referred to in the Metlar case, to wit: "For the construction of any railway built, \* \* \* "either as an extension of the line of an existing "railroad or a new line \* \* \* " and the statutory prohibition against the right "to lay or construct "any railroad track or tracks or any extension of "the same."

Evidently it was the purpose of the Legislature, by the passage of the Act of 1893, to prohibit a street railway from putting down any track or extension thereof without municipal consent. We contend, therefore, pursuant to the provisions of this act and other acts which have been referred to, that in order to confer a right upon a street railway company to lay down any track there must be an exact location prescribed by the municipal authorities. This restriction had reference to the single track and sidings in use under the 1892 ordinance, and thereafter no additional siding and no connections of siding parallelling the original track or no extension of the latter could have lawfully been laid without complying with the provisions of the 1893 act.

Furthermore, the statute referred to in the Metlar case, being a grant of sovereign power in favor of a corporation clothing it with the authority to exercise the right of eminent domain, was construed strictly.

The 1893 act requires consent not only "of Common Council, Board of Aldermen, Board of Public Works, or other Governing Body having the control of public streets, avenues or roads in such "municipality" but such requirement for consent refers to the following: "along the streets of which "municipality said railroad company desires or intends to construct its railroad." There seems to



be a marked distinction in this statute between the public highways generally of a municipality and public highways which are under the control of the municipal authorities. Therefore, adopting but without admitting the correctness of the argument of the defendant that the Turnpike in Merchantville was not under the control of Borough Council, it certainly was a street in Merchantville, along which the company desired or intended to construct its said railroad. The irresistible conclusion is, therefore, that any new track, whether it be a continuous line or a section thereof, or an extension of an existing track, could not have been constructed on any highway in a municipality, without the consent of the municipal authorities, regardless of where the control and jurisdiction of such highway was vested. There can be no doubt about the proposition that Maple Avenue, or the turnpike, was a public highway of Merchantville. It was so characterized in the application of the Suburban Company, which is recited in the ordinance of 1900.

We share the belief, stated by counsel for the defendant, that the application to the borough in the fall of 1896 was occasioned by reason of the act passed April 21st of that year, Comp. Stat. 5040, but confidently assert that prior legislation on the subject, above referred to, was also responsible therefor.

We deny, however, that the situation is in any way controlled by the Metlar case or that by reason of such authority the application to the borough was unnecessary.

We also take issue with the statement that under the ordinance of 1892, a double track could have been constructed at any time after the expiration of the six months' limitation. While the 1892 ordi-



nance might have justified the construction and use of a double track, the building of a single line only within the six months' period would amount to an election and an exhaustion of the authority conferred by said ordinance.

The legal effect of such failure to construct within the time limited is considered fully in *McQuillin*, Sec. 1665, and cases cited.

The Camden Horse officials, by making application for the 1896 ordinance understood that the powers under the former ordinance were exhausted.

The Act of April 21, 1896 (Comp. Stat. 5040), provides that no street railway shall be constructed upon any street in any municipality, except with the consent of the governing body, and such act prescribes the method by which such consent can be obtained. It will be observed by an examination of the 1896 ordinance that the Camden Horse predicated its application for such ordinance upon the provision of such act, as will appear from the recitals contained therein. The applying company was obliged, in its petition, to specify the character of the road to be constructed, operated or maintained, the motive power to be used thereon, the street or streets through which the same were to extend. An authority was vested in the municipality to grant permission, which should be accepted by the corporation making the petition, in writing within thirty days thereafter. It also provides that the application shall be accompanied by a map showing the route of the highway, the proposed location of the rails and tracks and of the poles, and the municipal body was also given the authority to fix and determine the location of the various tracks and rails



and the places and the manner in which the poles were to be erected. Therefore, we disagree with the contention that the application of 1896 was unnecessary and take issue with the statement that the Camden Horse had a perfect right to construct the railway on the turnpike prior to the Act of 1896, Comp. Stat. 5040.

We further contend that the authorities cited in support of this proposition can easily be distinguished. The case of *State vs. Hoboken* is above adverted to. Manifestly it is no precedent whatever for the proposition urged.

The case of *Hudson vs. Jersey City*, 49 L. 303, merely decides that Common Council cannot revoke a designation of the streets in which the telephone company may place its poles when the telephone company has conformed to the conditions upon which the designation was made and has expended money in placing the poles upon the designated streets.

The only vested right which the Camden Horse had in 1896 was to maintain and operate with horse-drawn cars a single track with turnouts constructed prior to the expiration of the six months' limitation contained in the 1892 ordinance. Obviously, under the case of *West Jersey vs. Camden Horse*, 53 Eq., 163, the Legislature could modify the conditions under which the legislative grant, conferred by the amendment to the Camden Horse charter, could be exercised, and various acts of the Legislature, above referred to, passed prior to 1896, made it necessary for the Camden Horse to have municipal consent before it laid a parallelling track from Centre Street to the western boundary of the borough or extended the double track east from Centre Street.



The *Phillipsburg Electric case*, 56 L., 505, is similar to the *Hudson Telephone case*.

The other telephone cases decided in the Federal courts, are in line with the decisions in the *Hudson case*. There attempts were made by the municipality to revoke the franchise rights granted after the companies had exercised the same and were in possession of the public highways.

The other cases are along the same general lines. It will be observed also that these cases can also be distinguished for the reason that the ordinance of 1896 was not an attempt to repeal any franchise theretofore granted to the *Camden Horse*. It was passed on the application of the latter company to build a continuous track,

“parallel with the present tracks on said avenue or turnpike road \* \* \* and to be so constructed that the middle of the track here-in authorized shall be five feet southward from the middle of the turnpike road, leaving a clear space of five feet between the two tracks, so that when the tracks hereby authorized are constructed and completed, the *Camden Horse Railway Company* may then maintain and operate a double track street railway from the limits of the Borough of Merchantville Eastward on said Maple Avenue, or said turnpike road, to said Centre Street.”

Such application was recognized as absolutely essential by the representatives of the *Camden Horse* at that time, and from our present investigation of the various acts of the Legislature, applicable to the situation, it is manifest that the understanding of the representatives of the *Camden Horse* at that time was correct, regardless of the attitude of the representatives of their successors, the Public Service, asserted in this proceeding.



Furthermore, the ordinance of 1896 shows that it was not then seriously considered that the existence of turnouts to the south of the existing single track would entitle the company at any time thereafter to make connections so as to have a second continuous track parallelling the first. That such right existed, independently of municipal consent, is undoubtedly an after-thought and was not contemplated by anybody when the application for the 1896 ordinance was made.

Section 3 of the act relative to statutes (Comp. Stat. 4971), applies only to repeal of statutory provisions, which is substantially different from the provisions of the Act of 1896, last above referred to, imposing upon the street railways the necessity of obtaining municipal consent to lay down and operate additional tracks.

Certainly the power conferred by the ordinance of 1892 to lay and operate a street railway, with necessary turnouts and poles and to use electricity to operate electric motors, would not create such a general franchise so as to permit the unrestricted exercise thereof, regardless of any regulations which the Legislature might impose as to construction not actually accomplished within the six months' limitation. If the contention of the defendant is sound, the Camden Horse, after putting down the single track within the six months' period, could, in total disregard of any statutory or municipal limitations, lay down as many tracks as it were possible for the width of the highway to accommodate, parallel with each other, on the turnpike road. The right to lay and operate a street railroad under the circumstances can be restricted and every consideration, with respect to public rights, should induce the Courts to enforce the expressed limitation desig-



nated in this ordinance. The cases heretofore cited cover this question. We fail to discover any relevancy of the authorities referred to in the defendant's brief in support of the proposition there made. None of them apply to the conditions existing here.

The Act of 1896 (Comp. Stat., 5040) does not pretend to be retroactive. It only applies to construction after the passage thereof. Of course, if the ordinance of 1892 is to be construed so as to vest in the Camden Horse the right to put down as many parallelling tracks as it chose under a provision to lay and operate a street railway and it was not necessary that the privileges should be taken advantage of within six months, then, of course, these cases apply; but, it is inconceivable that such ordinance and limitation together with the statutes hereinbefore referred to can be so construed as to confer on the Camden Horse such power, in view of the purpose and scope of all the legislation enacted from 1893 to 1896, at a period when the street car service in the state was being developed, that construction and operation on public highways of the state should be subject to municipal consent. This principle of municipal control seems to be prevalent in all of these statutes and while the Legislature might not have had any power to interfere with any existing tracks, there can be no doubt that under the general authority reserved by the Legislature, the latter could have imposed upon various street railway companies of the state the obligation to apply to the municipal authorities for the consent covering new work and additional tracks.

Counsel for the defendant concedes that if the Camden Horse was required to apply to Merchantville for its consent, for some purpose, the municipi-



pality may annex any pertinent condition to its consent and so bind the company. We are in accord with this proposition. We dispute, however, the argument that it is entirely clear that the Camden Horse obtained no right under the ordinance of 1896 which it did not previously possess. Except as it may be instructive as a matter of history in showing the motives actuating the Suburban Company in applying for the ordinance of 1900, it is unimportant as to whether or not the obligation prescribed in the 1896 ordinance requiring the Camden Horse to pave became effective, for the reason that no effort has ever been made to enforce this provision as against either the Camden Horse or the Suburban Company. The significance of the non-performance of the paving obligation contained in the ordinance of 1896, applies to the claim made originally that the construction of the paralleling track west of Centre Street in 1900 was made, not pursuant to the provisions of the 1900 ordinance, but in accordance with the provision created by the 1896 ordinance. No claim is made by the defendant that the Camden Horse ever did fulfill the paving requirement of the 1896 ordinance. The existence of this liability, which was not at all in harmony with the paving requirement set forth in the 1900 ordinance, is what undoubtedly induced the Suburban, as the lessee of the Camden Horse, to consent to the repeal of the 1896 ordinance.

We earnestly insist that the privileges granted by the 1896 ordinance were abandoned by the Camden Horse, by reason of the non-exercise thereof and no rights thereunder existed when the ordinance of 1900 was passed. This explains the reason for the repeal of the 1896 ordinance at that time.



Whether or not the Suburban Company ever obtained a consent from the turnpike company to build west of Centre Street, as required by the 1893 act, is immaterial in this discussion, and cannot be set up by the defendant as a defense to the plaintiff's action. The turnpike company undoubtedly acquiesced in such construction and evidently considered that the consent given to the Camden Horse covering that portion of the turnpike, inured to the benefit of the Suburban as lessee.

Counsel for the defendant relies on the Supreme Court decision of *Russell vs. Sebastian*, 233 U. S. 195.

The decision in such case, as we understand the same, is in entire harmony with the telephone cases which have been decided by the Supreme Court in our own state, but we contend that the situation present in those cases is not analogous to the question with which the defendant is confronted in the case under consideration. The Sebastian case held that a grant to lay pipes and conduits in a street of a municipality, dependent only upon acceptance, is not to be regarded as accepted, foot by foot, as pipes are laid, but in a entirety for all the streets of the municipality and after acceptance and preparation for compliance with the offer, the grant cannot be withdrawn as to the streets in which pipes have not been laid and that such action would have impaired the contract.

The ordinance of the municipality, which was attacked in that proceeding attempted to impose restrictions as to the exercise of the right which had heretofore been granted to the company to lay such pipes and conduits.

This opinion seems to be somewhat in conflict with our Court of Errors case of *Camden Horse Rail-*



*road Company vs. West Jersey Traction Company*, heretofore referred to, where it was held that notwithstanding the passage of the amendment to the Camden Horse charter to extend its track from the City of Camden into the County of Camden, the Legislature reserved the authority to impose restrictions under which the legislative grant could be exercised.

Another feature of the Sebastian case, which is not pertinent to this discussion, is the fact that the right of the company to lay pipes and conduits was exercisable under a provision of the Constitution of the State of California. Here no such question arises. A legislative grant only is involved. This is referred to in the traction case.

Another distinguishable feature which must necessarily control the ultimate determination of this question and demonstrate that the case *sub judice* is not to be decided upon the authority of the Sebastian case is the point that the legislative grant, conferred upon the Camden Horse under its charter, was limited to the use of horses to draw its cars. Therefore, the supplement of 1872, which conferred the right to build a street railway into the county, must be construed in connection with the charter powers exercisable under the original certificate of incorporation. The law relied upon to confer the right to build through Merchantville was a supplement to the act incorporating the Camden Horse, under which horses only could be used for operation.

It became necessary, therefore, in order to warrant the use of electricity and the installation of poles and wires for that purpose, to secure the support of subsequent general legislation which in no way applied exclusively to the charter rights possessed by the Camden Horse. Certainly the Legislature possessed the right to impose restrictions



and conditions with reference to the exercise of such additional rights, which were not contemplated under the original charter of the Camden Horse or the supplement of 1872.

In *Green vs. Trenton*, 54 L. 92, our Supreme Court held that even the provisions of the act hereinabove referred to, empowering street railways, with the consent of the municipal authorities, to use electric or chemical motors or grip cables as the propelling power of cars, instead of horses, did not legalize the erection of poles and stringing of wires in a public street as a part of the system of electrical railroading. Subsequent legislation was enacted permitting the use of poles and wires (see Act of 1893, Comp. Stat. 4992, Sec. 9). Obviously, therefore, the only legislative grant acquired under the Camden Horse charter and the supplement of 1872, was to operate a street railway by horse power. Subsequent legislation conferred the right to use motors and wires and poles erected in the highway for that purpose. There can be no doubt that the Legislature had the power to provide that the exercise of such additional powers, beyond the scope of the charter, should be subject to municipal control and consent.

Therefore, we contend that regardless of the legislative grant created by the charter and the said supplement, if either the Camden Horse or the Suburban attempted to exercise rights which are dependent upon general legislation, the exercise of such rights must necessarily be subject to such reasonable restrictions as the Legislature, in conferring such rights, may impose.

Furthermore, it is evident that the application of the Camden Horse to build a single track line and use electricity in the operation thereof, as granted



by the ordinance of 1892, was an election to exercise the charter rights to build tracks under the charter and to use electricity under the various acts of the Legislature above referred to.

In the Sebastian case, there was a blanket grant to use all of the streets in the municipality for the purposes of the company. Here no such situation exists. Under the ordinance of 1892, adopted pursuant, not only to the charter rights of the Camden Horse but to the various acts of the Legislature above referred to, the company constructed a single track line west of Centre Street and by the acceptance of such ordinance and the exercise of the rights thereunder, agreed with the municipality that no further rights would be exercised, unless performed within the six months' period prescribed by the ordinance.

Another point which seems to be particularly applicable to the contention based upon the Sebastian case is the admitted fact that in 1892, 1896 and 1900 the Camden Horse and the Suburban, as lessee, applied for and were granted rights in the highway, inconsistent with the charter of the company if the latter granted the authority to use the highway without limitation. Certainly this is evidence of an abandonment by both companies of any rights in the highways, which did not depend upon any of the three ordinances. For the reasons above stated, the Sebastian case is not dispositive of the questions here involved.

It is conceded by the defendant that the Suburban Company, under the provisions of March 6, 1896 (Comp. Stat. 5038), was required to apply to Borough Council of Merchantville for an or-



dinance locating its tracks and authorizing the construction of its road east of Centre Street, notwithstanding that on November 10, 1900, the turnpike company gave its consent to such construction. This being the correct construction to be put upon the 1893 statute, it is equally clear to our minds that the same situation existed with respect to the south-bound track, west of Centre Street, for the reason that the right to construct the same can not be predicated either on the ordinance of 1892 or the consent of the turnpike company. This point has already been discussed.

The first agreement made by the turnpike company was with reference to a single track on the north side of the turnpike as far east as the Pensauken Road, throughout the entire length of the road. The act in relation to the construction of railways on turnpikes, hereinbefore referred to, was passed in 1893. It was not until June, 1896, that the Camden Horse obtained from the turnpike company consent to build a second track west of Centre Street parallel with the first track, which when laid would constitute a double track. The consent, therefore, obtained in 1896 for the parallelling track was secured subject to the provision of the Act of 1893, which provided that it would be necessary for the street railway company to have the construction first authorized by the municipal authorities before the same could be undertaken on the turnpike road.

Neither the Camden Horse, nor the Suburban Company, as its lessees, in 1900 had any vested rights whatever, through any consent of the turnpike company, to construct the second track east of Centre Street. Therefore, it was necessary, for the Suburban Company to obtain an ordinance locating this track and consenting to the construction in 1900 of



the road east of Centre Street. It is perfectly manifest, therefore, that the Camden Horse and the Suburban, as lessees, were obliged to obtain like consent to the construction of the second track west of Centre Street if the work were done after March 16, 1893, when the act above referred to was passed.

The latter Act of 1893 was passed before the turnpike company gave consent to the Camden Horse to build a second track west of Centre Street, which consent was obtained in 1896.

Therefore, the right to construct the parallelling track from the eastern boundary of the borough to Centre Street is predicated solely upon the provisions of the 1900 ordinance, for the following reasons:

(a) The legislative authority possessed by the Camden Horse under the charter supplement of 1872, could not be exercised after March 8, 1893, without the consent of the municipal authorities, as provided by the act passed on the last mentioned date.

(b) If the Camden Horse originally had the right to construct the additional track under the ordinance of 1892, the same was lost because of the failure to exercise it within the time provided by said ordinance.

(c) The privileges conferred by the ordinance of 1896 were abandoned and could not be exercised after the repeal of that ordinance, in view of the further fact that the rights granted by the 1900 ordinance, were manifestly in substitution of all those theretofore existing and conferred upon the Suburban, as the lessee of the Camden Horse.



**Upon the Passage of the 1900 Ordinance and the Exercise by the Suburban, of the Privileges Conferred Thereby, it Assumed all the Paving Obligations Provided Therein.**

This conclusion necessarily follows from the situation as it existed, based upon the franchise granted, as well as what occurred after the adoption of the ordinance. The Suburban was the only corporation which had any franchise rights in Maple Avenue, east of Centre Street. There is no pretense that the Camden Horse had any authority to construct or operate in this portion of the highway, and it is equally manifest that the Suburban was the only corporation which then possessed the right to build a parallelling track from the easterly limits of the borough to Centre Street.

As a matter of fact, the testimony of Mr. Corliss (C. p. 32, *et seq.*), proves that the Suburban did build the additional track and construct the pavement, both east and west of Centre Street, in accordance with the paving obligations imposed by the 1900 ordinance.

The work of repairing the highway was in accordance with the paving requirements of the 1900 ordinance, regardless of the original track being put down and operated by the Camden Horse. The Suburban kept in repair the macadam which was built, as described in the franchise ordinance of 1900 (C. pp. 33, 34 & 35).

How there can be any legitimate contention that the work done by the Suburban after 1900, was not pursuant to the provisions of the ordinance passed that year, is incomprehensible.



It will be observed also that the 1900 ordinance specifically described the southerly track as extending between the easterly and the westerly boundaries of the borough and the northerly track as extending from Centre Street to the easterly boundary. Without doubt, the Suburban did exercise the privilege of constructing a double track from Centre Street east, as permitted by the 1900 ordinance. Furthermore, how can the Public Service be justified in now claiming that there should be a severance of the performance of the paving obligations, merely because the southerly track, which is referred to in conjunction with such obligations, is described as extending the entire width of the borough?

Paragraph 5 of the complaint alleges (C. p. 4, l. 44):

“After the passage of said ordinance (1900),  
“the said Suburban Company accepted the  
“same, as required of law, and proceeded to  
“lay the tracks and operate a street railway,  
“in accordance with the terms thereof.”

The facts alleged in this paragraph are admitted in the answer of the Public Service (C. p. 12, l. 23).

Paragraph 7 of the complaint avers (C. p. 5, l. 43):

“After the passage of said ordinance, and acceptance thereof by the Suburban Company,  
“the latter did pave between the rails and between the tracks with rubble pavement, using  
“the stones then constituting the existing rubble pavement on the road, with additional  
“stone necessary therefor, and did also for a  
“distance of three feet on the outside of both  
“the north and south tracks construct a macadam pavement, in accordance with the provisions of said ordinance (1900).”



This allegation is also admitted in the answer of the Public Service (C. p. 12, l. 23).

Therefore, our contention is that the paving requirements, created by the 1900 ordinance, as imposed upon the Suburban, related to that portion of the highway west, as well as east of Centre Street.

**The Paving Obligations, with Respect to the Highway West of Centre Street, Related to the Entire Width Thereof, and Were Not Limited to the Southerly Track. Which is Specifically Described in the 1900 Ordinance.**

The answer of the Public Service denies generally that any obligation exists respecting the paving west of Centre Street, but at the trial it was intimated that while such liability might apply to that part of the double track built after the passage of the 1900 ordinance, it cannot, in any event, relate to the northerly track which was built by the Camden Horse, pursuant to the ordinance of 1892.

The suggestion made was that the right of the municipality to recover might be limited to the cost of the improved pavement, laid between the rails and three feet on each side of the southerly tracks, west of Centre Street.

We contend that there is nothing in the ordinance to indicate, in the slightest degree, that the paving requirements were not applicable to the highway which passes through the center of the borough throughout its entire length and breadth. It is true that the tracks, specifically described, do not include the single track built by the Camden Horse in 1892, but it should be remembered that at the time of the passage of the 1900 ordinance, such single track



railway was in the possession of and operated by the Suburban, under the Camden Horse lease, by the terms of which, the former company was obliged to carry out and perform any paving requirements imposed upon the latter.

The manifest object of the 1900 ordinance was to prescribe a comprehensive adjustment of street railroad matters in Merchantville, so that the service might be improved. Under these conditions, it could not have been the purpose of the parties involved, to make such plan apply to the entire width of the street, east of Centre Street, and to only one-half of the width west thereof. That purpose would seem to be furthest from the thoughts of anybody connected with the transaction.

The title of the ordinance refers to the construction and operation of a street railway for passenger and mail service on Maple Avenue in Merchantville. This is certainly broad enough to include the track then in existence (C. p. 104, l. 20).

Section 6, which describes the paving requirements, refers generally to the railway and provides that the Suburban shall pave between the rails and tracks with rubble pavement, using the stones then constituting the pavement on the road, and for a distance of three feet on the outside of both the north and southbound tracks shall construct a macadam pavement. The existing rubble, undoubtedly, was related to the original track. Under these provisions, the Suburban actually put down the rubble pavement and constructed a macadam pavement with reference to both tracks the entire width of the borough, without making any distinction as to the original single track of the Camden Horse (C. p. 108, l. 11).



The Suburban was also obliged to construct sixteen feet of trap rock macadam in strips of eight feet wide, immediately adjoining the three foot pavement on the outside of each track. This provision refers generally to all of the rails, regardless of the single track of the Camden Horse, and as actually constructed, applied to both track from the easterly to the westerly boundary of the borough.

The 6th clause contains the following:

“Whenever, after five years from the passage  
“of this ordinance, such remaining sections of  
“the Moorestown Pike or Maple Avenue, not  
“required by this section to be paved by the  
“said Camden and Suburban Railway Company,  
“shall be paved under the direction and at the  
“expense of said borough from curb on each  
“side to within three feet of the outermost  
“rails, with any other improved pavement, the  
“said company shall, within sixty days, after  
“notice by said council, pave between the tracks  
“and between the rails of said railway, and  
“three feet on the outside of the both north and  
“south tracks with such improved pavement as  
“said borough council shall direct, and shall  
“keep the same in repair, under the direction  
“of said borough council, and in case the said  
“railway company shall fail to comply with  
“such notice, the said paving may be done by  
“said borough council, as aforesaid, at the ex-  
“pense of the company.”

It will be observed that this provision applies generally to all of the tracks and is not limited, by its terms, to those specifically described in the ordinance. Even if it be proper to so interpret the ordinance as to limit the provisions to the original rub-



ble pavement, between the tracks and rails and the macadam, as applied only to the tracks specifically described, which would exclude the north single track, it is perfectly manifest from the repaving liability, i. e. if such remaining portions of the highway, not required by the 6th Section to be paved, shall be paved from the curb on each side to within three feet of the outermost rail, that the Suburban thereby assumed the obligation to co-operate with the borough in securing a uniform pavement the entire length and breadth of the highway and agreed that the expense thereof, so far as it applied to the space between the rails and tracks and three feet outside thereof, should be imposed upon it. This must necessarily be so, without regard to the fact that the authority to construct the tracks related originally to those portions of the double railway not originally constructed by the Camden Horse. No other logical or reasonable construction can be put upon this language. There is nothing in this section to show that the result sought to be accomplished was that the improved pavement should apply only to a limited portion of the highway west of Centre Street and should apply to the entire width of the highway east thereof.

Furthermore, Section 7 provides that the Suburban Company shall at all times keep the said railway in good condition and repair, so that the same shall be a good roadway for the use of railways and the public generally. This undoubtedly applied to the old portion as well as the new portion of the double track railway. This section has also been so interpreted by the defendant in that it repaired the roadway immediately adjacent to both tracks indiscriminately, as shown by the testimony and admitted in the pleadings (C. p. 109, l. 13).



Section 8 describes the trap rock macadam to be built on either side of the tracks at a distance of three feet from each outermost rail. This unquestionably was understood as relating to both north and southbound tracks, the entire width of the borough. There would be absolutely no sense in providing this character of pavement for three feet beyond the outermost rail of the tracks specifically described in the ordinance and eliminating the same with respect to the north single track extending west of Centre Street (C. p. 109, l. 20).

The following provision in Section 8 is particularly illuminating (C. p. 109, l. 27):

“(a) The said macadam pavement is to be  
“constructed not less than eight inches in depth  
“to be sixteen feet wide and, where possible, to  
“be divided into strips eight feet in width on  
“each side of said tracks.”

A proper construction of this language requires strips of macadam on both sides of the tracks the entire width of the borough, which would include the old single north track. Any other interpretation would be illogical and nonsensical. Otherwise, it would follow that there be strips eight feet wide on each side of the southerly track, extending from Centre Street west, which would provide an improved surface between the south track and the curb and for eight feet north of the north rail of the south track, which would extend over a portion of the old north single track and leave no improved surface whatever between the north rail of the old north track and the curb. There is nothing in the language to indicate that such a distinction between the old and new construction work was intended.



Section 9, prescribing a single fare of five cents within the limits of the borough and designating the speed of the cars, unquestionably had reference to the entire system, including the old single track (C. p. 111, l. 8).

Section 10, respecting sprinkling, must be construed as applying to all the tracks (C. p. 111, l. 15).

Section 11 provided that daily service be maintained and required all cars entering the borough from the west to run to the easternmost boundary (C. p. 111, l. 21).

All of these provisions must be construed as applying to the whole system, because no reason whatever appears for any other interpretation of or application to the words "tracks and rails."

Section 16 provides that the provisions of the ordinance, so far as they relate to the construction and operation of such street railway and said rubble and macadam road, should not only be binding upon said Suburban, but upon its successors and assigns, and any other person or company operating thereunder (C. p. 112, l. 33).

Manifestly this provision is general and applies to the entire system used by the Suburban and cannot be limited to those tracks specifically described therein.

The construction of Section 6, for which we contend, leads to a rational, logical and complete plan for a uniform pavement from curb to curb, including the space between the tracks and rails throughout the length of the borough. If the paving and repairing requirements specified in that ordinance are to be limited to both tracks east of Centre Street, and only to the southbound track west of that highway, it would mean that the borough authorities and the Suburban, when the 1900 ordinance was passed,



intended that the improved pavement, contemplated thereby, would extend the entire width of the thoroughfare, east of Centre Street, and only from the south rail of the southerly track and the south curb of the street between the rails and three feet north of north rail of the south track, in that portion of the highway west of Centre Street.

This would leave practically the northern half of the highway extending west from Centre Street without any improvement whatever and without any paving requirements, because the 1892 ordinance is silent in this respect. The 1900 ordinance is the only efficacious piece of municipal legislation applicable to the situation. Certainly, the municipal authorities would never have agreed to a condition of affairs, which would provide for a municipal improvement, amounting to nothing more or less than a piece of patch work. The whole purpose was to impose upon the Suburban the responsibility of co-operating with the municipality when the latter improved the highway from curb to curb. Manifestly, this comprehends the inclusion of the north single track east of Centre Street. No other determination could be logically maintained.

Furthermore, Section 6 of the ordinance requires the paving to be done between the tracks and between the rails. The words "tracks" and "rails" are here used advisedly. "Between the rails" means the space covered by the tracks. "Between the tracks" comprehends the space between the innermost rails of both the north and south tracks. There is nothing in this language to indicate that the same was intended only to apply to both north and south tracks east of Centre Street.



Therefore, we contend, that if the defendant is liable at all for the paving requirements contained in Section 6 of the 1900 ordinance, such responsibility extends to the entire space between the tracks and rails and three feet outside of both the entire length of the highway.

Below certain specific contentions were made as to the validity of the 1900 ordinance insofar as it applied to the turnpike west of Centre Street.

The first one was that the ordinance attempted to supplant the rights of the Camden Horse without the knowledge and consent of that company.

Primarily, we contend that the Camden Horse possessed no rights west of Centre Street, with respect to a parallelling track, except those which might be exercised to lay down tracks under the supplement of 1872, subject to the consent of the municipal authorities, as provided by statutes above referred to. The application of the Suburban Company, unquestionably, was in pursuance of the possession by it, as lessee, of such inchoate rights. Section 1 of the General Traction Act of 1893, Comp. Stat. 5021, conferred upon the Suburban the power to enter upon any street upon which any street railway or any railroad operated as a street railway was constructed, with the consent of the owner of such railway or the person or persons operating the same and to make, construct, apply, maintain and operate such railway, motors, cables, electrical or other devices and appliances and to construct lines of street or passenger railway; with the provision, however, that no such traction company should enter or use any street under color or by virtue of said act for the extension of construction of



new lines of railways or for the operation thereof without the consent of the municipal body having control and operation of the municipal streets.

Section 16 of the same act conferred upon the Suburban the right to lease the property and franchises of the Camden Horse and thereafter to use and operate the franchises and property so leased.

Furthermore, it is manifestly obvious from the proofs that the Camden Horse and the Suburban were in perfect harmony and accord with relation to the adoption of the 1900 ordinance and the repeal of the ordinance of 1896. There is absolutely no foundation for the claim that by the former ordinance the Suburban Company attempted, without the knowledge of the Camden Horse, to abrogate the rights of the latter in the street west of Centre Street.

The second one was that the Suburban could not obtain or accept an ordinance to construct a street railway on the turnpike west of Centre Street because it did not have the consent of the turnpike company to construct a street railway on that part of the turnpike.

The obvious answer to this claim is that the Suburban was acting for and on behalf of the Camden Horse in making the application, as was contemplated by the lease. Whatever rights were possessed by the Camden Horse under the consent of the turnpike company given in 1896, about the time of the adoption of the 1896 ordinance, passed to the Suburban and were exercisable by it under the lease. Any consent from the turnpike company which was required by the Suburban to construct the additional track west of Centre Street existed



by virtue of the agreement with the turnpike of 1896, which expressly referred to the said additional track. This right passed to the Suburban by the terms of the lease. Of course, neither the Camden Horse nor the Suburban could exercise the right conferred by the turnpike without the consent of the municipal authorities.

It seems to us that the enforcement of the ordinance cannot be resisted by the Suburban even if the turnpike company had not, at the time of the passage of the ordinance, conferred a valid right on either the Camden Horse or the Suburban to build a line. That was a matter with which the municipality had nothing to do. The consent from the turnpike company might very properly be obtained after the passage of the ordinance.

The third one was that because the lease to the Suburban contained a provision that all double tracking of the lessor should be done at the expense of the lessee and under the rights of the lessor and become the property of the lessor, which expressly precluded the Suburban Company from acquiring any right to construct a street railway on the turnpike west of Centre Street.

It seems to us that there is nothing in this language, nor of any other provision of the lease, which would prevent the Suburban from making the application to build a single track west of Centre Street under the conditions as above recited, in view of the provision thereof that all work shall be done at the expense of the Suburban. The lease expressly provided that the Suburban should be obliged to comply with all paving obligations. Of course, as between the Suburban and the Camden Horse any work constructed under the ordinance would event-



ually inure to the benefit of the Camden Horse under the reversionary clause of the lease. This also is a matter with which the municipality is not concerned and of which, according to the proofs, it had no knowledge.

Furthermore, there was no obligation imposed upon the municipality, when the application of the Suburban was made, for the rights subsequently conferred under the ordinance of 1900, to make any investigation whatever as to the status and authority of the Suburban to carry into effect the powers applied therefor. If the Suburban applied for rights which, according to the lease with the Camden Horse, it had no authority to exercise, it cannot take advantage of its own wrong. It does not now lie in the mouth of the Suburban to deny the validity of the ordinance granted upon its application, in view of the fact that it applied for the rights subsequently granted. The municipality was not obliged to take notice of the right of the Suburban to exercise the privileges for which it applied.

The fourth referred to the statute passed in 1891 (Comp. Stat. 5008, Sec. 56), which provides that

“in no case shall such proposed road (a new  
“street railway) be allowed upon any portion  
“of a street or avenue where a road is now con-  
“structed and operated.”

The Act of 1891, referred to in this objection, applies to street railways incorporated under any general law of New Jersey. The only general act to which such provision was applicable is “An act to provide for the incorporation of street railway companies and to regulate the same,” passed in 1886, P. L. 185.



In the first place it would seem that the act of 1891 would apply only to corporations organized under such act. The General Traction Act, under which the Suburban was incorporated, was passed in 1893. No such limitation exists in the traction act and we insist that in the absence of such limitation a general authority to construct would be an implied repealer of the limitation set forth in the prior statute.

Manifestly also, the provision of the 1891 act was not intended to apply to the situation here present. The Suburban, under the lease of the Camden Horse and the provisions of the Traction Act, had the right to exercise the franchises of the former and enter upon any highway in which the Camden Horse possessed rights, either legislative or by ordinance; subject, of course respecting new construction to the consent of the municipality. Undoubtedly, the provision referred to in the Act of 1891 was intended to apply to competing companies so as to prevent the encumbering of public highways with an unnecessary number of tracks.

We further urge, as a fundamental question to the sufficiency of any of the four objections to the validity of the 1900 ordinance, the general doctrine of estoppel which will be discussed and supported by cases hereafter referred to.

Regarding the contention that the 1900 ordinance was illegal so far as it conferred any right or imposed any liability on the company west of Centre Street, it should be borne in mind primarily, as a reasonable presumption, that the parties intended to make a valid contract and it is incumbent upon the defendant to establish such circumstances as



would warrant a contrary construction. In any event it is perfectly manifest that such principle of law is not pertinent to this discussion, for the following reasons:

First: The provisions of the ordinance relating to that portion of the highway west of Centre Street are not *ultra vires*.

Second: It is utterly impossible to separate such provisions from the general regulations contained in the ordinance respecting the entire highway, and furthermore the doctrine of estoppel must necessarily apply.

The first reason here assigned will be discussed hereafter under the general head of the jurisdiction of the borough over the turnpike road.

So far as the second reason is concerned, in support of our contention that there is no practicable or reasonable method by which the provisions of the 1900 ordinance, relating to the operation of the highway west of Centre Street can be severed from the entire highway or at least that section east of Centre Street, we repeat what has already been said on this subject.

If we are right in our contention that neither the Camden Horse nor the Suburban, as lessee, after 1900 could have constructed the parallelling line and operated the same by wires and poles installed in the street, without the consent of the municipality, is it not a fair inference that such grant would not have been made by the borough without the incorporation of all of the stipulations and conditions contained in the ordinance covering the en-



tire highway? It is also reasonable to assume that the borough would not have conferred the right to build a double track east of Centre Street unless the Camden & Suburban agreed to construct a second track west of Centre Street. It must be remembered that the railway ran from Merchantville to Camden, and that portion of the highway upon which the second track was built, under a provision which the defendant now claims to be illegal, was located between Centre Street and Camden. It would have been utterly impracticable, both from the standpoint of the borough and the Suburban, to have provided for a double track east of Centre Street without also providing for the continuation thereof toward Camden parallelling the existing track west of that highway. The ordinance was a consummation of an adjustment and rearrangement of the entire traction situation in Merchantville, based upon the application of the Suburban as an entire, definite and comprehensive scheme.

Furthermore, the particular track which is the subject-matter of objection, so far as the defense of *ultra vires* is concerned, is described in the ordinance as part of the double track which the Suburban was permitted to construct east of Centre Street under the terms of the ordinance.

The object of the borough was to have a paved highway the entire length and breadth thereof. It is most reasonable to assume that no rights in the highway east of Centre Street would have been granted if the ground of objection now made on part of the Suburban as to the west thereof had been disclosed. Obviously the provisions respecting the several portions of the highway cannot be disregarded and separated. The testimony and minutes show that the ordinance was adopted after full and



comprehensive discussion and consideration and each particular section of the ordinance was passed upon. There was no pretense or intimation on the part of the Suburban that its application for rights west of Centre Street was unnecessary and that the grant thereof would be illegal. If it had been disclosed to the borough authorities that the Suburban would attempt to repudiate its paving obligations west of Centre Street, unquestionably no rights in the highway east thereof would have been given. The question of estoppel will be discussed hereafter.

**The Steps Taken by the Borough to Enforce the Paving Obligation Contained in the 1900 Ordinance, as Supplemented by the Agreement of November 15, 1915, Were Legally Sufficient to Charge Upon the Public Service Railway Company Liability for the Expense Incurred.**

It might not be inappropriate to here suggest that this question, while raised at the trial, was not set up in the answer, and the record shows an admission of counsel that the only defenses relied upon were those specifically pleaded (C. p. 31, l. 26; p. 32, l. 1). Furthermore, the Public Service was fully advised of the methods proposed to be adopted by the borough, to cooperate with the county in the improvement of the entire width of the highway and of the purpose to impose upon it the cost of that portion thereof, as contemplated by the 1900 ordinance (see testimony of McAllister, C. p. 89, *et seq.* and of Berry, C. p. 81, *et seq.*).

It is true that after the plans and specifications of the proposed improvement had been served upon the Suburban and the Public Service, the former



disclaimed any responsibility because all obligations in this respect had been assumed by the latter under its agreement to operate.

It is also true that after the proposals had been invited and bids received and the Public Service had been notified of the purpose of the borough to enter into a contract with the lowest bidder for that portion of the work for which, it was contended, the Public Service was liable under the terms of the ordinance, namely, between the tracks and rails and three feet on the outside of both, the Public Service, on April 5, 1916, served a notice, which is marked "Exhibit D1" (C. p. 147).

This notice was given in response to a notice sent by the borough (C. p. 146).

It will be observed that no protest was made respecting the method pursued by the borough in having the work done, but the disclaimer was to the effect that the company was not liable to do the paving or pay the cost thereof *as claimed by the borough*, on the highway. This is entirely consistent with the attitude of the Public Service from the beginning, that the paving obligation contained in the 6th Section of the 1900 ordinance was limited to that portion of the highway east of Centre Street, and had nothing whatever to do with the remaining portion of the highway.

We contend, not only is the Public Service precluded from raising the defense that the steps taken by the borough to impose liability were insufficient and it cannot be considered because it is not pleaded, but also that the Public Service is now estopped because it was always fully informed of the steps about to be taken and it was incumbent upon it to specifically direct the borough's attention to any objection as to the method pursued.

This, of necessity, must be so for two reasons.



First: The protest itself is limited to a statement that the objection is based upon its non-liability to do the paving or pay the cost thereof, and not to the methods being adopted to carry said purpose into effect, and

Secondly: That even if the said notice is to be given the force ascribed to it by the Public Service, the latter was obliged to do something more to make the protest effectual.

It was held by Chancellor Howell in the case of *Smith vs. Spencer*, 81 Eq. 389, with relation to the violation of a building restriction, as follows at 393:

“Complainants cannot, in a situation like this,  
“protect their rights by claiming such rights,  
“however persistently, by mere correspondence.  
“Legal proceedings must be taken before there  
“has been a serious expenditure of money.  
“They waited until the defendant’s building  
“was half finished and not until then did they  
“seek the relief which they should have sought  
“as soon as they had ascertained the facts. On  
“this branch of the case, I must hold that the  
“defendants are guilty of laches.”

It would seem, therefore, that the Public Service, having served notice upon the borough of its claim that it was not liable to do the paving, or pay the cost thereof, as claimed by the latter, without protesting against the steps being taken by the borough to impose such liability, cannot be heard to object, at the present time, that the methods pursued were not those contemplated by the 1900 ordinance; particularly in view of the fact that such defense has never been pleaded.



However, it is perfectly manifest from the evidence taken, that the methods pursued and adopted by the borough, in conjunction with the county authorities, for the improvement of the highway from curb to curb, were brought to the attention of the officers of the Public Service and approved by them, as the most feasible plan for carrying out the entire project.

No step was taken in the matter, from start to finish, without the same being brought to the attention of Mr. Burleigh, or the other officers of the Public Service, and this not only applies to what occurred immediately before and after the execution of the agreement of November 15, 1915, but to the proceedings initiated by borough council with reference to the actual improvement. At no time and under no circumstances did the Public Service ever protest as to the use of these methods, until the case was tried and then the point was raised without being set up in the pleadings.

The situation with reference to the possibility of enforcing the paying obligations, contained in the ordinance of 1900, is somewhat unique.

When the ordinance was passed, Maple Avenue was a turnpike road upon which toll was charged and the turnpike company had jurisdiction and control of the road to such an extent that it was necessary for the Camden Horse and the Suburban to enter into agreements with the turnpike company before the tracks could be laid. As long as the highway continued as a turnpike, there was no practicable way by which the paving obligations could be enforced against the Suburban, or its successors. The condition, to wit: That the remaining sections of the road, exclusive of those required to be paved originally by the Suburban should be paved under the



direction and expense of the borough from curb to curb, as a practical proposition could never be fulfilled.

To enforce the paving obligation, the municipality would be obliged, at its own expense, to pave the surface of the highway within the control of the turnpike company. This it would never do. An improvement by the turnpike company would not be a fulfillment of the condition. Consequently, the condition imposed by the ordinance could never be literally carried into effect, as long as the turnpike continued.

Probably this was the joker which the municipal authorities never comprehended or discovered, until it came to determine the means by which the abominable conditions existing in the highway could be ended. As a start, to correct the situation, the borough authorities requested the county to acquire the turnpike so that it might become a county road and thus one step forward would be taken toward the improvement thereof (C. pp. 143-4).

Consequently, in 1913, at the request of the borough the county took over the road from the turnpike company and it became one of the roads of the county. While an advance had been made in the right direction, still the situation which would create an obligation on the part of the Suburban to perform the paving obligation could not be created. If the county did the work, the improvement would not be at the expense of or under the direction of the borough, from curb to curb. Without the consent of the county, the borough could not do the work. As a municipal problem, therefore, it could not be expected that the borough should incur this expense on a road over which it had no jurisdiction. Furthermore, a contribution from the state could not



be secured if the borough did the work exclusively, because at that time, so far as we have been able to ascertain, there was no method by which state aid could be obtained for the construction of roads by any municipality other than the county.

So the borough was again blocked in having the highway improved. This was the condition of affairs at the time negotiations were resumed between Mr. Burleigh and the municipality, acting in conjunction with the county authorities, and, in order to bring the county in line and arrive at some definite understanding between the two municipalities, so that the proposition might be put in concrete form for approval by the respective parties, the borough council, on June 5, 1914, passed a resolution declaring that it was the sense of the borough, that Maple Avenue, from borough line to borough line, should be improved and that the borough would agree to pay for a five foot strip and also 10% of such portion as would be constructed by the state and county (C. p. 125, l. 20).

Then followed correspondence between Mr. Burleigh and the municipal officers, which referred to the various paving obligations imposed upon the Public Service. The first is a letter dated July 14, 1914 (C. p. 126), written by Mr. Burleigh to the mayor; the second is a letter written by the borough clerk to Mr. Burleigh (C. p. 128). The latter contains a request to know what the attitude of the Public Service would be in case the improvement be made. Mr. Burleigh replied to this communication on October 26, 1914 (C. p. 129), stating that the Public Service was under no obligation to repave west of Centre Street but that it was obliged to repave east of that highway. The following sentence is particularly interesting:



"I apprehend there will be no difficulty in  
"having our company agree to permit the bor-  
"ough to do the work, which the company would  
"be obliged to do and pay to the borough the  
"cost thereof. This, of course, would be sub-  
"ject to detailed negotiations. There is, at pres-  
"ent, a very great money stringency, which may  
"be even worse next year, so that any contem-  
"plated improvements for that time must, of  
"course, be subject to conditions at that time."

The next appears to be a letter written by Mr. Burleigh to the clerk, dated November 6, 1914 (C. p. 130), with which Mr. Burleigh sends a report from the engineer of the franchise bureau showing the different paving obligations of the Camden Horse and the Suburban (C. p. 131).

The following paragraph contained in this letter is suggestive of the arrangement which was subsequently incorporated in the agreement of November 15, 1915:

"In connection with the inquiry of his Honor,  
"the mayor, as to the feature of Section 6 of  
"the 1900 ordinance, referring to the paving  
"being done at the expense of the borough, you  
"are advised that no advantage will be taken  
"by this company by reason of the division of  
"your expense with the county and state."

On May 7, 1915, the borough adopted a resolution (C. p. 130, l. 36), reciting that the stone road committee of the freeholders had signified their intention to recommend to the board the improvement of the turnpike and that the committee had asked the borough the kind of road desired and what action the borough would take regarding the improvement



and part of the expense the borough would bear. The resolution then described the character of the road desired and contained an agreement on the part of the borough to pay 10% of the construction of the improved road, sixteen feet in width, to be constructed by the state and county and also to pay the balance of the cost of such additional paving necessary to carry said pavement from curb to curb, as is not contributed by the state or county, and by the Public Service Railway Company. The county to assign to the borough all rights in the road obtained from the turnpike company and that the pavement should be constructed under the direction of the borough engineer, acting in conjunction with the county engineer and state inspector, and that upon the completion of the improvement, the borough would agree to take over from the county said improved road and thereafter maintain it as a street of the borough (C. p. 133).

On May 12th, 1915, a resolution was adopted, modifying and changing some of the minor details with reference to the resolution passed the preceding week (C. p. 135).

The next step in the negotiations was a report made June 7, 1915, by the stone road committee to the Board of Freeholders, in which it was recited that the county engineer had plans prepared for improving the turnpike, which had been submitted to the borough authorities, who insisted upon the bituminous surface instead of Belgian block (C. p. 161).

Presented with the report was a copy of the resolution of borough council of May 7th, as amended May 12th (C. p. 135).

The Board of Freeholders then resolved to accept the proposition of the borough, so far as it applied



to that portion of the road in Merchantville, but action was deferred until the borough could furnish the necessary profiles and plans, showing their revised grades, as set up in the resolution above referred to. This meeting of the freeholders occurred on the 9th of June, 1915 (C. p. 161 ).

Later, Mr. Berry, as solicitor of the borough, took up negotiations with respect to the details of having the improvement carried into effect, and on August 18, 1915, he wrote a letter to Mr. Burleigh referring to the prior correspondence, in which the attention of Mr. Burleigh was directed to the franchise of 1892 and the ordinance adopted in 1896. Attention is also directed to the repeal of the latter ordinance, when the franchise ordinance of 1900 to the Suburban was adopted. Mr. Berry refers to the fact that in maintaining the paving obligations, contained in Sections 6 and 8 of the latter ordinance, no distinction was made between the new tracks authorized and the old track existing, but under such paving obligations, which referred only to such tracks, the Suburban had paved with rubble between the rails and between the tracks and on three feet outside thereof, for the whole length of Maple Avenue within the borough and did lay a macadam pavement on each side of each track the whole length of the borough. Mr. Berry then makes this statement (C. p. 136) :

“I feel this situation has been overlooked by  
“you in your correspondence, because it seems  
“to me to be entirely inconsistent to now take a  
“position with regard to a subsequent paving ob-  
“ligation, which was not taken by your company  
“at the time the ordinance in question was  
“passed or the provisions first put in force.  
“This seems so obvious to me that I am in-



“clined to think that the exact situation existing at the time the ordinance of 1900 was passed and the precise terms thereof cannot have been properly called to your attention. I trust you will again take the matter up and advise me whether or not you do not agree with my construction of your obligations.”

To this letter, Mr. Burleigh replied August 30, 1915, as follows (C. p. 110):

“I am familiar with the ordinance to which you refer, but you have confused Camden Horse Railroad Company with Camden & Suburban Railway Company. The railroad from the westerly limits of the borough to Centre Street, both tracks, belong to the Camden Horse Railroad Company and is subject to the obligations of that company.”

After the receipt of the letter last mentioned, negotiations were again resumed and Messrs. Burleigh and Berry had a conference in Camden at which the entire situation was discussed (C. p. 82) and, as a result thereof, a meeting was arranged in Newark between Mr. Berry and Mr. McAllister, the mayor of the borough, and Mr. Burleigh, Mr. Bergen and Judge Armstrong, representing the Public Service (C. p. 82). This interview resulted in the supplemental agreement of November 15, 1915, and the same was presented to the borough later and by resolution adopted and the mayor and borough clerk authorized to execute the same on behalf of the latter. Predicated upon the adjustment agreed upon, the borough prepared plans and specifications for the prosecution of the work for which the Public Service was obligated under the ordinance of



1900, to wit: between the tracks and rails and three feet each side thereof (C. p. 141).

On December 30, 1915, the Board of Freeholders took appropriate action with reference to the adjustment between the borough and the Public Service, and on that day the road committee presented to the board, for consideration and action, certain resolutions which recited that the borough had submitted a copy of the agreement of November 15, 1915. Whereupon, the former resolution for adoption of plans, as prepared by the county engineer, was rescinded and new plans and specifications prepared by the borough and county engineers were adopted and the county engineer directed to present the same to the state commissioner of public roads for his approval after which he was authorized to invite proposals for construction (C. p. 163).

The situation, therefore, at this time, was that the county was to contract for all of the work on the highway, except between the tracks and rails and three feet each side. The county was to receive the state aid and the borough was to pay 10% of the contract price and take over the road when finished and maintain it as a borough highway. The borough was to bear the expense of all the rest of the road, except that portion for which the Public Service was liable under its paving obligations. In other words, the county and state were to build sixteen feet of road, of which the borough was to contribute 10% of the cost. The borough was to do all the rest of the work and take a chance of being repaid by the defendant. This is the precise method which was agreed upon by Mr. Berry and the mayor, representing the borough, Judge Armstrong, Mr. Burleigh and Mr. Bergen, representing the Public



Service, and it was the exact plan which was covered by the agreement of November 15, 1915 (C. p. 114).

Subsequently, the plans and specifications for the construction of that portion of the highway, included in the alleged repaving requirements, were prepared by the borough engineer and submitted to the Public Service, with the request that it do the work within sixty days, as required by the ordinance of 1900. Notice was also given that unless the work was done the borough would undertake the same at the expense of the Public Service. The latter declined which action was entirely in accord with the letter of Mr. Burleigh written October 26, 1914, in which he stated (C. p. 129):

"I apprehend there will be no difficulty in  
"having our company agree to permit the bor-  
"ough to do the work, which the company would  
"be required to do and pay to the borough the  
"cost thereof. This, of course, would be sub-  
"ject to detailed negotiation."

Bids were then invited by the borough and the Public Service again notified, after the bids were received, that unless it did the work the borough proposed to enter into the contract to have the work done at its expense. There being no protest, except the contention that it was not liable to do the paving or pay the cost thereof, *as claimed by the borough*, shown by the letter written by the Public Service, dated April 15, 1916, the borough then proceeded to enter into the contract, the work was finished and suit brought to recover the amount expended. In the meantime the Public Service paid the cost for that portion of the highway east of Centre Street.



The contention was urged below by the Public Service, that the borough cannot recover because the street was not paved from curb to curb, under the direction and at the expense of the borough; in other words, the borough cannot recover because it did not contract for the entire width of the street and receive contributions toward the expense thereof from the county and state. Obviously the Public Service is again attempting to take advantage of the joker which was inserted in the 1900 ordinance, which was evidently placed there for the purpose of making it well nigh impossible for the technical conditions to be fulfilled. This claim is made despite all the negotiations by correspondence and personal communication between the parties, which, by the way, are not disputed, and the express terms of the modifying agreement of 1915. It comes with mighty poor grace from the Public Service, after all of these negotiations, and the making of the agreement of November, 1915, to interpose a defense based upon a literal construction of the words of Section 6 of the 1900 ordinance, when everybody admits the effort to deviate from the exact terms thereof, and that the agreement of 1915 was intended to accomplish that purpose.

The circumstances and situation at the time of the making of the agreement of 1915, to be considered as bearing upon what the parties thereto intended, are as follows:

Maple Avenue was a county road.

The necessity of improvement was urgent and Mr. Burleigh, representing the railway company, as well as the property owners, were all anxious to have this work done, but in strict accordance with existing paving obligations.



Merchantville itself could not comply with the terms of the ordinance of 1900 for two reasons:

A. It had no jurisdiction over the road.

B. Inability to finance the whole project.

The borough officials were in constant communication with Mr. Burleigh and were urging the Board of Freeholders to start the improvement.

Manifestly, the initiative was taken by the borough officials with the cooperation of Mr. Burleigh.

State aid could not be obtained except through the county and the borough was willing to bear the expense not assumed by the county and state, and take the chance of enforcing the paving obligations of the Public Service whatever they might turn out to be.

The county would not undertake the paving between tracks and the space outside, which was imposed upon the Suburban by the 1900 ordinance.

Finally, in May, 1915, county and borough came to an understanding regarding details of having the work done and county agreed, with state aid, to pave 16 ft. and borough agreed to bear 10% of this expense and also the expense of the balance of the pavement from curb to curb, including that portion which was assumed to be imposed upon the Suburban, if it could not be collected.

County had accepted this proposition and the plans and details of the work had been prepared.

No other method could be pursued to have the road built with county and state aid and even if thus accomplished, the paving obligation of the Public Service could not be enforced without a modification of the 1900 ordinance.



This was the situation immediately prior to the conference in Newark on November 15, 1915.

The agreement made that day was intended to apply to the conditions as they then existed and to effectually carry out the contemplated plan of improvement but without relieving the Public Service from the paving obligations contained in the 1900 ordinance.

**The Agreement Did Accomplish the Object Which Everybody Identified With the Transaction Contemplated.**

Undoubtedly, the agreement of 1915 is not inconsistent with the claim of the plaintiff that the terms thereof are sufficient to effectuate the manifest purpose of all concerned.

The plaintiff's right of action in this case depends upon the contract existing pursuant to the ordinance of 1900 and the agreement of 1915. Unquestionably the Public Service had the power to contract, in accordance with the terms of the ordinance and agreement. It is manifest also that it cannot now question the power of the borough to make the contract of 1915, because the same has been acted upon and it cannot now set up the defense of *ultra vires*.

The obligation to pay a portion of the expense of improvement under the ordinance of 1900, became fixed when the street was paved from curb to curb, under the conditions as set forth in said ordinance.

This obligation became effectual when the street was paved from curb to curb, regardless of the manner in which it was accomplished, if the agreement of 1915 is to be construed to cover the situation then existing.



Under the ordinance, as modified by the agreement of 1915, the paving obligation became enforceable when the street was improved from curb to curb. This was the manifest purpose of the agreement of 1915.

It was no concern of the Public Service what means were employed to carry out this object. The agreement expressly provided that when the paving was completed, it was deemed to have been done in accordance with the requirements of the 1900 ordinance.

The borough having no jurisdiction over the turnpike, because it then was a county road, any ordinance for paving of the entire street would be ineffectual. This was the situation the agreement was intended to correct and cover.

The extent of the paving requirements was fixed by the 1900 ordinance and no attempt was made by the 1915 agreement to alter or in any way modify the contractual obligations between the parties respecting the same. The effect of the 1915 agreement was to provide a means for enforcing such paving obligations as existed pursuant to the 1900 ordinance, whenever the street was paved from curb to curb.

Manifestly, the conditions agreed upon by the parties, upon which the paving obligation contained in the ordinance of 1900 would become enforceable, have all been fulfilled.

In the agreement of 1915, it is recited that the borough proposes to have Maple Avenue, throughout its entire length, paved with an improved pavement, having the assistance therein of the state and the county, which both make appropriations toward the same and over which they have certain supervision.



The borough made no engagement to do this work by its contract, and there is nothing in the agreement to indicate that such purpose was ever thought of.

The very object of making the agreement indicates that it was never intended that it would do the work itself, independently and exclusively of the county and state.

It is manifest that the language indicates that the parties intended to do precisely what was eventually done.

The word "assistance" is certainly susceptible of the construction that the state and county were to provide, by contract taken in the name of one or both, for having certain portions of the work done.

This is the most natural interpretation to be put upon the language, in view of the fact that the parties did not contemplate assistance in any other way, because, by law, the state and county could not contribute any portion of the expense incurred solely by the borough.

The same reason applies to the use of the word "appropriations" and the only reasonable interpretation to be put upon this language is that the moneys expended by the county and state would be under contracts made by the county, in its name, for some portion of the highway.

Any appropriation made by the state and county could not be devoted to reimburse the borough on a contract made in its name.

The same situation applies to the provision relative to supervision. There would be no authority in law for the county or state to participate, by supervision, in the performance of a contract made by the borough in its own name.

The language of the agreement clearly indicates an intention on the part of the Public Service to have



the paving obligations, set forth in the ordinance of 1900, enforced against it without regard to the methods pursued by the borough in having the highway improved from curb to curb.

The following paragraphs of the agreement contain an admission of liability for the paving east of Centre Street. It is recited that no dispute exists and that the paving is considered to be done under the direction and expense of the borough from curb to curb, notwithstanding the prior recitals as to methods.

The next sentence indicates that the paramount situation which would impose an obligation to fulfill the paving requirements of the 1900 ordinance, was the paving from curb to curb.

The provision that a portion was to be solely at the expense of the borough indicates an intention to carry out the purpose for which the agreement was made, and the phrase, which provides that the remaining portion is contributed by the state and county, can only apply to work actually done in the name of the county, because the state and county were unable to contribute toward the work in any other way.

The agreement then proceeds to deal with the disputed repaving requirements and the same stipulation as to the recognition of such paving being done under the direction and at the expense of the borough and from curb to curb, is made applicable thereto in any legal action by the borough to enforce payment.

This latter paving was to be done in the same manner and assisted in the same way.

No interpretation can be put upon this language other than that the situation, so far as the latter work was concerned, was the same as agreed upon respecting the undisputed portion of the street.



There is no reason why any different arrangement should be made as to the work in the two sections of the street.

One reason why the Public Service was willing to waive the provisions of the ordinance of 1900 was the stipulation on the part of the borough that granite blocks should be laid on both sides of each rail.

This evidently was a substantial modification, the benefit of which inured to the Public Service.

The last clause of the agreement provides that when such paving, done in the manner as indicated, is completed, it shall be deemed to have been done under the provisions of the 1900 ordinance. It will be observed that this clause makes no specific mention as to the way in which the paving is to be done, or the means to be employed. The important feature is the fact that it is done.

By the whole agreement, therefore, it is manifest that it is of no concern of the Public Service as to the methods pursued to have the highway improved, so long as the portion of the work to recover the cost of which this suit is brought, was done at the expense of the borough.

Under the arrangement, the borough actually did the work, under contract with the Kelley-McFeeley Company, between the rails, tracks and three feet outside thereof, which is in accordance with the paving obligation, admittedly enforceable on the section of the highway east of Centre Street.

There can be no shadow of doubt that Mr. Burleigh was fully cognizant of the circumstances under which the work at Merchantville was to be carried through as appears by the uncontradicted statement made by Mayor McAllister that the borough was not going to do this paving and that it was going



to be done by the county and state and that the borough would contribute only ten per cent.

Therefore, we contend that the borough did have Maple Avenue paved with an improved pavement, having assistance therein of the state and county. The existence of these conditions automatically imposes upon the Public Service the obligation to perform the paving requirements of the 1900 ordinance, whatever they are.

The claim was also made below that the agreement of November 15, 1915, was *ultra vires* the Public Service Company.

The testimony and the defenses urged in the answer both show that the only contention with reference to the highway west of Centre Street was that both the tracks were owned and constructed by the Camden Horse and not by the Suburban. It was never intimated during the negotiations, which preceded the making of the agreement of 1915, that any doubt existed as to the authority of the Suburban to enter into the contract created by the ordinance. Neither was there any suggestion that the ordinance was *ultra vires* the Suburban. No such defense is set up in its answer. Neither is it claimed in the answer that the agreement of November 15, 1915, was *ultra vires* the Public Service. The latter company, as the lessee of the Suburban, was obliged to perform all paving obligations which were imposed upon the former company. It is so alleged in the complaint (C. p. 6, l. 30), and also admitted in paragraph 4 of the first defense of the answer, in the following language:



“Any obligation that otherwise would have rested upon the defendant, the Camden & Suburban Railway Company, thereby became the obligation of this defendant, Public Service Railway Company, and the defendant, Camden & Suburban Railway Company, by law was relieved therefrom. It admits that the obligation, if any, of Camden & Suburban Railway Company, growing out of the improving and repaving of Maple Avenue, is imposed upon this defendant” (C. p. 12, l. 24).

Paragraph 5 of the answer also admits that the liability, if any, accruing to the plaintiff is limited to and against the Public Service Railway Company only (C. p. 12, l. 39).

Furthermore, the Public Service is estopped from raising the question of *ultra vires* because, by the construction of the new street pavement, under the circumstances recognized by the agreement of November 15, 1915, the latter company has been relieved of all obligation to keep the surface in repair, for an indefinite period, or as long as the improved pavement lasts.

One of the conditions under which the road was improved, was an agreement between the borough and the county that the borough would take it over and keep it in repair as a borough highway. Another advantage reaped by the defendant, with reference to the agreement of 1915, is the modification of the ordinance of 1900 permitting the laying of two rows of granite blocks on either side of each rail. This was agreed to and inserted in the agreement for the benefit and at the request of the defendant.



**The Ordinance of 1900 Was Not Ultra Vires the Borough and the Acceptance Thereof by the Suburban Constituted a Valid and Enforceable Contract.**

The reason urged by the defendant, in support of the claim that the ordinance is invalid, so far as it relates to the portion of the highway west of Centre Street, is that Maple Avenue was a turnpike over which the municipality had no jurisdiction or control whatever.

The status of the turnpike is shown by the facts set forth in the stipulations agreed to and filed in the cause (C. p. 23, *et seq.*), and particularly the amendment (C. p. 28).

The turnpike company exercised the corporate powers conferred by its charter, but the borough from time to time did exercise municipal authority over the road. Proceedings were taken under Section 13 of the charter to acquire the right to use the highway for turnpike purposes as against the abutting owners. The statement in paragraph 3 of the stipulation (C. p. 24, l. 37), that deeds were made by the land owners is not accurate, and this stipulation was modified by the substitution of the amendment thereto (C. p. 28).

This question was not raised by the pleadings. The borough did have complete control and supervision over Maple Avenue when the ordinance of 1900 was adopted, regardless of the fact that the turnpike company had a franchise to operate a turnpike thereover, and this jurisdiction extended to the very thing which is the subject-matter of Section 6 of the ordinance—to wit, the paving of the highway.



One of the earliest decisions on this subject is *Parker vs. New Brunswick*, 32 L. 548. In this case the question was whether or not the city could cause a public highway over which a turnpike was operated to be improved. The contention was made that the ordinance was illegal because the street involved was a turnpike and that the alleged municipal jurisdiction applied only to public streets and not turnpike roads.

After considering the earlier cases, the Chief Justice uses this language:

“On the assumption, therefore, that this is  
“the rule of law, on this subject, there does not  
“appear to be any good reason why such roads  
“(turnpikes) should not be held to be subject,  
“when they lie in cities, to the regulation, in a  
“manner not inconsistent with their use as turn-  
“pikes, of such local authority.”

The decision turned upon a stipulation in which it was admitted that Easton Avenue was one of the public recognized streets of the city and the Court held that because of that admission the municipal authorities did have control over the paving of the highway, notwithstanding the existence of a turnpike thereon. It seems to us that this authority, which is in the Court of Errors, is absolutely binding in view of the statement on the part of the Suburban in its application and contained in the ordinance itself, referring to the highway as a public road known as the Moorestown and Camden Turnpike Road and also as Maple Avenue. If Maple Avenue is a public road of the borough, under the authority of the Parker case, Merchantville did have the authority, not only to pave the surface thereof, but to exercise such other control and authority which



would not be inconsistent with the use of the road as a turnpike.

In *Seigler vs. Fuller*, 34 L. 227, an assessment for paving and improving a sidewalk was attacked upon the ground that the street was a turnpike. Mr. Justice Bedle after approving of the rule of the *Parker* case uses this language:

“The fact that the turnpike in that case  
“was in a city while this is yet a township  
“can make no difference, as the Legislature has  
“the same right to provide for improvements in  
“a small district when, in their judgment, the  
“public demands require it, as in a city, and  
“a turnpike may become a public street so far  
“as the necessity of sidewalks is concerned in  
“such similar locality, although a turnpike, as  
“in a larger municipality.”

By general legislation, the Borough of Merchantville had the authority to improve all the highways of the borough which, under these cases, would include Maple Avenue, regardless of its use as a turnpike.

The Court of Errors of this state in *Opkedyke vs. Public Service*, 78 L. 576, passed upon the right of the plaintiff to recover damages caused by a horse becoming frightened by an unauthorized obstruction in a public highway, which was also used as a turnpike. The *Parker* case was cited with approval. The following language appears in the opinion of Chancellor Pitney:

“It is admitted that the road was a public  
“highway and this being so it makes no differ-  
“ence whether it was a toll road or a free road.  
“In either case, the right of a member of the



“general public as against one maintaining  
 “within its limits an unauthorized obstruction  
 “would be the same.”

In *Atlantic & Hoboken Railway vs. State Board of Assessors*, 80 L. 83, the Supreme Court held that within the meaning of the act providing for the taxation of franchises of street railway corporations, occupying public streets, highways, roads, lanes and other places, a turnpike is a public place. This decision is based upon the Parker case. Mr. Justice Read used the following language:

“The question propounded is whether a turnpike, a part of which the prosecutor is occupying as a highway or public place, is within the meaning of the statute of 1906. For most purposes, a turnpike is regarded as a highway and it may be said to be so regarded when the term highway is used in a statute, unless the words and purposes of the act display a different legislative intent.”

Under the authority of this case, we claim the general power given to boroughs of this state to pave and otherwise exercise authority over public highways of the municipality is sufficiently broad to have included Maple Avenue, when the ordinance was passed in 1900.

A case directly in point is the decision of Vice-Chancellor Leaming in *French vs. Camden*, 77 Eq., 151. The plaintiff made an application for a preliminary injunction to restrain the Court from confirming a commissioner's report assessing benefits for street improvements, upon the ground that the proposed assessment was for improvements in a



turnpike road. In denying the injunction, the learned Vice-Chancellor used the following language:

“The objection here made that the public street here in question is also a turnpike road was before the Supreme Court in *State vs. New Brunswick*, 30 L. 395. It was there held that the city’s control over its highways enabled it to improve the road and assess the benefit to adjacent landowners, notwithstanding the highway was occupied and operated by a Turnpike Company. On appeal, a similar view was adopted. 32 L. 548.”

Vice-Chancellor Green in *Perkins vs. Moorestown and Camden Turnpike Company*, 48 Eq. 499, had occasion to investigate the rights of the turnpike company which is concerned in this litigation. The question decided was as to the construction of a dwelling within the boundaries of the road in front of the complainant’s property. The Court said:

“The grant by the Legislature to the defendant (turnpike company) did not affect the title of the complainant but only conferred upon the company the right formerly enjoyed by the public, of passage, with the right to take toll from the persons using the same.”

The Supreme Court in *Wright vs. Carter*, 27 L. 76, in defining the status of a turnpike company uses this language:

“By the transfer of a road from the public to a corporation, the title to the soil is not changed but remains in the owners of the adjoining land and they have the same use and enjoyment of it as they had before; the ease-



“ment or right of way is transferred to the company to be held by them while they work the road and keep it in repair, subject to the right of the public to use the road upon paying the tolls established by law. \* \* It remains “a public highway as before.”

The result of this rule, as applicable to our case, is that the Moorestown Turnpike did not own a foot of the bed of the street because the title to the same remained in the abutting property owners. All that the turnpike acquired, by virtue of its charter, was an easement or right of way, which interest therein was subject to the exercise by the public of all rights and privileges thereover, not inconsistent with the duty on the part of the turnpike company to keep the road in repair and the privilege of collecting tolls for the use thereof.

Again the Supreme Court in *Simons vs. Passaic*, 42 L. 524, had occasion to pass upon the power of assessment conferred by the charter of Passaic for the work done upon a street; the contention being made that the latter was a plank road. Mr. Justice Reed said:

“It appears to be true that Maine Street was “the property of the plank road company. It “had, however, for years been a principal business street of the City of Passaic. I consider “the law settled in this state to this effect, that “the use as a street by the citizens of a municipality within which it lies, of a turnpike or “plank road, gives it the character of a street, “to the degree that its existence as such cannot be questioned by any party other than the “company which owns the turnpike or plank “road.” Citing the cases above referred to.



Upon the doctrine of the case last mentioned, it would seem that it is not the privilege of either the Suburban Company or the defendant, in this action, to question the status of Maple Avenue as a public highway of the borough.

Under the authority of *Haight vs. The State*, 32 L. 449, decided by the Court of Errors, a plank road in this regard is the same as a turnpike company.

In *Felix vs. Atlantic City*, 34 L. 99, the Supreme Court determined the rights of the public in Atlantic Avenue, Atlantic City. The following is a quotation from the opinion of Judge Scudder:

“The principle of assessment for benefits is well settled in many cases. But it is insisted that Atlantic Avenue in front of the prosecutor’s lands is not a public street, but the private property of the Camden and Atlantic Railroad Company, and therefore the Common Council had no power to compel the owner of said real estate, by ordinance, to grade, curb, and gravel the avenue along and opposite to his property. If the fact were so, it might present a question differing in principle from *State vs. New Brunswick*, 3 Vr. 548, which relates to a turnpike road lying within the city limits. To this, however, it might be answered that this avenue was *de facto* a street, and sufficiently in use by the public and for such time as would induce the Court to refuse to investigate this question collaterally. But I am satisfied, from a careful examination of the exhibits and testimony in this cause, that the railroad at the place in controversy is but an incident to the street, which is the main thoroughfare of the city.”



The same situation arises with respect to the turnpike in Merchantville. Maple Avenue is the main thoroughfare of that municipality.

**The Defendant is Estopped From Denying the Right of the Borough to Enforce the Paving Obligation Contained in the 1900 Ordinance, Even if the Court May Hold that Such Ordinance Was Ultra Vires the Borough, so Far as it Concerned the Highway West of Centre Street.**

Without doubt, the Suburban did acquire some rights in Maple Avenue by virtue of the terms of said ordinance. It certainly obtained the authority under such ordinance to construct and operate the road on Maple Avenue east of Centre Street. That is conceded by the defendant.

So far as the highway west of Centre Street is concerned, our contention is that it acquired the right to construct the additional track. Certainly, beyond any question, it could not have installed its system of poles and wires except for the terms of such ordinance. It is conceded in the answer that any obligation imposed by the terms of said ordinance on the Suburban is now obligatory upon the defendant.

We contend that the Suburban and the defendant cannot accept the benefits conferred by the ordinance and repudiate any of its obligations. Having accepted and taken advantage of the benefits conferred, it is bound to fulfill and perform its obligations, regardless of whether or not there was an absence of municipal authority on the part of the borough to impose such an obligation with respect to the highway west of Centre Street. It should be borne in mind also that the ordinance was granted



upon the application of the Suburban. It requested the grant of the privileges subsequently conferred. Upon the adoption of the ordinance it accepted the terms and a binding and enforceable contract was thereby created between the parties. The condition is not the same as if the borough imposed the restrictions of its own volition and the Suburban had no alternative but to accept. The terms and conditions of the ordinance were the subject-matter of the discussion and negotiations of the parties and finally agreed upon and the ordinance accepted, as provided by the Traction Act and filed in the office of the secretary of state and there made a public record.

Furthermore, the company exercised the privileges therein conferred, even as to the highway west of Centre Street and never, until recently, after a period of nearly nineteen years, was any question made that there was lack of municipal authority on the part of the borough.

It seems to us that this question is settled in this state by the decision in *Rutherford vs. the Hudson River, etc.*, 73 L. 227. There the defendant, organized under the General Traction Act of 1893, obtained an ordinance granting the location of tracks subject to restrictions contained therein. The ordinance was carried into effect by the construction, maintenance and operation of the railway. It was held that the company, and its successors, while retaining and enjoying the privileges and franchises granted by the ordinance, could not resist the claim of the municipality for enforcement of the restrictions upon the plea that the ordinance was *ultra vires* the municipal corporation. An application was made for a mandamus to compel the company to macadamize certain of the public highways of Rutherford. The claim was made by the defendant therein



that the requirements of the ordinance were unreasonable, and *ultra vires* the municipality. Mr. Justice Pitney in disposing of the case used this language:

"But in our view it is not open to the traction company to raise the question that the grant of its local privileges and franchises was *ultra vires* the municipal corporation, while at the same time the company retains and uses and enjoys those privileges and franchises. The plea of *ultra vires* is not admitted in such circumstances, except where it is practicable to restore the status quo ante, and we, therefore, think the present respondent is estopped from setting up that plea."

In another part of the opinion, the learned Justice states that if the ordinance was *ultra vires* the municipality, the whole thereof, including its grants and privileges must fall at the same time "for, undoubtedly, the provision for macadamizing is an essential part of the ordinance, without which it presumably would never have been adopted."

How similar is this authority to the case *sub-judice*. Merchantville would never have granted any privilege with respect to the road east of Centre Street had not the Suburban made the same agreement with respect to the paving obligations covering the entire highway. Either the whole of the ordinance must go by the board or the whole of it must be recognized and performed.

If Section 6 of the 1900 ordinance is modified, so as to make it applicable only to that portion of Maple Avenue east of Centre Street, it would overthrow the entire scheme.



It is also held in the Rutherford case that the paving obligation objected to as unreasonable could not be eliminated without invalidating the entire instrument.

We have made an exhaustive examination of the reports since 1906, when the Rutherford case was decided, and the doctrine promulgated thereby has never been modified, disturbed or reversed.

Apparently the defendant, by reason of the acceptance and operation of the road and franchises of the Suburban, became bound by the conditions and restrictions contained in the 1900 ordinance, irrespective of the expressed obligation assumed by the latter.

*Asbury Park vs. Neptune*, 73 Eq. 223.

“A telephone company which, without objection, accepts and acts upon a franchise granted by a city, is bound by the conditions thereof, although the council had no power to impose them, but merely power to give or withhold consent.”

*Southern Telephone Co. vs. Richmond*, 98 Fed. 671. Affirmed 103 Fed. 331.

The general rule of law, upon which the doctrine of estoppel is predicated will be found in *McQuillin on Municipal Corporations*, Vol. 4, p. 3570, Sec. 1688, viz:

“The general rule is that one who makes a contract with a municipality is estopped to assert that it is ultra vires, when it is sought to be enforced against him. On the same theory, the beneficiary of a grant to use the streets, who has acquiesced therein and received valuable property thereunder, is estopped to deny its validity as against the municipi-



“pality and another beneficiary. Thus, the  
“grantee of a franchise which has accepted it  
“is estopped to attack the validity of the grant  
“on the ground that the municipality had no  
“power to grant it, or to claim that the condi-  
“tions of the franchise are ultra vires, although  
“there is a line of cases holding that where the  
“condition imposed is unlawful the grant is  
“valid but the condition is of no effect. In other  
“words, the general rule is that although the  
“municipality has no power to impose condi-  
“tions on granting the right to use the streets,  
“the public service company is nevertheless  
“bound by conditions imposed, where it accepts  
“the grant with the conditions and the munici-  
“pality has the right to refuse to consent to the  
“use of the streets, since it may be assumed that  
“without such conditions, consent would not  
“have been given. So a company which has ac-  
“cepted a franchise containing conditions is  
“estopped from thereafter claiming that the  
“conditions are unreasonable. On the other  
“hand, where a municipality has no power to  
“grant a franchise to use a street, it cannot be  
“contended that a company to whom it has  
“granted a franchise is estopped to deny the  
“validity of the grant as to conditions imposed,  
“while accepting the benefits thereof.”

Assuming for the purpose of this argument, with-  
out admitting the assumption to be a proper one,  
that it may be ultimately decided in this case; first,  
that the municipality did not have such jurisdiction  
over the highway because it was a turnpike, so as  
to impose a legal liability upon the Suburban to  
pave, and second, that the Suburban did without any  
further municipal action, as the lessee of the Cam-



den Horse, have the right to construct the paralleling track and install poles and wires for operation, nevertheless we contend that under the authority of the Rutherford case, both the Suburban and the defendant are estopped from taking advantage, in this proceeding, of lack of power on the part of the borough to impose in such ordinance the paving obligation as to that portion of the highway.

The status of the turnpike in 1900 was not so absolutely definite and certain as to make this question undebatable, from the point of view of the present defendant. Neither was the right of the Suburban to construct the second track west of Centre Street so definitely certain as to make that question undebatable likewise from the standpoint of the present defendant. At most, from its standpoint, the rights of the Suburban in the disputed territory had not been definitely ascertained and settled. Therefore, is it unreasonable to impose upon the Suburban the obligation to perform the conditions with respect to this portion of the highway, in view of the privileges which were granted therein as well as in the remaining parts, a part of which admittedly could not have been secured without the consent of the municipality by the ordinance in question? This is the precise situation to which the Rutherford case is applicable.

Apparently no question is raised by the defendant's brief as to the fact that after 1913 Maple Avenue became a county road by virtue of the purchase from the turnpike company. There may be some doubt of the legal authority of the municipality to have imposed paving obligations upon either the Suburban Company or the defendant if the highway had been a county road when the ordinance of 1900 was adopted, although the doctrine of estoppel, above referred to, would apply if either of the companies had accepted the franchises conferred, in



which event, they would have been obligated to carry out the conditions. This question cannot arise, however, for the reason that the agreement of 1915 was intended to take care of and correct the situation and the defendant stipulated by the terms of such agreement that when the paving was done, as contemplated thereby, it should be considered to have been done under the terms of the ordinance. This question is fully discussed elsewhere in this brief.

It further appears that the jurisdiction of the county over the highway originated long after 1900, when the ordinance was passed, and terminated on or about the time of the improvement, it being agreed between the municipality and the county that when the highway was improved, in accordance with the agreement of 1915, the road would cease to be a county road and jurisdiction and control would be transferred to the municipality, which assumed the obligation to keep the same in repair.

The representatives of the defendant were fully advised of this situation and a copy of the 1915 agreement was incorporated in the resolution of the county, authorizing the acceptance of the proposition of the municipality, which included an agreement to accept the road as a borough street and assume the duty of maintaining and keeping the same in repair.

Manifestly, therefore, the fact that subsequent to 1913, the highway became a county road is absolutely immaterial, except as it will establish that the lack of jurisdiction in 1915 of the municipality over the road, was one of the elements operating as an inducement to the making of the 1915 agreement.

Respectfully submitted,

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**ADDITION TO PLAINTIFF'S BRIEF.**

The claim is also made by the defendant that it should not be obliged to pay any portion of the expense incident to the improvement of Maple Avenue, because that improvement was not specifically authorized by any ordinance of the borough.

Our answer to this proposition is, first, that the only work of paving actually undertaken by the borough was that for which we contend the Public Service was liable, and such work was specifically authorized by the last clause of Section 6 of the 1900 ordinance, viz:

“in case the said railway company should should  
“fail to comply with such notice, the said paving may be done by said Borough Council.”

It has been repeatedly held that where work is once authorized by ordinance all subsequent proceedings to carry it out may be by resolution.

Further, the same reasoning as that urged against the defense that the work was not done at the expense and under the direction of the borough applies as to this point.

Manifestly, under the circumstances, it does not lie in the mouth of the Public Service to raise this objection.

If the improvement was being done as a borough proposition with a charge to be imposed upon the borough at large, or assessed against the abutting property, doubtless the improvement should have been sanctioned by ordinance. It makes no difference respecting this question whether the work was done by ordinance or resolution, because if the duty was imposed upon the Public Service, the borough



was merely acting as the latter's agent in having the work done at its expense, pursuant to the terms of the 1900 ordinance.

If no duty at all was imposed upon the Public Service, and the borough did the work by authority of resolution, the Public Service is not in a position to object, because it is not harmed in any way.

If any liability exists, so far as the Public Service is concerned, it is by virtue of the ordinance of 1900, supplemented by the agreement of 1915, and we know of no rule of municipal law which would require the passage of another ordinance to compel the performance of such obligation or recover the cost thereof, even if the responsibility is denied.

However, if the improvement could not have been conducted legally, without the passage of an ordinance, it was incumbent on the Public Service to have raised this question by a writ of certiorari, or other proper method, before the contract was let and the expense incurred, and they cannot raise it collaterally.

The same argument heretofore urged in support of the doctrine of estoppel applies to this situation. It is too late now for the Public Service to raise this question, particularly in view of the fact that such defense is not set up in the answer, and is entirely inconsistent with the admission of counsel (C. p. 32, l. 1), that the only defenses relied upon were those pleaded.

Secondly, permit us to suggest that the final clause in the agreement of 1915, to wit:

“When such paving, done in the manner  
“aforesaid, is completed, it shall be deemed to  
“have been done in accordance with the require-  
“ments named in Section 6 of the aforesaid or-  
“dinance,”



is a complete bar to the assertion of any question by the Public Service as to the methods pursued in having the work done.

The essential and material element is the fact that the paving was done from curb to curb, regardless of how it was accomplished, whether by ordinance, resolution, contract with the borough or contract with the county. When done, no matter how, the obligation became effectual and the defendant is bound to pay.

Counsel for defendant further contends that the Public Service is not obliged to perform the paving obligations contained in the 1900 ordinance, because at the time the work was done by the plaintiff, Maple Avenue had been taken over as a county road and the borough had no jurisdiction thereover. Primarily, it should be observed that the defendant was in possession of the highway, using the same in the operation of its street railway system, and naturally one would suppose, that coupled with the right of enjoyment of these privileges would be the obligation to perform the conditions which were imposed when the rights were granted. In any event, it is manifest that the agreement of 1915 was made for the express purpose of providing for this situation. Not only did such contract, but the previous negotiations, show that this situation was one of the conditions which the parties had in mind, and the plan, which was subsequently perfected, was adopted because of lack of jurisdiction of the borough over the highway as a county road.

Therefore, it would seem that the defendant is estopped from denying liability upon this ground, in view of such agreement and under the circumstances in which it was made.

We further insist that there is nothing in the statutes authorizing the acquisition of turnpikes by



counties and conferring jurisdiction over the roads thus taken over, which would warrant the assumption that the Legislature, either expressly or impliedly, intended to release or in any way waive or modify, so far as the public was concerned, the obligations of a corporation using the highway in the conduct of its business, which obligations were imposed when the privilege to use the highway was granted. Certainly the Street Railway Company could not be deprived of its right to occupy the highway, and it would be merely a matter of simple justice to require performance by the Street Railway Company, if it was to continue in the use of the highway for its purposes of its obligations. Unquestionably, the county took over the control of the highway, subject to the rights of the Street Railway Company, therefore neither the rights or obligations of the latter was disturbed. It might be added also that this question was not set up in the defendant's answer.



## New Jersey Court of Errors and Appeals

BOROUGH OF MERCHANTVILLE,

*Plaintiff-Respondent,*

*vs.*

(CAMDEN & SUBURBAN RAILWAY COMPANY

and) PUBLIC SERVICE RAILWAY COMPANY,

*Defendant-Appellant.*

*Action at Law.*

*On Appeal*

*from*

*Supreme Court.*

### BRIEF FOR PUBLIC SERVICE RAILWAY COMPANY.

#### Statement.

The judgment in this case is for the cost of part of the paving of a county road in the borough of Merchantville. The road was a turnpike for many years and until its acquisition by the county of Camden in 1913. For paving a portion of this highway, *i. e.*, the part east of Centre street, the defendant paid the borough and that part of the avenue is not involved in this litigation. The paving for the cost of which judgment was rendered extends westward from Centre street and is shown on the map between the letters A-B and C-D.

The liability of the defendant, Public Service Railway Company, is claimed under the provisions of an ordinance of the borough of Merchantville, passed December 18th, 1900 (case, p. 104), granting a location to the Camden & Suburban Railway Company of railway tracks therein described. These tracks as described run from B to F and from C to E, as indicated on the diagram herewith submitted. The Camden Horse Railroad Company had built in 1892 and owned a line of street railway west of Centre street extending from A to B, with the five turn-outs indicated by heavy lines on the map between C and D. It also claimed by its charter, an ordinance by the borough and consent of the turnpike company, the right to build the full line of railway from C to D. The property of the Camden Horse Railroad Company was leased to the Camden & Suburban Railway Company May 1, 1896, Exhibit P. 6, case, p. 115.

Suit was originally brought against both the Camden & Suburban Railway Company and the Public Service Railway Com-



pany, but a non-suit was allowed the Camden & Suburban Railway Company (case, p. 99, ll. 25-26), because that company was not a party to an agreement (Exhibit P. 5, dated November 15th, 1915, case, p. 114), which it is claimed modifies the ordinance of December 18th, 1900 (Exhibit P. 1, p. 104).

The defendant's claim on this appeal is (1), that so far as the portion of the turnpike occupied by the tracks from A to B is concerned, it is not mentioned or referred to in the ordinance at all; and (2), that so far as that portion of the turnpike shown between the letters D and C is concerned, the ordinance was entirely inoperative, illegal and void and could create no obligation at all.

## ARGUMENT.

### I.

This is a suit brought to recover the cost of paving part of Maple avenue in the borough between the tracks of the street railway companies and three feet outside of each outer rail.

The borough of Merchantville is surrounded by Pensauken township, and Maple avenue extends entirely through the borough, as shown on the diagram herewith submitted. (The width of the avenue on the diagram is wider than the scale of the rest of the map, for convenience of examination of the lines of the street railway.) Part of the pavement between the tracks and for three feet outside thereof has been paid for by Public Service Railway Company, and is not in dispute. That part is all of Maple avenue east of Centre street.

The Camden Horse Railroad Company was incorporated on March 23, 1866 (P. L. 1866, p. 640). A supplement to its charter was granted March 11, 1872 (P. L. 1872, p. 512), which authorized the company, *inter alia*, to build a street railway on the Moorestown and Camden turnpike, known as Maple Avenue in Merchantville, that being one of the highways leading out of Camden. The charter did not require the consent of Merchantville or any other municipality to the construction of the railway, but, of course, it was necessary for the railway company to get the consent of the turnpike company before entering on its property. Such consent was obtained March 30, 1892 (Exhibit D. 7, p. 118). Precisely such proceedings were held to be



sufficient, in the case of *State v. Council of Hoboken*, 30 N. J. L. 225, to authorize a horse railroad company to construct a railway on a turnpike. In the opinion in that case it was said:

“By a statement of facts filed with the papers in the case, not signed, but which is understood to be agreed to by the parties, it appears that the railroad company did, in 1860, lease from the turnpike company their franchise, and that the rails of the prosecutor’s road in Hoboken are laid upon the turnpike road, as laid out and constructed fifty years ago, and that the tracks were laid by the prosecutors, by virtue of their charter and the lease to them from the turnpike company.

“By this lease, the railroad company acquired the right to lay rails independently of the ordinance of 1860, and without the consent of the city council. This right is not affected by any condition in the charter of the prosecutors, if such condition was intended to be imposed.”

The charter of the Camden Horse Railroad Company only authorized the use of horses to draw its cars, but in Exhibit D. ~~7~~ the turnpike company consented not only to the construction of the railway but also to the use of electricity. By an act passed in 1886 (Comp. Stat. 4991, sec. 8) street railway companies were authorized to use electric motors upon obtaining consent of the municipalities “having charge of the public streets or highways” on which railways were located. As the Borough of Merchantville did not have charge of the turnpike, its consent was not made necessary by the statute. However, an ordinance of the borough purporting to give such consent was passed April 5, 1892 (Exhibit D. 8). The ordinance was much broader than a mere consent to the use of electricity. It not only purported to consent to such use, but also to authorize the construction of the street railway itself on the turnpike, rights which the company already had. Perhaps the reason why the ordinance took that form is because it authorized the company to construct a street railway on Center street, in Merchantville, which intersects the turnpike. Permission of the borough to construct a street railway on Center street and operate it by electricity was undoubtedly necessary because the borough had charge of Center street. There was some question raised whether the act of 1886 was broad enough to authorize the erection of poles as well as to use electric motors in cases where the consent of municipalities was necessary. That difficulty was overcome by a statute passed in 1893 (Comp. Stat. 4992, sections 9 and 10), which also removes any doubt that may have existed as to the



right of the company to use electricity by consent of the turnpike company only.

Therefore, it seems to be clear that the Camden Horse Railroad Company did not in 1892 need or obtain from the borough of Merchantville any right whatever to construct, maintain or operate its street railway on the turnpike.

## II.

The Borough of Merchantville had no jurisdiction over the turnpike to grant consent to the location of the street railway tracks thereon or to consent to the use of electricity as a motive power prior to March 16, 1893, nor had the borough jurisdiction at any time over the turnpike to authorize or require the street railway company to pave any part thereof.

The borough had no authority whatever to pave any part of the turnpike itself, or to authorize or require the street railway company to do so. Any proceeding of that kind would have been a trespass on the property of the turnpike company and a misappropriation of public funds so far as the pavement was paid for out of the treasury of the borough.

In the case of *Hudson Tel. Co. v. Linden*, 80 N. J. L. 158, it was held that a designation by a township committee of a county road as part of the line of a telephone company was *ultra vires* and void. A turnpike is in the same relative position.

Subsequent to the agreement with the turnpike company of March, 1892, and the consent of the borough to the use of electricity of April following, the Camden Horse Railroad Company built a single track street railway on the turnpike in the borough as far east as Centre street, with five turnouts, according to the agreement with the turnpike company (Exhibit D. 7). Nothing further was done until June 15, 1896, when a second agreement was made between the Camden Horse Railroad Company and the turnpike company whereby the turnpike company agreed that an additional track might be laid on the turnpike in the borough in place of the five turnouts (Exhibit P. 6). A few months after this second agreement was made the street railway company applied to the borough for consent to the construction and operation of the second track, and subsequently an ordinance was passed purporting to grant such consent with the customary formalities (Exhibit D. 4). This consent was un-



necessary, because the substitution of a second track for the five turnouts was not the construction of a street railway on the turnpike or even an extension of the railway previously laid thereon. It was so held by this court in *Metlar v. Middlesex and Somerset Trac. Co.*, 72 N. J. L. 524, in which it was said:

“The multiplication of tracks, or switches, or turnouts, can no more make the entire road a new railroad than can the addition of a new portion to an old house transform it into a new structure” (p. 527).

The application to the borough in the fall of 1896 was probably made because on April 21st of that year an act had been passed to regulate the construction, operation and maintenance of street railways (P. L. 1896, p. 329; Comp. Stat. 5040, sec. 147). That statute purports to forbid any street railway company to construct a street railway on any highway or public place in any municipality without the consent of the governing body. Before the decision of the *Metlar* case in 1905 the application to the borough may have been prudent although not necessary. The company had the consent of the borough granted April 5, 1892, if its consent was needed at all, and that consent was not limited to a single track railway. (D. 8, page 149.)

The application to the borough in 1896 was unnecessary, not only for the reason stated in the *Metlar* case, but also for the reason that the street railway company, as already shown, had acquired a perfect right to construct a railway on the turnpike prior to the passage of the act of 1896, and that act could not divest the company of its right to do so. This was distinctly held by the Supreme Court of the United States in the recent and important case of *Russell v. Sebastian*, 233 U. S. 195, and that decision is directly in line with several decisions of the Supreme Court and of this Court. *State v. Hoboken*, 30 N. J. L. 225, 229; *Hudson Telephone Company v. Jersey City*, 49 N. J. L. 303; *Phillipsburg Electric Company v. Phillipsburg*, 66 N. J. L. 505; *Stemmler v. Madison*, 82 N. J. L. 596; *Louisville v. Cumberland Telephone Co.*, 224 U. S. 649, 664; *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58, 65, 66.

Besides, the act of 1896 (P. L., p. 329) to regulate the construction of street railways, can only be construed prospectively according to the act relative to statutes (Comp. Stat., p. 4971, sec. 3). It cannot be applied to companies that already had obtained a right to build a railway. *State v. Hoboken*, 30 N. J.



L. 225, 229-30; *State, Baker v. Scudder*, 32 N. J. L. 203 (207); *State, Alden v. Newark*, 40 N. J. L. 93 (97); *Citizens' Gas Light Co. v. State, Alden pros.*, 44 N. J. L. 648 (654); *Warshung v. Hunt*, 47 N. J. L. 256 (257); *Allen v. Township of Bernards*, 57 N. J. L. 303 (306); *Frelinghuysen v. Morristown*, 77 N. J. L. 493 (496); *Williamson v. N. J. Southern R. R. Co.*, 29 N. J. Eq., 311 (333-5).

It is therefore entirely clear that the borough had no right to authorize or require the street railway company to pave or pay for the pavement of any part of the turnpike in the borough and the Camden Horse Railroad Company obtained no right by the ordinance of October 6, 1896, which it did not previously possess. A provision in a municipal consent not authorized by law confers no right, and creates no obligation. This is not a case where a street railway company is required by law to apply to a municipality for its consent for some purpose, as to construct its railway or to use electricity for motive power. In such a case the municipality may annex any pertinent condition to its consent and so bind the company.

The second track referred to in the ordinance of 1896 was not built until the year 1900 and subsequent to the passage of another ordinance by the borough purporting to give consent to the Camden and Suburban Railway Company to build on the turnpike east and west of Center street, although that company had not obtained the consent of the turnpike company to build west of Center street, as required by an act passed in 1893 (Comp. Stat., p. 5038, sec. 138).

(See note on page 21)

### III.

Whatever control the Borough may have had over the turnpike prior to its conveyance to the county in 1913, by that conveyance it is perfectly clear that all jurisdiction over it for all purposes, except as to sidewalks, passed to the county.

Maple avenue, as it is now called, for many years was a turnpike called Moorestown pike, and remained a turnpike until November 7, 1913 (case, p. 23, par. 2), when it was conveyed to the county of Camden. **It was never under the jurisdiction of the borough of Merchantville except for incidental police purposes as other private property.** The act providing for the purchase of turnpikes by boards of chosen freeholders under which



the conveyance to the county was made, was passed in the year 1905 (Comp. Stat., p. 5697). That act provides that a turnpike so purchased "shall thereupon be and become a county road, and shall be cared for, repaired, improved and maintained for free public use in the same manner as other county roads are cared for, repaired, improved and maintained." Other county roads are cared for and maintained exclusively by boards of chosen freeholders of the counties wherein they are located. The 10th section of the act relating to county roads (Comp. Stat., p. 4542) states that "the duty of keeping the same in repair shall devolve exclusively upon the board of chosen freeholders and the county supervisor as hereinafter mentioned, and all other powers and duties respecting such road shall be imposed upon and vested in the said board of chosen freeholders, to the exclusion of all township, town, borough, village or other municipal officers; provided, however, that nothing in this act shall divest the municipal authorities of townships or boroughs of their power to construct, grade, curb, pave or repair the sidewalks along said county roads." Similar provisions are contained in all other statutes that provide for the construction and maintenance of highways by counties. Consequently, all authority, the Borough of Merchantville had, if any, over the turnpike prior to the time when it was conveyed to the county of Camden, and all agreements that had been made, if any had been legally made by the ordinance of December 18, 1900 (P. 1, case, p. 104) and the memorandum of November 15, 1915 (P. 5, case, p. 114), on which the plaintiff relies, were abrogated and annulled by the sale of the turnpike to the county, according to the express language of the statute. The power of the legislature to divest the borough of any authority it may have had over the turnpike and to relieve the street railway company of any obligation to pave any part of the same is entirely clear as the legislature has complete control over municipalities, and may modify or rescind all contracts which they may have made, unless the other party, not being a municipality, objects. *Cortelyou v. Anderson*, 73 N. J. L. 427 (a very pertinent authority); *Public Service Railway Co. v. Board of Public Utility Commrs.*, 85 N. J. L. 123, affirmed 86 N. J. L. 696; *Borough of North Wildwood v. Board of Public Utility Commrs.*, 88 N. J. L. 81; *Atlantic Coast Electric Ry. Co. v. Board of Public Utility Commrs.*, 92 N. J. L. 168; *Collingswood Sewerage Co. v. Collingswood*, 91 N. J. L. 20; affirmed 92 N. J. L. 509; *Northampton, Easton & Washington Traction Co. v. Board of Public Utility Commrs.*, 102 Atl. 930.



## IV.

Without the consent of the Turnpike Company the Borough had no jurisdiction to pass an ordinance locating street railway tracks on the turnpike. The Turnpike Company never gave to the Camden and Suburban Company consent to lay a railway on the turnpike west of Centre street.

The grant by the Turnpike Company to the Camden & Suburban Railway Company for the location of the street railway on the turnpike was a prerequisite to the passage of the ordinance of the borough of Merchantville. **No grant by the Turnpike Company was ever made for that portion west of Centre street.** This prior consent of the turnpike company is required by section 11 of the Traction Act (Comp. Stat., p. 5027, par. 107) which provides "that the consent of the corporation owning such turnpike or plank road \* \* \* **shall have been first had or obtained.**" The consent of the Turnpike Company was limited to the turnpike east of Centre street (see Exhibit D.7a, case, p. 123). There is another act on the same subject, in force at the time and still in force, entitled "An Act to authorize and regulate the construction of street railways upon turnpikes" (P. L. 1893, p. 342, Comp. Stat., p. 5038, par. 139), section 2 of which is as follows:

"Sec. 2. That the board of commissioners, common council, township committee or other governing body or bodies of any city, incorporated town, borough or township within or through the limits whereof such turnpike shall lie or extend shall upon the petition of such street railway company **and proof of the granting of such permission or right of way by the turnpike company,** by resolution or ordinance, locate the track or tracks of such street railway company upon the roadbed of such turnpike company; provided, such governing body may require the surrender by said turnpike company of its toll and other turnpike franchises as a condition upon which such location shall be made."

The action of the borough could be valid only in so far as the Turnpike Company had given consent.

Besides, there is an express contract in the lease between the Camden Horse Railroad Company and the Camden & Suburban Railway Company preventing the Camden & Suburban from ac-



cepting an ordinance locating tracks (case, p. 115); and a statute (Comp. Stat., p. 5008, par. 56, P. L. 1891, p. 465) which absolutely prohibits the making of any such grant by the municipality. Therefore an attempted location of the south track of the Camden & Suburban west of Centre street was entirely *ultra vires* the borough, and absolutely void. It was something that could not be ratified or affirmed. A thing forbidden by law cannot be authorized or validated by estoppel. Farmer v. Tel. Co. 74 N. C. 1  
Elliott v. Corp. 5th  
Sec. 79

It should be borne in mind in considering this matter that it is not a case in which the borough is bringing suit on a valid part of an ordinance-contract and the company is seeking to avoid recovery by alleging that the contract contains illegal provisions not involved in the suit. It is, in fact, precisely the reverse. The action of the borough is based entirely upon a provision of the ordinance-contract that is manifestly *ultra vires* and illegal, and the company is simply resisting the enforcement of that provision of the ordinance. Where a contract contains legal and illegal provisions, the illegal provisions may be separated and disregarded where it is manifest that they were not the inducement to the contract, and no claim is made in this case that they were. In fact, the company has performed the requirements of the contract relative to pavement east of Centre street, and whatever objections the company might have made to the technical legality of the pavement requirement east of that street have certainly been waived.

That legal and illegal provisions of a contract may be separated and the legal provisions enforced and the illegal provisions disregarded is well settled. The general rule is stated in *Elliott on Contracts*, sec. 1074, and Supp., sec. 1074, as follows:

“The illegality and invalidity of one provision of a contract will not make the entire contract illegal and void where such provision is separable so that the contract can be enforced without its aid.”

The rule is also stated in the case of *Huber v. Culp*, 46 Okla. 570, 149 Pac. 216 (218):

“Where, in the same instrument there are legal and illegal covenants, the performance of those which are legal may be enforced, although the performance of those which are illegal may not.”

See also *Barriere v. Depatie*, 219 Mass. 33, 106 N. E. 572; *McCutcheon v. Terminal Station Commission*, 150 N. Y. S. 850; *McCullough v. Smith*, 243 Fed. 832.



The rule that illegal or unenforceable provisions in a contract, or that the illegal part of a single provision may be disregarded and the rest enforced is well settled in New Jersey. In *Fleckenstein Bros. Co. v. Fleckenstein*, 76 N. J. L. 613, this Court held that a contract for sale of a business in which the vendor agreed not to engage in the same business within five hundred miles of Jersey City was enforceable in the territory of Jersey City, but unenforceable beyond; that is, the contract was held to be unenforceable to the extent that it was illegal. The same rule is stated in *Artistic Porcelain Co. v. Boch*, 76 N. J. Eq. 533, and also in *Stewart v. Lehigh Valley R. R. Co.*, 38 N. J. L. 505.

## V.

The act approved March 9, 1893, does not apply to the facts in this case.

Counsel for the borough seem to think that the act of 1893, approved March 9 (Comp. Stat. 5017), prohibited both the Camden Horse and the Camden & Suburban Company from constructing the second track on the turnpike west of Centre street without first obtaining the consent of the governing body of the borough. That statute, however, did not prohibit construction of the second track west of Centre street for reasons stated in the *Metlar case* and it does not apply east of Centre street for these reasons: *First*, it relates to streets, avenues and roads of the municipality, not of turnpike companies, and being a penal statute must be construed strictly; *Second*, if that act as originally passed included turnpikes it did so for a short time only, because just one week after, that is, on March 16, 1893, a statute was passed entitled, "An act to authorize and regulate the construction of street railways upon turnpikes," which of course, excepts turnpikes if they ever were within the purview of the earlier act. The act of March 16, 1893, authorizes any street railway company to construct a street railway on a turnpike upon obtaining the consent of the turnpike company; and, upon obtaining a location of its tracks by the governing body of the municipality, which the governing body must grant by resolution or ordinance upon application of the street railway company and proof of permission of the turnpike company. It will be noticed that the statute in this respect (sec. 2) is mandatory on the municipality, and the only condition which it is permitted to impose



is to require the turnpike company to surrender its right to take toll and other turnpike franchises. The third section of that act requires the consent of the municipality before construction of the railway. The borough gave that consent in 1892 and did not limit it to a single track railway with turnouts, nor did it require the company to pave any part of the turnpike. The following cases hold that the act of March 16, 1893, being complete in itself, repeals by implication all other statutes relating to the construction of street railways on turnpikes: *Roche v. Mayor &c., of Jersey City*, 40 N. J. L. 257; *De Ginther v. New Jersey Home*, 58 *Id.* 354; *Camden v. Varney*, 63 *Id.* 325, 329; *Cortelyou v. Anderson*, 73 N. J. L. 427.

## VI.

Under no construction of the ordinance of December 18, 1900, can it be held to apply to pavement along the north track, west of Centre street.

Passing for the present the point that the entire ordinance of December 18, 1900 (Exhibit P. 1, case, p. 104) is invalid for the reason that the borough had no jurisdiction over the turnpike for the purpose of authorizing the location of street railway tracks thereon, the question arises as to what part of the railway the ordinance applies. It purports to locate the north track on the turnpike east of Centre street, and the south track entirely through the borough and over the right of way granted to Camden Horse Railroad Company by the Turnpike Company, and directly over the five turnouts that had previously been laid west of Centre street. The north track west of Centre street and the five turnouts had been built by the Camden Horse Railroad Company in the year 1892. It is important to observe the definition of the north and south tracks in the ordinance. It is Exhibit P. 1, and begins on page 104 of the case. The north and south tracks are described on page 106. At the top of that page it is stated, referring to the street railway which the ordinance purported to grant permission to construct—"It shall be a double track street railway, of the gauge of five feet, and the middle line of each track is described as follows:

"THE NORTH TRACK. Beginning in the Turnpike Road known as the Moorestown and Camden Turnpike Road, and known also as Maple Avenue, at a point distant five



feet northwardly from the center line of said road and opposite the west line of Centre street and extending thence north eighty-nine degrees ten minutes east twenty-one hundred and twenty-seven and three-tenths feet to the division line between the borough of Merchantville and the township of Pensauken."

The south track is defined as follows:

"THE SOUTH TRACK. Beginning in the Turnpike Road known as the Moorestown and Camden Turnpike Road and also known as Maple Avenue, at a point distant five feet southwardly from the centre line of said road and opposite the division line between the borough of Merchantville and the township of Pensauken, and extending thence north eighty-eight degrees and fifty-five minutes east forty-two hundred and twenty-four and seven-tenths feet to a point opposite Park avenue, thence north eighty-nine degrees ten minutes east twenty-six hundred and twenty-nine and eight-tenths feet to the division line between the borough of Merchantville and the township of Pensauken."

Then follows a description of a cross-over near the easterly line of the borough, which is not important.

With these descriptions of the north and south tracks in mind, and by reference to the map, the meaning of section 6 of the ordinance, in respect to the provision relating to paving can be ascertained. Lines 1-23 of section 6 (case, p. 108), provide for paving between the rails and between the tracks with *rubble pavement*, additional stones (to those that had been laid on the turnpike) to be provided by the company. The company was also required to construct, for a distance of three feet on the outside of both the north and south tracks, a *macadam pavement* not less than eight inches in depth, bound and finished in a manner similar to the sixteen feet of trap rock macadam pavement "as hereinafter provided" (referring to the macadam pavement called for by section 8, case, p. 109).

Section 6 is obscurely written. Lines 1 to 23 repeat the requirements in the contract between the Turnpike Company and the Camden & Suburban Railway Company relating to paving (Exhibit D. 7a, case, p. 123). The meaning of sections 6 and 8 of the ordinance is that the company shall construct a *macadam*



*pavement* eleven feet wide on each side of the outer rails of its north and south tracks, as defined in the ordinance at the time of building the railway, that is, two adjoining strips of three feet and eight feet, on each side of the outer rail; the three feet strip to be laid under section 6, and the eight feet strip under section 8. The provision in section 6 out of which this litigation arose begins at the 11th line from the bottom of page 108. It purports to require the company to pave between its rails and between its tracks, and three feet outside of its tracks whenever the borough **under its own direction and at its own expense should pave the remainder of the roadway with some improved pavement.**

Five or six years ago the borough seems to have started a movement to pave Maple avenue with improved pavement (case, p. 126) and desired the street railway company to pave or pay the cost of paving the part between its tracks and three feet outside with the same material. The company raised no question as to its obligation to pay its part of the cost of the improved pavement east of Centre street, but denied any obligation to pay for any part of the pavement west of Centre street.

## VII.

**The Borough of Merchantville could only pave a highway by ordinance, and no ordinance providing for the pavement in question was ever passed by the Borough.**

The borough of Merchantville was incorporated by a special act of the Legislature approved March 3rd, 1874, P. L. 1874, p. 216, with certain corporate rights, afterwards, of course, obtaining the general powers conferred upon boroughs under the general borough act, Revision of 1897, section 33, sub-division 2 of which (Comp. Stat., p. 244) provides that the borough by *ordinance* may pave any street. This, of course, is limited to its own streets and highways. It cannot, without an ordinance, provide for the pavement of streets belonging to any other municipality or to another corporation. The sections of the Borough Act relating to pavement were amended April 8th, 1915, P. L. 1915, p. 400. It does not appear that the necessary procedure by ordinance to pave the turnpike was ever taken by the borough.

Wherever municipal action requires an ordinance, no effectual action can be otherwise taken. *Dilts v. Stockton*, 73 N. J. L. 158; *Hitchner v. Richman*, 74 N. J. L. 234. It is admitted that no ordinance specifically authorizing this pavement was ever passed by the borough. (Case, p. 94, ll. 10-12.)

*Parkard v. Bergen Neck Ry. Co.* 48 N.J. L. 251, 252, 9



## VIII.

The pavement, for which payment is now demanded by the Borough, was not laid "under the direction and at the expense of said Borough," as the ordinance of December 18, 1900, requires, nor was it laid by the Borough "having the assistance therein of the state and county" as contemplated by the memorandum (P. 5) of November 15, 1915.

The memorandum of November 15, 1915 (P. 5, case, p. 114), recites that "the borough of Merchantville proposes to have Maple avenue through its entire length paved with an improved pavement, having the assistance therein of the state and county, which both make appropriations toward the same, and over which they have certain supervision."

The borough had power to make an agreement with the county, by which the borough should control the improvement, under legislation then in force. P. L. 1911, p. 273; Comp. Stat. Supplement, p. 1038, par. 97; P. L. 1914, p. 124; Comp. Stat. Supplement, p. 1356, par. 103. The street railway companies supposed that the borough intended to proceed under one of those statutes.

As a matter of fact the pavement in question was not laid by the borough of Merchantville with the assistance of the state and county. Every foot of the pavement, other than that for which payment is claimed from the defendants, was laid by the county under a contract made subsequent to the date of the contract for the pavement between the tracks and three feet outside thereof made by the borough with Kelly-McFeeley Company, for payment of which this suit is brought. (Case, pp. 43 and 44.)

A notice dated February 1, 1916, served by the borough on the defendants (Exhibit P. 17 a, case, p. 144), states: "You are hereby notified that the Moorestown Pike or Maple avenue throughout the extent of said road in the borough of Merchantville is about to be paved **under the direction and at the expense of said borough** from the curb on each side to within three feet of the outermost rails of the tracks used by the Public Service Railway Company, lessee of Camden & Suburban Railway Company, on said road, with a pavement consisting of a concrete base and interlocking stone," etc., and that the companies will be required within sixty days from the notice to pave between the



tracks and between the rails of the railway, and three feet on the outside of both north and south tracks.

The pavement between the tracks and three feet outside was laid under a contract by the borough with the Kelly-McFeeley Company. Before awarding the contract a notice (Exhibit P. 18, case, p. 146) was given by the borough to the defendants stating that bids had been received and that unless the company paved between its tracks and three feet outside thereof with a certain pavement therein described "in accordance with the notice heretofore served [that is the notice dated February 1, 1916] within sixty days from the time of the service of said notice said work will be awarded to Kelly-McFeeley Company in accordance with their bid as aforesaid, at the expense of your companies or such one as shall be liable therefor, in accordance with the terms of the ordinances referred to in said notice so heretofore served."

It does not appear when Exhibit P. 18 was served on the company, but on April 15, 1916, Public Service Railway Company notified the borough as follows (Exhibit D. 1, case, p. 147):

"To the Borough Council of the Borough of Merchantville.

"PLEASE TAKE NOTICE that Public Service Railway Company, the lessee in possession and operation of the street railway on Maple avenue on the highway known as Moorestown & Camden Turnpike Company road, called Maple avenue, in the Borough of Merchantville, asserts that it is not liable to do the paving or pay for the cost thereof, as claimed by you, on said highway, and that any steps, proceedings or contracts which you may let or undertake, or any costs or expense you incur, will be entirely at your own risk.

"Very respectfully yours,

PUBLIC SERVICE RAILWAY COMPANY,

By R. E. Danforth,  
General Manager.

"Dated April 15th, 1916."



Evidently P. 18 (case, p. 146) had not been served on the company until shortly before April 15, 1916. It does appear by the testimony of the mayor of the borough (case, p. 93) that no action was taken by the borough until after receipt of the protest by the railway company of April 15, 1916.

## IX.

### The agreement of November 15, 1915.

That agreement begins by stating that "the Borough of Merchantville proposes to have Maple avenue through its entire length paved with an improved pavement, having the assistance therein of the state and county, which both make appropriations toward the same and over which they have certain supervision." This does not mean that the entire pavement is to be laid without expense to the borough or that entire supervision of the work was to be conferred on the county. At the end of the first paragraph of the agreement it is said: "While the paving is to be from curb to curb a portion of that only is to be solely at the expense of the borough, the remaining portion being contributed by state and county as aforesaid." It was upon these recitals of fact that the agreement was made. **The provision in section 6 of the ordinance of December 18, 1900, that the company should only be required to pave part of the turnpike when the borough should pave the rest at its own expense was intended as a protection to the company by postponing any obligation to pave until the borough should be willing to expend its own money also in the work.** In the first and second paragraphs of the agreement a statement is made that the obligation of the street railway company to pay a part of the cost of the paving west of Centre street is disputed, and when the borough notified the company that it intended to proceed with the work or award a contract for paving the turnpike west of Centre street an emphatic denial of the company's liability was served on the borough. Consequently, the borough proceeded with full notice of the company's legal position and cannot set up a claim of estoppel based on silence or apparent acquiescence of the company in the work.

The Camden and Suburban Company did not sign the memorandum of November 15, 1915, and for that reason a non-suit as to that company has already been granted in this case. The



memorandum not only recites that a controversy existed as to the liability of the company to pay for any part of the pavement west of Centre street, but expressly declares that the "dispute is still open as to the obligation of the company." The controversy was between the parties to the ordinance of December 18, 1900, that is, between the borough and the Camden and Suburban Company, relating to the obligation of that company under the ordinance. **The memorandum if it purports to change the agreement expressed in the ordinance of December 18, 1900, was an effort of the borough and the Public Service Railway Company to change an agreement between the borough and the Camden and Suburban Company. There was no authority whatever for the Public Service Railway Company to do so.** It has already been held that the Camden and Suburban Company did not agree to change the ordinance, and there is nothing in the lease authorizing Public Service Railway Company to change the obligation, if any had been previously incurred by the Camden and Suburban Company by accepting the ordinance. **It will be noticed that in the memorandum the Public Service Railway Company assumed no obligation whatever.** There is nothing in the lease authorizing the company to modify any pre-existing contract of the Camden and Suburban Company. It is true that under the lease the Public Service Railway Company assumed the obligations of the Camden and Suburban, but that did not authorize the Public Service Railway Company to create or enlarge obligations of the lessor. For instance, would any one seriously contend that the Public Service Railway Company might modify the terms of a mortgage made by the Camden and Suburban to a trustee or to waive a defense that the Camden and Suburban may have had to a claim for money or damages.



### Summary.

(1) The Camden Horse Railroad Company by its charter obtained directly from the Legislature the right to construct a street railway on the turnpike subject to the consent of the turnpike company, which was obtained. No other consent was needed (*supra*, pp. 2 and 3). The company also obtained consent of the turnpike company to use electricity as a motive power. No other consent for that purpose was necessary, although an ordinance purporting to grant such consent was passed by the borough. That ordinance was unnecessary because the borough did not have charge of the turnpike (Comp. Stat., p. 4991, sec. 8; *supra*, pp. 4, 5 and 6, &c.). Any defect in the right of the railway company to use electric power by the overhead system was validated by an act passed in 1893 (Comp. Stat., p. 4992, sec. 10).

(2) The borough had no jurisdiction over the turnpike to grant consent to the location of street railway tracks thereon nor to require the Camden and Suburban Company to pave any part of the turnpike.

(3) The turnpike company never gave consent to the Camden and Suburban Company to construct a street railway on the turnpike west of Centre street, and without that consent the consent of the borough required by the act of March 16, 1893, could not be granted (Comp. Stat., p. 5038, sec. 139). The Camden and Suburban Company, even with the consent of the turnpike company and of the borough, could not obtain a right to construct tracks on the turnpike west of Centre street, because a street railway had already been constructed on that part of the turnpike (Comp. Stat., p. 5008, sec. 56; *supra*, pp. 8 and 9). Therefore, the ordinance of December 18, 1900, so far as it relates to the turnpike west of Centre street, is void.

(4) The second track on the turnpike west of Centre street was laid under the authority of the charter of the Camden Horse Railroad Company, although the work was actually done by the Camden and Suburban Company, as required by the lease. There was no other authority under which the second track of the street railway could have been constructed west of Centre street.

(5) Laying the second track in place of the five turnouts was not the construction of a new railway on the turnpike, and consequently the consent of the borough under the act of March



9, 1893, was not required. *Metlar v. M. & S. Trac. Co.*, 72 N. J. L. 524. Moreover, the consent of the borough expressed in the ordinance of 1892 was not limited to a single track. The turnpike company did consent.

(6) The act of March 9, 1893, if it ever applied to the turnpike, was amended by the act of March 16, 1893 (*supra*, p. 5), so as to exclude turnpikes from its purview. Besides, a street railway had been constructed on the turnpike before that act was passed, and no municipal consent to lay the second track was needed.

(7) The borough of Merchantville never had jurisdiction over the turnpike prior to its conveyance to the county, and subsequent to such conveyance in 1913 the borough was expressly prohibited by law from exercising any jurisdiction or control over the roadway of the turnpike. The statutes relating to county roads state that *all duties and powers* respecting the same shall be vested in the board of chosen freeholders to the *exclusion* of all township, town, borough, village or other municipal officers, except as to sidewalks (*supra*, pp. 6 and 7). Consequently, the borough had no right after that conveyance to pave or to require the street railway company to pave any part of the county road.

(8) The memorandum of November 15, 1915, Exhibit P. 5, shows a recognition by the borough of the fact that the railway company denied any liability for paving west of Centre street. This was repeated by formal notice (Exhibit D. 1, case, p. 147) before the borough did any work. There can be, therefore, no estoppel (*supra*, pp. 16 and 17) against defending this claim.

November Term, 1920.

FRANK BERGEN,  
*Counsel for Public Service Railway Company.*







### NOTE.

In 1896 the status of the street railway company west of Centre street was this. In 1892 a street railway and five turnouts had been constructed west of Centre street, in Merchantville, by the Camden Horse Railroad Company, with the consent of the turnpike company and the borough. (Agreement, Exhibit D. 7, Case, p. 118; ordinance of April 5, 1892, Exhibit D. 8, Case, p. 149.) In 1896 the Camden Horse Railroad Company obtained another consent from the turnpike company, and a consent from the borough, to lay a second track on Maple avenue west of Centre street, parallel with the track already laid. (Agreement, Exhibit D. 6, Case, p. 120; ordinance, October 6, 1896, Exhibit D. 4, Case, p. 116.) These rights obtained in 1896 by the Camden Horse Railroad Company were strictly in compliance with the terms of the lease of the property of that company to the Camden & Suburban Railway Company dated May 1, 1896 (Exhibit P. 6, Case, p. 115). In this situation the Camden & Suburban Railway Company, without the consent of the Camden Horse Railroad Company, and without the consent of the turnpike company, applied to the borough of Merchantville for consent to locate tracks not only east of Centre street, for which they had a right to apply and for which they had the consent of the turnpike company (Exhibit D. 7a, Case, p. 123), but also for permission to construct a single track west of Centre street over the location of the five turnouts, for which they had no right to apply.

It appears in the case that at the time when the ordinance to the Camden & Suburban Railway Company was passed by the council of the Borough of Merchantville, December 18, 1900, the borough passed another ordinance, presented the day before, purporting to repeal the ordinance of 1896 granting consent to the Camden Horse Railroad Company (Case, p. 124). That repealing ordinance was introduced and passed without the knowledge or consent of the Camden Horse Railroad Company. An effort was made to show that Mr. Lippincott was present at the meeting when this repealing ordinance was passed; but he had no interest in the Camden Horse Railroad Company, had no right to speak for it, and did not pretend to consent, saying that he had no right to do anything of the kind (Case, p. 58, bottom), and he had no recollection of the effort of the council to pass the repealing ordinance (see Case, pp. 60 and 61).



Mr. Early testified (Case, p. 53), that he was almost certain that Judge Armstrong, who was a director of the Camden Horse Railroad Company, was present at the meeting; but Mr. Early was mistaken. The proof conclusively shows that Judge Armstrong was not there, and had nothing whatever to do with this matter (Case, p. 59, l. 30; pp. 61-62). There was no decision of this question in the court below.

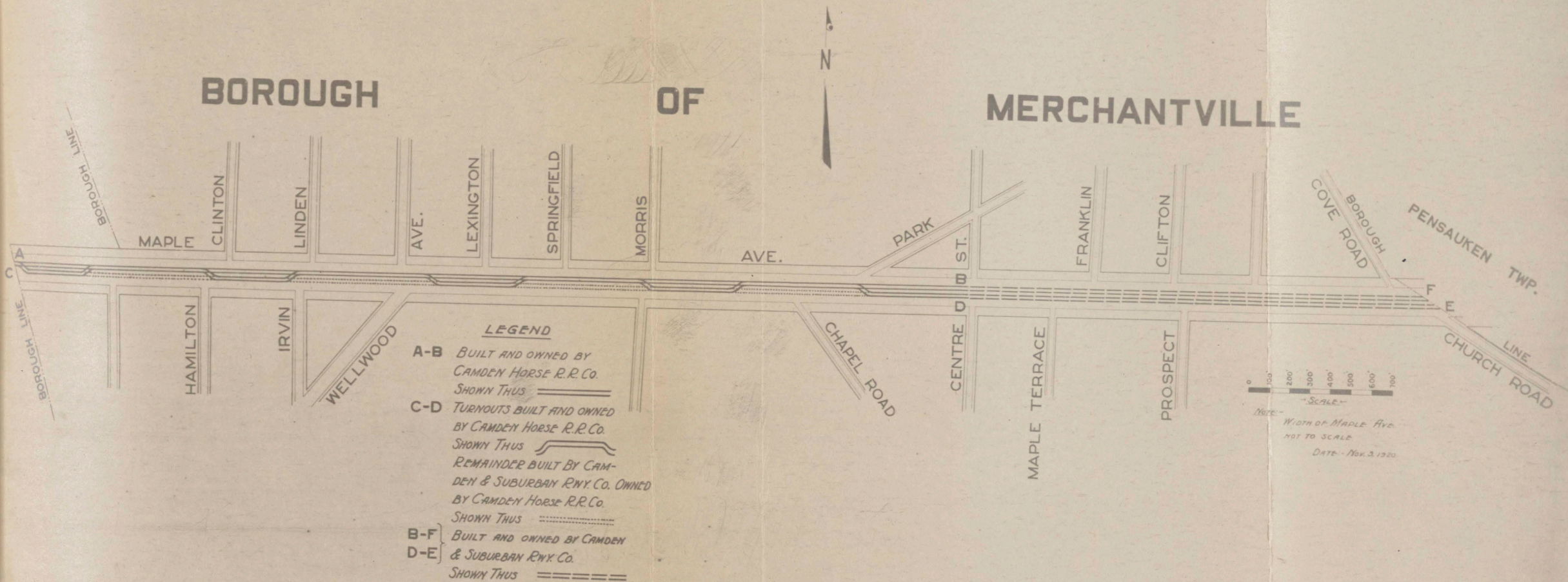
Under these circumstances it is perfectly clear that the ordinance to the Camden & Suburban Railway Company, which purported to confer consent to construct a track west of Centre street, was absolutely void. The company had no power to take it, and the borough had no power to give it; and for that reason the street railway company while willing to waive any question as to the legality of its obligation to pay for the paving east of Centre street (which it has paid), from the beginning denied any obligation to pay for paving west of Centre street, and gave timely notice of its position in that respect. (See P. 5, November 15, 1915, Case, p. 114; and notice, Exhibit D. 1, dated April 15, 1916, Case, p. 147.) It is admitted that this notice was given before the pavement now in question was laid or contract awarded for laying the same. (Case, p. 93, l. 30.)



# BOROUGH

# OF

# MERCHANTVILLE









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