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**WRIT OF CERTIORARI.**

STATE OF NEW JERSEY, to wit:

To the HACKENSACK IMPROVEMENT  
COMMISSION, a municipal corporation,  
(SEAL) the governing body of the City of  
Hackensack, in the County of Bergen: 10

We being willing for certain reasons  
to be certified of certain assessments confirmed  
by the Hackensack Improvement Commission,  
the governing body of the City of Hackensack,  
on December 2nd, 1929, against lands of New  
Jersey and Hudson River Railway and Ferry  
Company, owner, and Public Service Coordinated  
Transport, lessee, for the paving and grading,  
construction of a drain, curbs, sewers and instal-  
lation of water and gas connections in Hillside  
Place, Marlatt street, Susquehanna street and 20  
Second street in said City of Hackensack, which  
assessments are as follows:

Public Service Railway Co. Block 238 D, Right of Way, N-S of Sus- quehanna St. ....	\$ 878.63	
Public Service Railway Co. Block 234 B, Right of Way, E-S of Sec- ond St. ....	1,470.08	
Public Service Railway Co. Block 234 B, Right of Way, W-S of Sec- ond St. ....	1,470.08	30

We do command you that the said assess-  
ments, with the record of the making and con-  
firmation thereof, together with all things touch-  
ing and concerning the same, as fully and en-  
tirely as before you they remain, to our Justices  
of the Supreme Court of Judicature, at Trenton  
on the 3rd day of March, 1930, you do certify

*Return to Writ.*

and send, together with this writ, that therein may be done what of right and according to the laws of this State should be done.

WITNESS, William S. Gummere, Esq., Chief Justice of our Supreme Court of Judicature, at Trenton this 11th day of February, 1930.

10

FRED L. BLOODGOOD,  
Clerk.

FRANK BERGEN,  
Attorney.

This writ is allowed. Let it be sealed.

Feb. 8, 1930.

20

C. W. PARKER,  
J. S. C.

**RETURN.**

*To the Honorable Justices of the Supreme Court  
of Judicature of New Jersey:*

I, WILLIAM SCHAAF, Clerk of the Hackensack Improvement Commission, in the County of Bergen, in obedience to the command of the writ hereto annexed, directed to the Hackensack Improvement Commission, do hereby certify and send to you the said Justices, the ordinance to provide for the draining, grading, paving, curbing of Hillside Place, Marlatt street, Susquehanna street and Second street, and for the construction of sidewalks on both sides thereof and for the installation of sewer, water and gas mains and service connections in said highways; the proceedings and report of the Commissioners

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*Return to Writ.*

of Assessment in connection with the said improvement, including the assessments levied upon the property of the prosecutor, New Jersey and Hudson River Railway and Ferry Company, owner, and Public Service Coordinated Transport, lessee, together with all things touching and concerning the same as fully and completely as they remain before the Hackensack Improvement Commission all as appears by the schedules hereunder written. 10

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the Hackensack Improvement Commission this 21st day of February, 1930.

(SEAL) WILLIAM SCHAAF,  
Clerk. 20

## SCHEDULES.

The following schedules contain true copies of the ordinance for the improvement of Hillside Place, Marlatt street, Susquehanna street and Second street, the resolution of the Hackensack Improvement Commission accepting said work and certifying the cost thereof to the Assessment Commission; the report of the Assessment Commission, including the amount of assessment against the prosecutor, and the resolution approving the report of the Assessment Commission by the Hackensack Improvement Commission. 30

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the Hackensack Improvement Commission this 21st day of February, 1930.

(SEAL) WILLIAM SCHAAF,  
Clerk. 40

*Return—Schedule 1.*

## SCHEDULE 1.

AN ORDINANCE TO PROVIDE FOR THE  
 DRAINING, GRADING, PAVING, CURB-  
 ING OF HILLSIDE PLACE, MARLATT  
 STREET, SUSQUEHANNA STREET  
 AND SECOND STREET, AND FOR THE  
 10 CONSTRUCTION OF SIDEWALKS ON  
 BOTH SIDES THEREOF AND FOR THE  
 INSTALLATION OF SEWER, WATER  
 AND GAS MAINS AND SERVICE CON-  
 NECTIONS IN SAID HIGHWAYS.

Be it ordained by the Hackensack Improve-  
 ment Commission:

1. That Hillside Place, Marlatt street, Sus-  
 quehanna street from Overlook avenue to First  
 20 street and Second street from Beech street to  
 Central avenue, be drained and graded to their  
 full respective widths between property lines in  
 accordance with the drainage and grade maps  
 relating thereto, prepared by the City Engineer.

2. That concrete curbs six (6) inches in width  
 at the top and nine (9) inches in width at the  
 bottom and twenty (20) inches in depth shall be  
 constructed on both sides of said streets in  
 accordance with the plans and specifications re-  
 30 lating thereto, prepared by the City Engineer.

3. That Hillside Place and Marlatt street  
 shall be paved from curb to curb with a bitumi-  
 nous macadam roadway all in accordance with  
 the plans and specifications relating thereto,  
 prepared by the City Engineer.

4. That Susquehanna street shall be paved  
 from curb to curb, between the bounds aforesaid,  
 with a six-inch stone base and two-inch Topeka  
 top, excepting that portion where the grade is  
 40 steep, which shall be paved with granite block

*Return—Schedule 1.*

on a concrete base, all in accordance with the plans and specifications relating thereto, prepared by the City Engineer.

5. That Second street shall be paved from curb to curb, between the bounds aforesaid, with a six-inch stone base and two-inch Topeka top, all in accordance with the plans and specifications relating thereto, prepared by the City Engineer. 10

6. That concrete sidewalks of a uniform width of four (4) feet and thickness of four (4) inches shall be constructed along both sides of said streets between the bounds aforesaid in accordance with the plans and specifications aforesaid.

7. That water and gas service connections, including necessary mains and connections therefrom from a point six inches inside the curb lines of said streets, and house connections from sewer to inside of curb lines, including the necessary mains, shall be constructed and laid so that every lot or plot shown upon the plans aforesaid and fronting on said streets, shall have one service connection inside the curb line for gas, water and sewer. 20

8. That the aforesaid improvements herein provided for, are declared to be local improvements, and the cost thereof is to be assessed upon the lands in the vicinity thereof benefited thereby in the manner provided by Chapter 152, P. L. 1917 as amended. 30

9. That the sum of \$155,000.00 is hereby appropriated for the improvements authorized by this ordinance, which said sum shall be temporarily financed by the issuance from time to time of temporary loan notes or bonds under Section 13 of Chapter 252, P. L. 1916 as amended, in an aggregate maximum amount of \$155,000.00, 40

*Return—Schedule 2.*

which notes shall bear interest at a rate not exceeding six per cent. per annum, and shall, with all renewals thereof, mature within six years from the date of completion of the improvements herein provided for. All other matters with respect to such temporary notes or  
 10 bonds, shall, unless determined by resolution, be determined by the Mayor and Treasurer of the Hackensack Improvement Commission, who shall sign the same and affix the corporate seal thereto. In case temporary bonds are issued hereunder, the same may be either registered or coupon bonds, and if coupon bonds, the coupons attached thereto shall bear the facsimile signature of the Treasurer.

10. This ordinance shall take effect when duly  
 20 published and as required by law.

WILLIAM SCHAAF,  
 Clerk.

## SCHEDULE 2.

RESOLUTION FOR THE IMPROVEMENT  
 COMMISSION

30 Offered by Mr.                      Seconded by Mr.

WHEREAS the improvement authorized by an ordinance adopted June 6, 1927 providing for the draining, grading, paving, curbing of Hillside Place, Marlatt street, Susquehanna street and Second street, and for the construction of sidewalks on both sides thereof and for the installation of sewer, water and gas mains and service connections in said highway, has been completed and the cost thereof certified to the Governing  
 40 Body of the City of Hackensack.

*Return—Schedule 2.*

BE IT RESOLVED by the Hackensack Improvement Commission of the City of Hackensack that the Board of Assessment Commissioners be notified of the completion of said improvement and requested that a proper assessment be made on any lands or real estate that may have been benefited or increased in value by such improvement, and further, that said Board of Assessment Commissioners be advised that the costs of said work amount to \$165,389.68 the details of which are as follows:

Construction .....	\$129,770.55	
House Connections (Water).....	4,501.31	
“ “ (Sewer).....		
“ “ ( gas ).....	4,344.00	
Engineering .....	12,977.05	
“ on making assessment	175.00	20
Advertising .....	63.62	
Legal .....	80.00	
Accounting .....	75.00	
Interest .....	12,328.15	
Assessment Commission—Clerk	25.00	
Commission..	1,050.00	
	<hr/>	
TOTAL .....	\$165,389.68	

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*Return—Schedule 3.*

SCHEDULE 3.

REPORT OF ASSESSMENT FOR STREET  
IMPROVEMENT

*To the Hackensack Improvement Commission, of  
the City of Hackensack, Bergen County, New  
Jersey:*

10

We, the undersigned, Board of Assessment Commissioners, for the City of Hackensack, under and by virtue of the provisions of an act of the legislature of the State of New Jersey, entitled "An act concerning municipalities" approved March 27, 1917, and the several acts supplementary thereto and amendatory thereof being charged with the duty of estimating and assessing benefits conferred on lands and real estate

20 fronting on or abutting Hillside Place, Marlatt street, Susquehanna street and Second street, by reason of the paving and grading, the construction of a drain, curbs, sewers and the installation of water and gas connections therein, do certify and report that having first taken and subscribed the oath required by law which oath is hereto annexed. We did proceed to fix the time and place when and where we would hear all parties in interest who should present themselves to be heard, to wit; the 2nd day of

30 May, 1929 at the Municipal building in the City of Hackensack, of which meeting ten days' notice was given by publication in the Bergen Evening Record newspaper circulating in said City of Hackensack and mailed to the owners of all lots affected, direct to the last known post office address of such owners, copies of said notices with proofs of such publication and mailing are hereto annexed and made part of this

40 report, and that at the time and place so fixed

*Return—Schedule 3.*

we met, and having heard all persons who presented themselves to be heard, we thereupon entered upon and viewed any and all premises that we deemed necessary or in any way likely, in our judgment to be benefited by said improvement.

And we do further certify and report, that the cost of the whole work of such improvement is the sum of \$165,389.68 such cost being arranged under the following heads or divisions: 10

Construction .....	\$129,770.55	
House Connections (Water).....	4,501.31	
“ “ (Sewer).....		
“ “ ( gas ).....	4,344.00	
Engineering .....	12,977.05	
“ on making assessment	175.00	
Advertising .....	63.62	20
Legal .....	80.00	
Accounting .....	75.00	
Interest .....	12,328.15	
Assessment Commission—Clerk..	25.00	
Commission..	1,050.00	
	<hr/>	
	\$165,389.68	

We do further certify and report, that having ascertained the whole cost of said improvement, we then made an estimate of the benefits derived by said lands and real estate from the said improvement which said estimates are fully set forth below. 30

We do further certify and report that having made and completed said estimates, we did thereupon assess said benefit upon all lands and real estate, actually, peculiarly and specially benefited by said improvement, which said assessments are fully set forth below. 40

*Return—Schedule 3.*

And we do further certify and report that the total amount of benefits assessed upon said lands and real estate for the improvement of the said streets is the sum of \$140,415.36 and the amount by which the whole cost of the improvement exceeds the amount of said assessment, to wit: the sum of \$24,974.32 shall be paid by the City of Hackensack and raised by general taxation.

And we do further certify and report that the annexed survey and map, which are made part of this report, show the lots or parcels of lands and real estate actually, peculiarly and specially benefited by said improvement, and, that the schedule hereto annexed, and made part of this report contain the numbers by which said lots or parcels of lands and real estate are designated the name of the respective owners of said lots or parcels of lands and real estate, so far as they can be ascertained and the amount of the estimate and assessment to each owner for each of such lots or parcels of lands and real estate for said benefits according to the assessment map of the City of Hackensack.

And we do further certify and report, that we have used diligent effort to ascertain the names of the owners of the land and real estate benefited by the improvement as aforesaid and that as far as can be ascertained they are named on such maps and schedules.

And we do further certify and report, that the said estimates and assessments made upon said lots or parcels of lands and real estate, and which are more particularly set forth and specified on the maps, surveys and schedules hereto annexed are in each case the amount of benefits actually, peculiarly and specially acquired by the lands

*Return—Schedule 3.*

and real estate bordering on said portion of said streets, and that in no case has any property owner thereof been assessed beyond the amount actually, peculiarly and specially derived from said improvement.

And we do further certify and report, that no lands or real estate other than those so assessed have received or acquired any actual, peculiar or special benefits by reason of such improvement. 10

And we do further certify and report that we have considered the amount of damages accruing to any property by reason of the making of this improvement for the purposes of fixing and determining the same and deducting the same from the amount of any benefits assessed thereon and that any damages so awarded have been deducted from the amount of any benefits so assessed. 20

CHESTER HINDS,  
WALTER HEMINGWAY,  
ALFRED TELFER,  
Assessment Commissioners.

Attest:

.....  
Secretary to Assessment Commissioners.

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*Return—Schedule 3.*

PAVING AND GRADING THE CONSTRUCTION OF A DRAIN, CURBS, SEWERS, AND THE INSTALLATION OF WATER AND GAS CONNECTIONS IN HILLSIDE PLACE, MARLATT STREET, SUSQUEHANNA STREET AND SECOND STREET.

10	BLOCK 238D						
	Right-of-way North						
	side of Susquehanna						
	Street.						
	Pave-						
	Grade ment Curb	Walk	Drains	Sewer	Total		
	75.37 319.26	57.53	147.82	278.65	878.63		
	BLOCK 234B						
	Right-of-way E/S						
	Second Street.						
20	Pave-						
	Grade ment Curb	Walk	Drains	Sewer	Total		
	111.08 610.34	52.98 67.20	217.84	410.64	1470.08		
	BLOCK 234B						
	Right-of-way W/S						
	Second St.						
	Pave-						
30	Grade ment Curb	Walk	Drains	Sewer	Total		
	111.08 610.34	52.98 67.20	217.84	410.64	1470.08		

*Return—Schedule 4.*

#### SCHEDULE 4.

#### RESOLUTION

WHEREAS, the Board of Assessment Commissioners for the City of Hackensack has certified to the governing body of said City by report in writing signed by said Board their assessment for the cost of the paving and grading, construction of a drain, curbs, sewers and the installation of water and gas connections in Hillside Place, Marlatt street, Susequehanna street and Second street, in the City of Hackensack, New Jersey, which report was accompanied by a map showing the lands and real estate taken, damaged or benefited by said improvement for which damages or benefits have been assessed; and

WHEREAS, said report has been considered by this governing body at the meeting held December 2, 1929, of which meeting two weeks' previous notice has been given by publishing in a newspaper circulating in the City of Hackensack, once a week for two weeks prior to said meeting and also by mailing a copy of the notice of said meeting to the owner or owners named in said report directed to their last known post office address which notice stated the object of said meeting; and

WHEREAS, all persons appearing before this governing body have been given ample opportunity to be heard as to their objections, if any, to said report

BE IT RESOLVED, That said report be and the same is hereby adopted and confirmed without alterations.

AND FURTHER, that duplicate of the same duly certified by the Clerk of this City be de-

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*Return—Schedule 4.*

livered to the Tax Collector and that said assessments shall be payable immediately and said Collector shall immediately send out bills for such assessments.

10 AND FURTHER, that any assessment not paid within two months after December 2, 1929, shall bear interest thereon from the said date at the rate of eight per cent. per annum.

20 AND BE IT FURTHER RESOLVED, that the owner of any lands upon which any assessment shall have been made may pay the same in ten equal yearly installments with legal interest at the rate of six per cent. per annum, provided said party shall have the privilege of paying the whole of said assessment or any balance of installments with accrued interest thereon at one  
30 time and in case any such installment shall remain unpaid for thirty days from and after the time when the same shall have become due and payable, the whole assessment or balance thereon shall become and be immediately due and payable with interest at eight per cent. per annum.

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*Stipulation—Affidavit of Harry K. Ford.*

**STIPULATION.**

It is hereby stipulated and agreed by and between the parties hereto that the affidavit of Harry K. Ford filed herein shall be used as the statement of facts in this cause to the same effect as though the same had been taken upon notice; it being agreed that the facts therein stated are all the facts relevant in connection with this cause. 10

Dated February 25, 1930.

FRANK BERGEN,  
Attorney for Prosecutors.

WALTER G. WINNE,  
Attorney for Defendant.

20

STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss.

HARRY K. FORD, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the Real Estate Assistant to the Vice-President in charge of Real Estate and Purchases of Public Service Coordinated Transport, and also of New Jersey and Hudson River Railway and Ferry Company, both corporations organized and existing under and by virtue of the "Traction Act" of the State of New Jersey. 30

2. New Jersey and Hudson River Railway and Ferry Company is the owner of a line of electric street railway extending from Main and Mercer 40

*Stipulation—Affidavit of Harry K. Ford.*

streets, in the City of Hackensack, in the County of Bergen, to the City of Newark, in the County of Essex. Said line of electric street railway runs in part over private right of way from First street, in the City of Hackensack, westerly to Susquehanna street, and thence through Susquehanna street to Summit avenue, and southerly through Summit avenue to Essex street, and thence over private right of way to the boundary line between the City of Hackensack and the Borough of Hasbrouck Heights. The private right of way from First street westerly to Second street in said City of Hackensack is a strip of land fifty feet (50') wide at right angles, and said right of way from Second street to Susquehanna street is a strip of land fifty feet (50') wide at right angles, extending westerly from Second street, about three hundred and sixty feet (360') more or less, and from that point continuing for the width of twenty-five feet (25') to Susquehanna street.

3. Public Service Coordinated Transport is the lessee of all the rights, properties and franchises of the New Jersey and Hudson River Railway and Ferry Company, including the aforesaid line of electric street railway running from Hackensack to Newark and known as "Hackensack-Newark Line." Under the terms of said lease Public Service Coordinated Transport is obligated to pay all taxes and assessments levied against the said New Jersey and Hudson River Railway and Ferry Company and its property.

4. That under date of November 22, 1928, the Hackensack Improvement Commission, the governing body of the City of Hackensack, entered into an agreement in writing with New

*Stipulation—Affidavit of Harry K. Ford.*

Jersey and Hudson River Railway and Ferry Company and Public Service Coordinated Transport providing for the temporary suspension of street railway operation over the said street railway line known as the "Hackensack-Newark Line," extending from Mercer street, in the City of Hackensack, to a point in the Borough of Hasbrouck Heights, and the substitution of auto bus operation in place of such electric street railway operation during the period of such suspension, a true copy of which agreement is hereto attached and marked "Schedule A," and made a part hereof, and to which for more certainty reference is hereby made. 10

5. That on or about the 26th day of November, 1928, Public Service Coordinated Transport made application to the Board of Public Utility Commissioners of this State for the approval of the suspension of street railway service upon the aforesaid line between Mercer street, in said City of Hackensack and the point in the Borough of East Rutherford, in accordance with agreements with the City of Hackensack and the several other municipalities affected and through which the said line runs. That the Board of Public Utility Commissioners by its decision bearing date March 19, 1929, approved of the suspension of street railway service and the substitution of auto bus service in place thereof in accordance with the terms and conditions of the said contracts, all of which were substantially similar to the contract with the City of Hackensack, a true copy of which is hereto attached and marked "Schedule A." A true copy of the said decision of the Board of Public Utility Commissioners is hereto attached and marked 20 30

*Stipulation—Affidavit of Harry K. Ford.*

“Schedule B,” and to which for more certainty reference is hereby made.

10 6. During the year 1929, the City of Hackensack completed certain improvements, consisting of the paving and grading, construction of a drain, curbs, sewers and installation of water and gas connections in Hillside Place, Marlatt street, Susquehanna street and Second street in said City of Hackensack, and on December 2, 1929, confirmed an assessment for benefits by reason of such improvement. That the said assessment purports to make an assessment against the right of way of Public Service Railway Company, being the right of way hereinbefore referred to of New Jersey and Hudson River Railway and Ferry Company, owner, Public Service Coordinated Transport, lessee, lying  
20 between First street, in the City of Hackensack, and Susquehanna street in said City, or some part thereof. Said assessments as made are as follows:

	Public Service Railway Co. Block 238	
	D, Right of Way, N-S of Susquehanna	
	St. ....	\$ 878.63
	Public Service Railway Co. Block 234	
30	B, Right of Way, E-S of Second Street	1470.08
	Public Service Railway Co. Block 234	
	B, Right of Way, W-S of Second St.	1470.08

That attached hereto and made a part hereof are maps showing the location of the aforesaid right of way between First street and Susquehanna street and in part the location of Susquehanna street.

40 7. That all notices of ordinances for local improvements, of hearings of Commissioners of

*Stipulation—Affidavit of Harry K. Ford.*

Assessment and of hearings of governing bodies for the confirmation of assessments, as well as bills for assessments, come to my office and are brought to my attention. I had no notice or knowledge of the proposed improvements as aforesaid or of the hearings before the Commissioners of Assessment with respect to the aforesaid assessment, or of the hearing before the Hackensack Improvement Commission, the governing body of the City of Hackensack, with respect to the confirmation thereof. The first notice which I received was the receipt of the bills for the assessments, which were received upon January 3, 1930. To the best of my knowledge, information and belief, as the result of inquiries made by me of various employees of the company, I state that no notice, either of the pendency or passage of the aforesaid ordinance, or of the hearings before the Commissioners of Assessment or of the hearing before the governing body for the confirmation of the assessment, were received either by the New Jersey and Hudson River Railway and Ferry Company or Public Service Coordinated Transport.

8. I am informed and believe it to be true that the aforesaid assessments against the right of way of the New Jersey and Hudson River Railway and Ferry Company were based upon a supposed increase in value of the land comprising the right of way, without regard to the use to which the said lands were dedicated, and are upon the same basis as other assessments made for the same improvement against other lands adjacent to and in the vicinity of the said right of way, and the said assessments were made without regard to the fact that the lands in

*Stipulation—Schedule A.*

question constitute a right of way for electric street railway and are dedicated to such public use. The said improvements for which the said assessments purport to have been made do not in any way benefit or increase the value of the lands constituting the aforesaid right of way, and said City of Hackensack had no power or right to make such assessments.

HARRY K. FORD.

Subscribed and sworn to before me this 7th day of February, A. D. 1930.

(SEAL) CLARA E. HURLBURT,  
Notary Public of N. J.

My Commission Expires April 11, 1932.

“SCHEDULE A.”

AGREEMENT made and entered into this twenty-second day of November, in the year of our Lord, One thousand nine hundred and twenty-eight, by and between the HACKENSACK IMPROVEMENT COMMISSION, for itself and as the governing body of the City of Hackensack, in the County of Bergen (hereinafter called “COMMISSION”) party of the first part, and NEW JERSEY AND HUDSON RIVER RAILWAY AND FERRY COMPANY, a corporation of the State of New Jersey, and PUBLIC SERVICE COORDINATED TRANSPORT, a corporation of the State of New Jersey (hereinafter called “TRANSPORT”) party of the second part:

WHEREAS, COMMISSION and the Borough Councils of the Boroughs of Hasbrouck Heights,

*Stipulation—Schedule A.*

Wood-Ridge, Carlstadt and East Rutherford have requested TRANSPORT to suspend the operation of that portion of its street railway known as "HACKENSACK-NEWARK LINE," extending from Mercer street in the City of Hackensack through the aforesaid municipalities, and to substitute for the electric street cars operated over such portion of such route, the operation of auto buses over the route or routes hereinafter more particularly set forth, or such other route or routes in lieu thereof as may hereafter be determined upon and approved in the aforesaid municipalities; and

WHEREAS, TRANSPORT is willing to suspend the aforesaid railway service upon that portion of its said line lying to the north of the car house located on the east side of Hackensack street adjacent to the Erie Railroad in the Borough of East Rutherford, upon condition that each of the said municipalities will approve the same and consent to the operation of auto buses in substitution for such railway service, over the said routes as aforesaid, and will agree that the said railway service may be resumed and that in case the track and/or overhead structures or any part thereof necessary for such railway service shall have been removed, that TRANSPORT may re-construct and restore the same in accordance with the terms and provisions herein contained,

NOW, THEREFORE, THIS INDENTURE WITNESSETH, that for and in consideration of the premises and the covenants and agreements herein contained, the parties hereto have bargained and agreed and by these presents do bargain and agree as follows:

*Stipulation—Schedule A.*

1. COMMISSION hereby approves of and requests the suspension of railway service upon the portion of the "HACKENSACK-NEWARK LINE" in the City of Hackensack and hereby grants consent to TRANSPORT to operate auto buses in substitution for such street railway service over

10 the following described routes or such other route or routes in lieu thereof as hereafter may be approved and determined, to wit: until such time as the Boulevard in the Borough of Hasbrouck Heights shall be extended northerly and in conjunction with either Summit Avenue or Prospect Avenue, intersect Essex Street, over the following route, *i. e.*, on Polify Road from the southern boundary line of the City of Hack-

20 ensack northerly to Essex Street, thence westerly on Essex Street to Summit Avenue, thence northerly on Summit Avenue to Central Avenue, thence easterly on Central Avenue to State Street, thence southerly on State Street to Essex Street, thence easterly on Essex Street to Main Street, thence northerly on Main Street to Court Street, thence easterly on Court Street to the extension of Moore Street, sometimes known as Church Street, thence northerly on said extension of Moore Street and Moore Street to Mer-

30 cer Street, thence westerly on Mercer Street to State Street, thence northerly on State Street to Central Avenue, thence westerly on Central Avenue to Summit Avenue, thence southerly on Summit Avenue to Essex Street, thence easterly on Essex Street to Polify Road and thence southerly on Polify Road to the City line.

Upon the opening of an extension of the Boulevard from Hasbrouck Heights to connect with Essex Street at Prospect Avenue or Summit Avenue, the route from the southerly City line

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*Stipulation—Schedule A.*

to Essex and Summit Avenue in both directions shall be as follows, to wit: along the said extension of said Boulevard and Summit Avenue or Prospect Avenue (which ever may be used as the extension of said Boulevard in the City of Hackensack) to the intersection of Essex Street and Summit Avenue, in other respects the same as the route above described unless some other route shall hereafter be determined or approved in lieu thereof and then along any such route. 10

2. TRANSPORT shall furnish such number of auto buses operating upon the aforesaid route as may be necessary from time to time to furnish the public safe, adequate and proper service, and during the period of such suspension of railway service will, if requested by COMMISSION, remove its track and/or overhead structures in conjunction with any proposed improvement of the streets whereon the same are located, at such time and in such manner as not to delay any such improvement, provided that no part of the cost of improving or paving such street shall be borne by or charged to TRANSPORT; if TRANSPORT shall so desire it may at any time during such suspension of railway service, without notice from COMMISSION, remove such track and/or overhead structures, provided in such case TRANSPORT shall properly restore the surface of any street disturbed by such removal; provided however, that in case at any time hereafter resumption of railway service over such portion of said line shall be deemed advisable by TRANSPORT, it may re-construct and restore the said track and/or overhead structures in such a manner as to properly resume railway service, and in the event of such re-construction 20  
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*Stipulation—Schedule A.*

and restoration TRANSPORT will properly restore the surface of any street disturbed thereby and will save COMMISSION harmless from any cost, expense or damage which may be occasioned by such re-construction and restoration.

10 3. It is expressly understood and agreed by and between the parties hereto that the suspension of railway service herein provided for and the removal of any track and/or overhead structures, is temporary and is not to be construed or deemed to be an abandonment or surrender by TRANSPORT of its rights, franchises or privileges to construct, re-construct, maintain or operate its track and other structures and to operate street cars thereon, and it is also understood and agreed that in case of the resumption  
20 of railway service by TRANSPORT as herein provided, the consent hereby given to the operation of auto buses in substitution of railway service shall, at the option of COMMISSION, thereupon cease and terminate.

30 4. It is understood and agreed that this agreement shall not become operative or in force until the Boroughs of Hasbrouck Heights, Wood-Ridge, Carlstadt and East Rutherford shall each have entered into a contract with TRANSPORT consenting to and approving the suspension of railway service with the right to resume the same substantially as herein provided and the substitution of auto bus service for such railway service and until the Board of Public Utility Commissioners shall have approved such suspension and substitution.

40 IN WITNESS WHEREOF, COMMISSION has caused its corporate seal to be hereunto affixed and these presents to be signed by its Mayor and

*Stipulation—Schedule A.*

attested by its Clerk and NEW JERSEY AND HUDSON RIVER RAILWAY AND FERRY COMPANY and PUBLIC SERVICE COORDINATED TRANSPORT have each caused their respective corporate seals to be hereunto affixed and these presents to be signed by their respective Vice-Presidents and attested by their respective Secretaries all as of the day and year first above written. 10

HACKENSACK IMPROVEMENT  
COMMISSION

By N. DEMAREST CAMPBELL

(SEAL)

Mayor

ATTEST:

WM. SCHAAF

Clerk

20

NEW JERSEY AND HUDSON RIVER  
RAILWAY AND FERRY COMPANY

By EDMUND W. WAKELEE

(SEAL)

Vice-President.

ATTEST:

CHARLES M. BREDER

Secretary.

PUBLIC SERVICE COORDINATED  
TRANSPORT

30

By EDMUND W. WAKELEE

(SEAL)

Vice-President.

ATTEST:

CHARLES M. BREDER

Secretary.

40

*Stipulation—Schedule B.*

## "SCHEDULE B."

STATE OF NEW JERSEY  
 BOARD OF  
 PUBLIC UTILITY COMMISSIONERS

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In the Matter of the Application  
 of the Public Service Coordin-  
 ated Transport for approval  
 of the suspension of street  
 railway service and the sub-  
 stitution of auto bus service  
 therefor between East Ruth-  
 erford and Hackensack, N. J.,  
 and for approval of a change  
 in the existing Hackensack-  
 Rutherford bus route.

20

*Decision.*

C. S. Straw for the Public Service  
 Coordinated Transport.

30

This is an application by the Public Service  
 Coordinated Transport for approval of the sus-  
 pension of street railway service on the Hacken-  
 sack-Newark Line and the substitution of auto  
 bus service therefor, in accordance with Chapter  
 52 of the Laws of 1928, between East Rutherford  
 and Hackensack, N. J., and for approval of a  
 change in the existing Hackensack-Rutherford  
 Bus Route.

40

The company first desires to establish what  
 is known as the Grand View Bus Route between  
 Hackensack and Rutherford over the following  
 route: starting at the Erie Railroad Station, East  
 Rutherford, thence along Park Avenue to Pater-  
 son Avenue, to Washington Place, to Hoboken

*Stipulation—Schedule B.*

Road, to Monroe Street, to Fourth Street, to Grand View Boulevard, to Williams Avenue, to Terrace Avenue, to Essex Street, to Summit Avenue, to Central Avenue, to State Street, to Essex Street, to Main Street, to Court Street, to Moore Street, to Mercer Street; returning by way of Mercer Street, to State Street, to Central Avenue, thence over the same route. 10

The operation of this route affects the Boroughs of East Rutherford, Carlstadt, Woodridge, Hasbrouck Heights and Hackensack, which municipalities have consented to the substitution of buses for street railway service.

A portion of the railway service which is to be suspended is on Hackensack Street, in the Borough of Carlstadt and Borough of East Rutherford, which is a County road. Submitted with the application is a copy of an agreement with the Board of Freeholders of Bergen County covering such suspension. 20

The private right-of-way of the street railway line is to be made a public highway, and upon the completion of the highway the Grand View Bus Route is to follow this street, but temporarily, the operation of the buses will be on Williams Avenue, to Terrace Avenue, and then follow practically the old street railway line to Hackensack. 30

The Hackensack-Rutherford Bus Route will operate from the Rutherford Station along Erie Avenue to Hackensack Street, through East Rutherford, Carlstadt, Woodridge, Hasbrouck Heights, and along Terrace Avenue to Essex Street, Essex Street to Main Street, to Court Street, to Moore Street, to Mercer Street, returning by way of Mercer Street to State Street, 40

*Stipulation—Schedule B.*

to Essex Street, thence over the regular route to Rutherford.

The rates of fare on the two bus lines are as follows:

10 From the southerly limits of East Rutherford, to Highland Avenue, (Ryerson Avenue), with a short overlap, which was permitted under the street railway operation within Woodridge back to Union Avenue .....5c

From Highland Avenue (Ryerson Avenue) to Williams Avenue, with a short overlap, which was permitted under the street railway operation within Woodridge back to Union Avenue.....5c

20 From Williams Avenue to Hackensack...5c

This makes a 15c fare on each bus route, the same as the old street railway fares.

In connection with the substitution, the Public Service Coordinated Transport desires to have the approval of the agreements made with the Borough of East Rutherford, City of Hackensack, Carlstadt, Woodridge and Hasbrouck Heights and the Board of Freeholders of Bergen County covering such suspension.

30 The Public Service Coordinated Transport, among other things, agrees as follows:

“2. TRANSPORT shall furnish such number of auto buses operating upon the aforesaid route as may be necessary from time to time to furnish the public safe, adequate and proper service, and during the period of such suspension of railway service, will if requested by BOROUGH” or COMMISSION” remove its track and/or overhead structures in conjunction with any proposed improvement of the streets whereon the same are

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*Stipulation—Schedule B.*

located, at such time and in such manner as not to delay any such improvement, provided that no part of the cost of improving or paving such street shall be borne by or charged to TRANSPORT; if TRANSPORT shall so desire it may at any time during such suspension of railway service, without notice from BOROUGH, remove such track and/or overhead structures, provided in such case TRANSPORT shall properly restore the surface of any street disturbed by such removal; provided however, that in case at any time hereafter resumption of railway service over such portion of said line shall be deemed advisable by TRANSPORT, it may re-construct and restore the said track and/or overhead structures in such a manner as to properly resume railway service, and in the event of such re-construction and restoration TRANSPORT will properly restore the surface of any street disturbed thereby and will save BOROUGH" or COMMISSION" harmless from any cost, expense or damage which may be occasioned by such reconstruction and restoration.

"3. It is expressly understood and agreed by and between the parties hereto that the suspension of railway service herein provided for and the removal of any track and/or overhead structures, is temporary and is not to be construed or deemed to be an abandonment or surrender by TRANSPORT of its rights, franchises or privileges to construct, re-construct, maintain or operate its track and other structures and to operate street cars thereon, and it is also understood and agreed that in case of the resumption of railway service by TRANSPORT as herein provided, the consent hereby given to the operation of auto buses in substitution of railway service shall, at the option of BOROUGH" or COMMISSION" thereupon cease and terminate."

*Stipulation—Schedule B.*

The Board approves of the terms of this agreement.

10 The Board finds and determines also that the proposed suspension of street railway service and the substitution of buses therefor between East Rutherford and Hackensack is necessary and proper for the public convenience and will properly conserve the public interest and approves of same upon the following conditions:

1. That said approval shall be subject to such rules, regulations or conditions now in force and as the Board may hereafter impose.

2. That said approval shall be revocable for violation of the Board's rules, regulations or conditions or for other good cause.

20 3. That all State laws and municipal regulations must be fully complied with before these consents become effective.

4. That the rates of fare charged by the petitioner shall not be changed without the approval of this Board.

Dated, March 19, 1929.

BOARD OF PUBLIC UTILITY  
COMMISSIONERS,

30 (SEAL) By (Signed) Jos. F. AUTENREITH,  
President

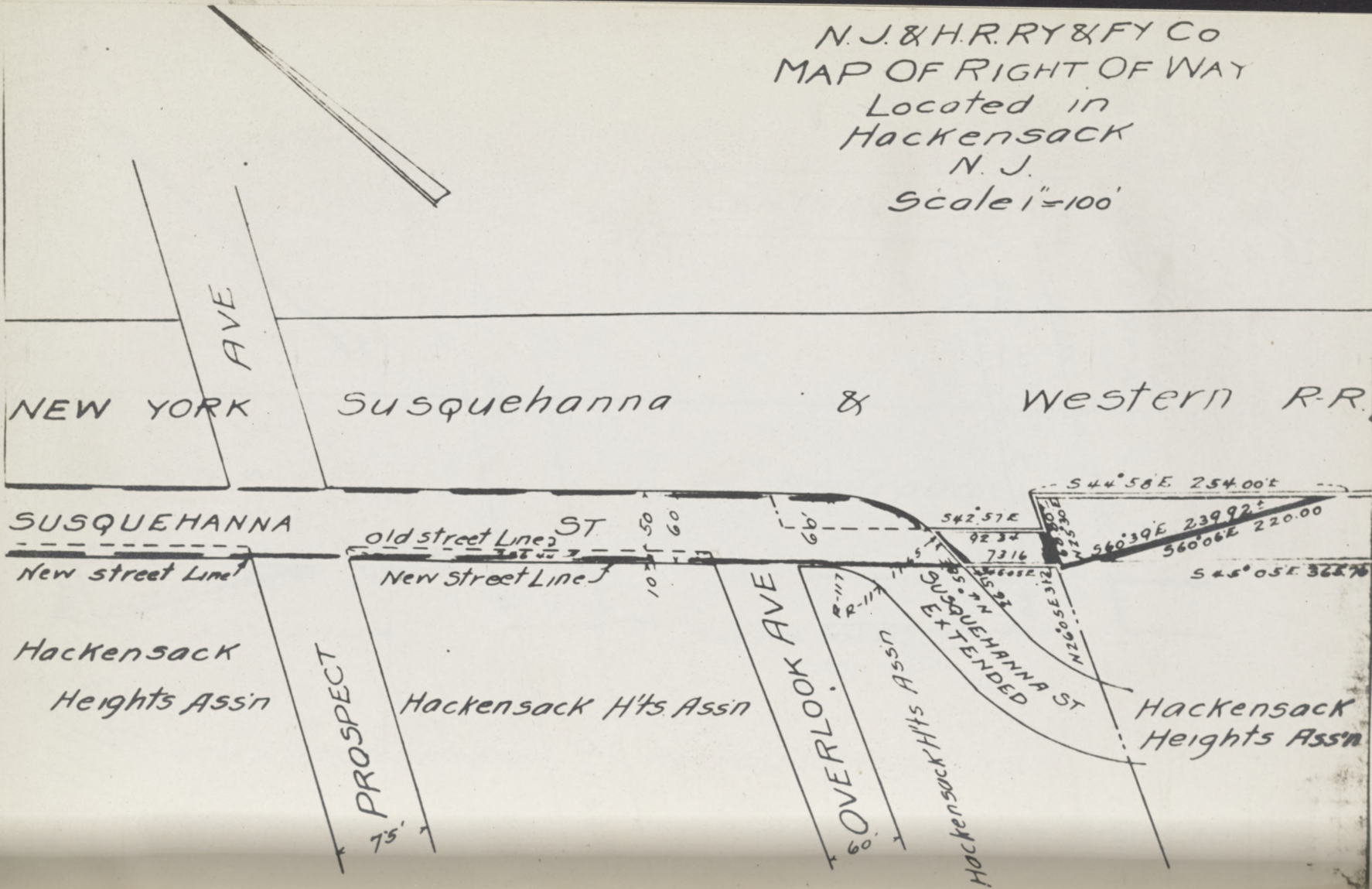
ATTEST:

(Signed) ALFRED N. BARBER,  
Secretary.

(SEAL) I HEREBY CERTIFY the foregoing to be a true copy of a Decision adopted by the Board of Public Utility Commissioners and ordered filed by said Board.

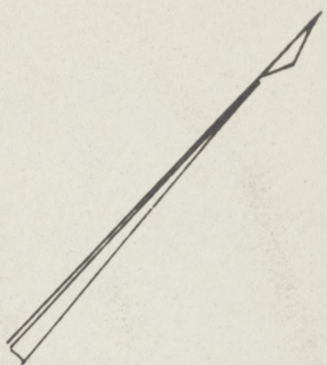
40 (Signed) ALFRED N. BARBER  
Secretary.

N. J. & H. R. RY & FV Co  
 MAP OF RIGHT OF WAY  
 Located in  
 Hackensack  
 N. J.  
 Scale 1"=100'



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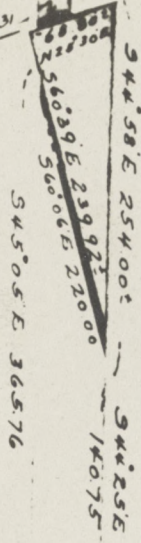
FIRS



N Y S & W.

Hackensack Heights Ass'n

Hackensack Heights Ass'n



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SECOND

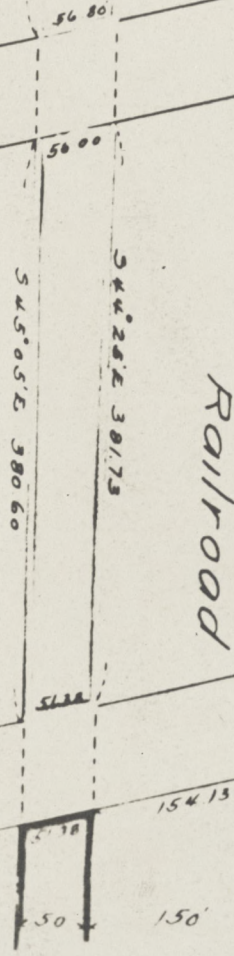
Railroad

CENTRAL

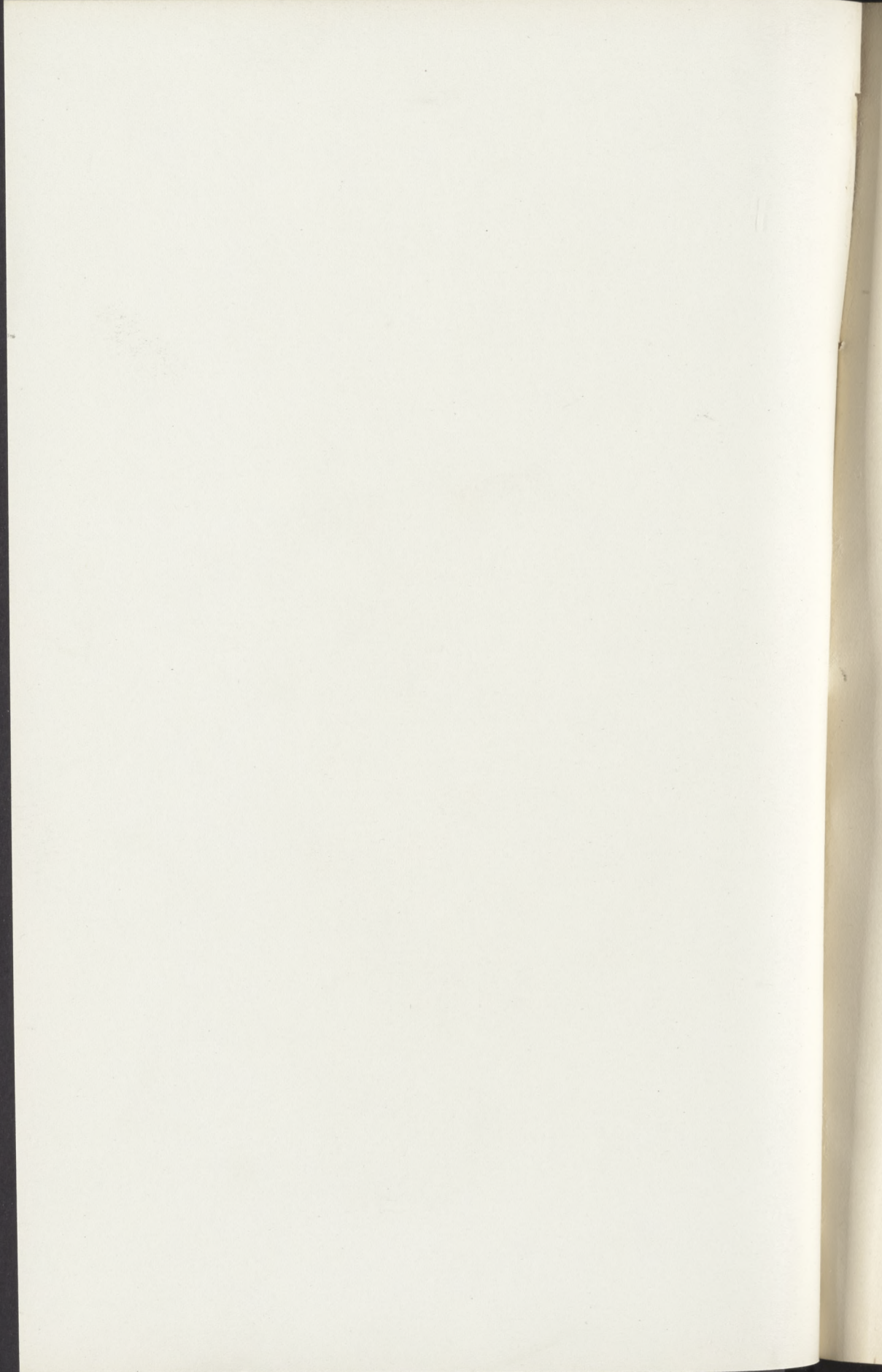
AVE

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FIRST



N.J. & H. R. RY & F. Y. CO.  
 MAP OF RIGHT OF WAY  
 Located in  
 Hackensack  
 N. J.  
 Scale 1" = 100'





**REASONS FOR REVERSAL.**

The prosecutors write down the following reasons for reversal of the assessments brought up by the writ of certiorari herein:

10 1. The assessments in question are against lands constituting an electric street railway right of way and which are devoted to the public use.

2. The improvements for which the assessments were made upon prosecutors' lands do not in any way benefit said lands.

20 3. The assessments in question were made upon prosecutors' said lands without regard to the use to which said lands were devoted and without regard to the fact that the lands in question constitute a part of a right of way of an electric street railway.

4. It does not appear that the improvements for which the assessments were made are a benefit to the railway use to which said assessed lands of prosecutors are devoted.

30 5. The prosecutors received no notice of the pendency of the ordinance providing for the improvement for which the assessments were made, or of the intention to make the assessments, or of any meetings of the Commissioners of Assessment, or of the hearing before the Hackensack Improvement Commission for the consideration and the report of the Commissioners of Assessment.

Dated February 28th, 1930.

FRANK BERGEN,  
Attorney for Prosecutors.

OPINION OF SUPREME COURT.

NEW JERSEY SUPREME COURT.

No. 208, May Term, 1930.

NEW JERSEY AND HUDSON RIVER RAILWAY AND FERRY COMPANY, <i>et al.</i> ,  <i>Prosecutors,</i>  <i>vs.</i>  THE HACKENSACK IMPROVEMENT COMMISSION,  <i>Defendant.</i>	}	<i>On          Certiorari.</i>	10
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Argued May 6, 1930. Decided May 16, 1930. 20

For prosecutors, Frank Bergen and William H. Speer.

For defendant, Walter G. Winne.

Before Justices Parker, Campbell and Bodine.

PER CURIAM:

The prosecutors seek to set aside three assessments for benefits by reason of the grading, paving and curbing of Susquehanna and Second streets, Hackensack, and the construction therein of drains, sewers and sidewalks. The lands against which the assessments were levied were owned by the New Jersey and Hudson River Railway and Ferry Company and were leased to the Public Service Coordinated Transport. The sufficiency of the ordinance and the regularity of the proceedings for assessment are not questioned. It is urged against the assessments, however, that the lands in question were devoted

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*Opinion of Supreme Court.*

to public use being the right of way for a street railway, and hence an assessment can be levied only to the extent of actual benefits conferred. *New York Bay R. R. Co. v. Newark*, 82 N. J. L. 591.

10 The assessments were based upon a supposed increase in value without regard to the use to which the lands were dedicated and are upon the same basis as other assessments made for the same improvements against other adjacent lands, and were made without regard to the fact that the lands in question were part of the right of way for a street railway. The land in question is a strip 50 feet wide for the most part and 25 feet wide for a small part. Years ago it was part of the right of way of the trolley line running between Hackensack and Newark. In 1928, 20 municipal authorities entered into a contract for a temporary suspension of the street railway operation and the substitution of auto buses therefor. The tracks, poles and overhead wires have been removed. The agreement states that the suspension thereunder shall not operate as an abandonment or surrender of existing franchises. The operation of the street railway has ceased. At the same time its franchise still 30 exists and the service could be restored.

It is apparent that although the lands in question might be used as a right of way for a street railway that there is an entire suspension of such use.

Mr. Justice Parker said in *Lehigh Valley R. R. v. Jersey City*, 81 N. J. L. 290, 299: "But the railroad owns, besides the right of way, over sixty city lots, some adjoining the right of way strip, some disconnected from it. It does not appear whether these lands are used in whole or 40 part for railroad purposes. If not so used, they

*Opinion of Supreme Court.*

are assessable like any other lands; if so used, and if benefited for such purposes by the sewer, they are assessable, not to the extent of enhancement of market value, but to the extent of benefit for railroad purposes."

"As a general rule property owned by a [not] 10  
 railroad but now used for railroad purposes is subject to special assessment for local improvements in the same manner and to the same extent as property owned by an individual." 44 Corpus Juris, 535; Lehigh Valley R. Co. v. Jersey City, 81 N. J. L. 290; Morris, etc. R. Co. v. Jersey City, 64 N. J. L. 148, aff. 65 *Id.* 683.

"So it has been held that land of a railroad company not necessary to the exercise of its franchise, nor within projected plans contemplating its use for such purposes, is properly assessed for local improvements, although in the exigencies of its legitimate business the company may at some future time need the property for railroad purposes." 44 Corpus Juris, 535; Morris v. Jersey City, 64 N. J. L. 148, aff. 65 *Id.* 683. 20

It is to be noted that there is no operation over the right of way in question or any part thereof. There is an entire suspension of public use. The lands in question might in the future be used for railway purposes, but they might also be sold or devoted to some other use. Hence, the assessment was proper. 30

Further, the assessment in question was affirmed December 2, 1929, and the present writ was not granted until February 8, 1930. Probably under P. L. 1907, p. 109 and P. L. 1921, p. 515, the application came too late. United Owners R. R. Co. v. Lodi, 99 N. J. L. 529. 40

The writ will be dismissed.

**RULE DISMISSING WRIT OF CERTIORARI.**

**NEW JERSEY SUPREME COURT.**

10	NEW JERSEY AND HUDSON RIVER RAILWAY AND FERRY COMPANY, <i>et al.,</i>	}	<i>On          Certiorari.</i>
	<i>Prosecutors,</i>		<i>Rule Dis-</i>
	<i>vs.</i>		<i>missing</i>
	THE HACKENSACK IMPROVEMENT COMMISSION,	}	<i>Writ of          Certiorari</i>
	<i>Defendant.</i>		

20 The Court having inspected the transcript and proceedings returned with the writ of certiorari in this cause and the reasons, and having heard the argument of counsel thereon and having duly considered the same,

It is on this 2nd day of July, 1930, ORDERED, that the writ of certiorari heretofore granted be dismissed without costs.

On motion of

WINNE & BANTA,  
 Attorneys for Defendant.

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Entered July 3, 1930.

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**NOTICE OF APPEAL AND GROUNDS.**

**NEW JERSEY SUPREME COURT.**

<p>NEW JERSEY AND HUDSON RIVER RAILWAY AND FERRY COMPANY, <i>et al.</i>, <i>Prosecutors-Appellants</i>,</p> <p style="text-align: center;"><i>vs.</i></p> <p>THE HACKENSACK IMPROVEMENT COMMISSION, <i>Defendant-Respondent.</i></p>	}	<p><i>On</i> 10 <i>Certiorari.</i></p> <p><i>Notice of</i> <i>Appeal and</i> <i>Grounds.</i></p>
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To Walter G. Winne, Esq., attorney of defendant, The Hackensack Improvement Commission. 20

SIR:

PLEASE TAKE NOTICE that the prosecutor-appellants in the above-entitled cause appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds:

Because the Supreme Court erred in giving judgment for the defendant-respondent instead of for the prosecutors-appellants. 30

FRANK BERGEN,  
Attorney of Prosecutors-Appellants.

Service of a copy of the within notice is hereby acknowledged this 7th day of July, A. D. 1930.

WINNE & BANTA,  
Attorneys of Defendant-Respondent.

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## New Jersey Court of Errors and Appeals

NEW JERSEY AND HUDSON RIVER  
RAILWAY AND FERRY COMPANY,  
*et al.*,

*Appellant,*

*v.*

THE HACKENSACK IMPROVEMENT  
COMMISSION,

*Respondent.*

On Appeal.

### BRIEF OF RESPONDENT.

The appellant obtained a writ of certiorari from the Supreme Court which sought to set aside three assessments for benefits by reason of the grading, paving and curbing of Susquehanna and Second Streets, Hackensack, and the construction therein of drains, sewers and sidewalks. The lands against which the assessments were levied were owned by the New Jersey and Hudson River Railway and Ferry Company and were leased to the Public Service Coordinated Transport. The assessments were questioned on the theory that the lands were devoted to public use, being the right of way for a street railway. The Supreme Court dismissed the writ of certiorari and from that judgment the appellants have appealed. There is only one ground for reversal which is that the lands assessed are so devoted to public use as a right of way for a street railway that they cannot be benefited by the improvements under the law of this State.

As stated in the opinion of the Supreme Court:

“The assessments were based upon a supposed increase in value without regard to the use to which the lands were dedicated and are upon the same basis as other assessments made for the same improvements against other adjacent lands, and were made without regard to the fact that the lands in question were part of the right of way for a street railway. The land in question is a strip 50 feet wide for the most part and 25 feet wide for a small part. Years ago it was part of the right of way of the trolley line running between Hackensack and Newark. In 1928, municipal authorities entered into a contract for a temporary suspension of the street railway operation and the substitution of auto buses therefor. The tracks, poles and overhead wires have been removed. The agreement states that the suspension thereunder shall not operate as an abandonment or surrender of existing franchises. The operation of the street railway has ceased. At the same time its franchise still exists and the service could be restored.

“It is apparent that although the lands in question might be used as a right of way for a street railway that there is an entire suspension of such use.

“Mr. Justice PARKER said in *Lehigh Valley R. R. v. Jersey City*, 81 N. J. L. 290, 299: ‘But the railroad owns, besides the right of way, over sixty city lots, some adjoining the right of way strip, some disconnected from it. It does not appear whether these lands are used in whole or part for railroad purposes. If not so used, they are assessable like any other lands; if so used, and if benefited for such purposes by the sewer, they are assessable, not to the extent of enhancement of market value, but to the extent of benefit for railroad purposes.’

“‘As a general rule property owned by a railroad but now used for railroad purposes

is subject to special assessment for local improvements in the same manner and to the same extent as property owned by an individual.' 44 *Corpus Juris*, 535; *Lehigh Valley R. Co. v. Jersey City*, 81 N. J. L. 290; *Morris etc. R. Co. v. Jersey City*, 64 N. J. L. 148, aff. 65 *Id.* 683.

"So it has been held that land of a railroad company not necessary to the exercise of its franchise, nor within projected plans contemplating its use for such purposes, is properly assessed for local improvements, although in the exigencies of its legitimate business the company may at some future time need the property for railroad purposes.' 44 *Corpus Juris*, 535; *Morris v. Jersey City*, 64 N. J. L. 148, aff. 65 *Id.* 683.

"It is to be noted that there is no operation over the right of way in question or any part thereof. There is an entire suspension of public use. The lands in question might in the future be used for railway purposes, but they might also be sold or devoted to some other use. Hence, the assessment was proper.

"Further, the assessment in question was affirmed December 2, 1929, and the present writ was not granted until February 8, 1930. Probably under P. L. 1907, p. 109 and P. L. 1921, p. 515 the application came too late. *United Owners R. R. Co. v. Lodi*, 99 N. J. L. 529."

The appellant attacks the assessment on the theory that the benefit to land devoted to the public use must be a benefit applicable to such use and relies on the line of cases beginning with *United N. J. R. R. v. Jersey City*, 55 N. J. L. 129. In this case it was decided that where a strip of land was acquired for railroad use over which a railroad was constructed and was in good faith operated, which was not devoted to another purpose, it was used for railroad purposes within the meaning of the "Act for the Taxation of Railroad and Canal

Property," and therefore was not subject to local assessment.

The case of *Erie Railroad v. Paterson*, 72 N. J. L. 83, set aside a curbing and paving assessment so far as the same was levied against land devoted to use for railroad tracks. This case held that even if property of the railroad company be not salable, nevertheless, if the facilities for using it are increased, assessable benefits do exist.

In *Lehigh Valley R. R. v. Dover*, 80 N. J. L. 63, a sidewalk constructed along the Morris Canal was held to be of no benefit to the owners of the canal but obviously built for the accommodation of the public, and therefore that assessment was set aside.

In *New York Bay R. R. v. Newark*, 82 N. J. L. 591, the Court of Errors and Appeals approved of the language of *United N. J. R. R. v. Jersey City*, 55 N. J. L. 129, and held that land devoted to public use has no market value to be enhanced and therefore the right of way of a railroad company could not be assessed except to the extent that it was benefited for the particular public use for which it was acquired.

*Erie R. R. v. Passaic*, 91 N. J. L. 504, affirmed assessments levied in the City of Passaic for resetting curb and laying asphalt where the assessment was based upon improved facilities for railroad purposes.

*Erie R. R. v. Newark*, 93 N. J. L. 90, determined that the cost of street pavement could not be assessed upon property entirely used for railroad purposes.

*Port Reading R. R. v. Woodbridge*, 98 N. J. L. 367, set aside an assessment for sidewalk and gutter improvement along a railroad yard which was used solely for the storage of coal and cars.

It is submitted, on the part of the respondent, that the prosecutor has not proven that its lands are devoted to any public use. They are for the moment not used at all and only time will tell whether they will be used for the benefit of the public or solely for the benefit of prosecutor. The cases set out as supporting the argument in Point I in the brief of prosecutor, are not in point.

It will be noted that the cases in brief of prosecutor in each instance involve corporations organized under the Railroad Act. There is a difference observed by the text books and courts in the assessment of property of railroads and that of street railways. *Page & Jones, Taxation by Assessment*, Volume 1, Section 594 and following, states in general that the right of way of railroads is ordinarily not subject to assessment for local improvements although in some jurisdictions railroad property other than the right of way is liable to assessment for local improvements even if used for railway purposes.

Section 601 and following treats of assessments upon street railways: "Unless a street railway company is protected by a charter which cannot be altered the legislature has undoubted power to provide for assessing its property including its right of way along a street. \* \* \* If the legislature has neither specifically provided for assessing the right of way of a street railway company nor for exempting the property of a street railway company from assessment we have a question presented as to the right of way upon which there is a divergence of judicial authority. In some jurisdictions it is held that a right of a street railway to make use of a public street under its franchise is property within the meaning of the statutes authorizing the assessment of property bene-

fited and that such right of way is therefore subject to assessment."

In other jurisdictions it is held or assumed that the right of a street railway company to make use of public streets is not a property right which is subject to assessment in the absence of a statute specifically enumerating such right as among those subject to assessment. (See *Dean v. Paterson*, 67 N. J. L. 199; *North Jersey Street Railway v. Jersey City*, 68 N. J. L. 140.) The reason given for this holding in some jurisdictions is that the right of a street railway company to occupy a part of a public street with its track is not real estate within the meaning of the statute. In *North Jersey Street Railway Company v. Jersey City* (*supra*), was that the Supreme Court decided, that the tracks of the railway in the streets of Jersey City were not subject to assessment because they were not a lot or parcel of land benefited. Of course, in the case under discussion the assessment is against land owned by prosecutor.

Section 606 of *Page & Jones, Taxation by Assessment*, states: "Land owned by a street railway company other than its right of way may be assessed in the absence of some statute specially exempting it." Citing *Chicago Union Traction Company v. Chicago*, 215 Illinois 410; *Chicago Union Traction Company v. Chicago*, 207 Illinois 544; *Chicago Union Traction Company v. Chicago*, 204 Illinois 363.

*McQuillan on Municipal Corporations*, Volume 5, Section 2050, says: "The rule that to be subject to assessment for improvements property must be benefited thereby, applies to property of railroad companies as well as to that of other owners. Hence, if such property is benefited by a local improvement it may be assessed therefor, unless it has been exempted from assessment by legislative

action." Citing *The State, The Paterson and Hudson River Railroad Company, Prosecutor v. The City of Passaic*, 54 N. J. L. 340. That case sustained a sewer assessment against the prosecutor whose roadbed was the center of Main Avenue in the City of Passaic, on the theory that the roadbed was benefited by the sewer.

The leading cases in this country are collected in *City of Barre v. Barre and Chelsea Railroad Company*, Vermont Supreme Court, February 6, 1924, 37 A. L. R. 207. At page 221 it is said: "The great weight of authority is to the effect that a railroad right of way, whether owned in fee or held by easement, is liable for special assessments for local improvements, if it can be said to be benefited by the improvements." In support of this New Jersey is cited, *State, Paterson and Hudson River Railroad v. Passaic* and *State, New Jersey Midland Railroad v. Jersey City*, 42 New Jersey Law 97, being relied on. This latter case affirmed an assessment for the improvement of Hoboken Avenue, Jersey City, against the roadbed and terminal lands of the prosecutor.

It is submitted that the cases relied on by the prosecutor apply only to land being used for railroad purposes and in the language of the Court of Errors and Appeals in *New York Bay Railroad Company v. Newark*, 82 N. J. L. 591. "The sound reason upon which this rule rests is that land acquired under a legislative sanction that implies its *permanent devotion to a public use* (italics ours) cannot, without a violation of such public use, have a market for any other purpose and hence, as such violation will not be presumed, such land has, in legal contemplation, no market value to be enhanced. Of course if such land is actually put to an alien use the rule in question does not apply. There is nothing, however, to prevent the land

while so devoted to its public use from receiving from a public improvement actual benefit for such public use, and hence to the extent that such land is thus benefited the right of way of a railroad company may be assessed for such an improvement."

It is submitted that "no certiorari \* \* \* shall be allowed \* \* \* to set aside any assessment \* \* \* for any improvement after thirty days have elapsed from the date of confirmation of such assessment." P. L. 1921, page 515. The assessment in question was confirmed on December 2nd, 1929, and the writ was not granted until February 8th, 1930. The Certiorari Act provides, P. L. 1907, page 109: "No certiorari shall be allowed to review any assessment for benefits unless application is made within sixty days after confirmation."

Under the authority of *United Owners Realty Co. v. Lodi*, 99 N. J. L. 529, the certiorari should be dismissed. In that case the Court of Errors adopting the opinion of the Supreme Court said:

"We think the writ of certiorari and the rule to show cause should be dismissed and the assessments confirmed on the ground of laches. Under Pamph. L. 1921, p. 515, par. 56, no certiorari shall be allowed after thirty days shall have elapsed from the date of the confirmation of such assessment. By the Certiorari Act (Pamphl. L. 1907, p. 109; 1 Comp. Stat. p. 407, par. 15), no certiorari shall be allowed to review any assessment for benefits for the construction of sewers, unless application shall be made for a writ within sixty days after such assessment shall have been confirmed by a court of competent jurisdiction. It is argued that these statutory limitations as to time do not apply, citing cases referred to by Mr. Justice DIXON in the case of *United New Jersey Railroad Co. v. Gummere*, 69 N. J. L. 111. That class of cases do not apply to the assessments under review. We fail to see the

force of the prosecutor's argument, that the statute under which the assessments were made is unconstitutional. Promptness to act in this class of cases is not only illustrated, but enjoined by many cases in our reports. The statutes above cited, with many others, contain provisions limiting the time in which review may be obtained. In *Durrell v. Mayor &c., of Woodbury*, 74 *Id.* 206, the report of the commissioners was confirmed January 19th, 1906, and the writ of certiorari was allowed May 23rd, 1906."

It is therefore submitted:

(a) The land of prosecutor is not permanently devoted to a public use and is therefore subject to assessment.

(b) There is no evidence that the land of prosecutor is not actually benefited to some extent even if it be held for a public use and this Court will not weigh the amount of benefits.

(c) The cases relied upon by prosecutor concern assessments against property of railroad corporations and the doctrine of *State, Paterson and Hudson River Railroad Company v. Passaic* is still the law where benefits are assessed as a result of a sewer improvement.

(d) The writ should be dismissed because of the laches of prosecutor.

Respectfully submitted,

WINNE & BANTA,  
*Attorneys for Respondent.*



## New Jersey Court of Errors and Appeals

NEW JERSEY AND HUDSON RIVER RAILWAY AND FERRY COMPANY, <i>et al.</i> ,  <i>Appellants,</i>	}	<i>On Appeal.</i>
<i>vs.</i>		
THE HACKENSACK IMPROVEMENT COMMISSION,  <i>Respondent.</i>	}	

### BRIEF FOR APPELLANTS.

This appeal is from a judgment of the Supreme Court dismissing a writ of certiorari herein which was allowed to review three certain assessments purported to have been made by the City of Hackensack against lands owned by New Jersey and Hudson River Railway and Ferry Company, constituting a part of its railway right of way, which have been leased, together with the rights and franchises of the aforesaid New Jersey and Hudson River Railway and Ferry Company to Public Service Coordinated Transport. The assessments are for supposed benefits by reason of the grading, paving, curbing, construction of drains and sewer, and the building of sidewalks in connection with the improvement of Susquehanna street and Second street.

From the judgment of the Supreme Court dismissing the writ of certiorari, appellants have appealed.

#### Ground for Reversal.

It is claimed as ground for reversal that the Supreme Court erred in giving judgment for

respondent, instead of for the appellants, in that the lands assessed are lands devoted to the public use, to wit, a right of way for a street railway extending from Main and Mercer streets, in the City of Hackensack, to the City of Newark, in the County of Essex, and it does not appear that the improvements in question in any way benefited the said lands so devoted to public use as aforesaid.

### Facts.

By an ordinance (presumably adopted some time prior to the making of the assessments), Case, p. 4, etc., the Hackensack Improvement Commission provided for the improvement of certain streets, including Susquehanna street and Second street, as a local improvement. The sufficiency and regularity of the said ordinance and the passage thereof are not questioned by the Prosecutors, except to the extent that the Prosecutors received no notice of the pendency thereof. (See Stipulation, Case, p. 15, and affidavit of Harry K. Ford, pp. 18 and 19, par. 7.)

Subsequent to the completion of the improvement provided for by the ordinance, the Hackensack Improvement Commission adopted a resolution requesting the Board of Assessment Commissioners to make an assessment on any lands or real estate that may have been benefited or increased in value by the improvement, which resolution set forth the details of the cost of the improvement. (See Case, pp. 6 and 7.)

Thereafter the Board of Assessment Commissioners did make an assessment and report, to be found in Printed Case, pp. 8 to 12, inclusive. In this report they made the assessments in question. (See Case, p. 12.)

Thereafter the Hackensack Improvement Commission adopted a resolution confirming the assessments as made by the Commissioners of Assessment. (See Case, pp. 13 and 14.)

Both the New Jersey and Hudson River Railway and Ferry Company, the owner of the lands in question, and Public Service Coordinated Transport, the lessee thereof, are corporations organized and existing under the Traction Act of this State. (Case, p. 15, par. 1 of Stipulation.)

Attached to the stipulation and following page 30 of the printed case, are maps showing the rights of way of the Prosecutors extending from Susquehanna street easterly to First street. The width of the right of way fronting on Susquehanna street at right angles is twenty-five feet (25'), having an actual frontage on Susquehanna street of twenty-six and fifty-one one hundredths feet (26.51'). This is the plot of land which is assessed as "Block 238-D, Right of Way, North side of Susquehanna Street," for \$878.63. This twenty-five foot (25') width right of way extends from Susquehanna street easterly less than one hundred feet (100'), from which point the right of way is fifty (50') in width at right angles, extending to and across First street and the assessment against the section thereof lying to the East of Second street is \$1,470.08 and the assessment against the section thereof lying to the west of Second Street is a like amount.

The improvement ordinance in question (Case, p. 4, etc.) was passed on June 6, 1927. (See resolution on p. 6 of Printed Case, l. 32.) The assessment in question was confirmed by the City of Hackensack on December 2, 1929. Under date of November 22, 1928, the Hackensack Improvement Commission entered into an agreement

in writing with the Prosecutors providing for the temporary suspension of street railway operation over the street railway line in question and the substitution of auto bus operation in place of the electric street railway operation. (See Sec. 4 of Stipulation, Case, pp. 16 and 17.) Shortly thereafter Prosecutors made application to the Board of Public Utility Commissioners for the approval of suspension of street railway service, as aforesaid, and the substitution of auto bus operation in lieu thereof. Under date of March 19, 1929, the Board of Public Utility Commissioners rendered its decision approving of the suspension of street railway service and the substitution of auto bus service in place thereof in accordance with the terms and conditions of said contract. (Par. 5 of Stipulation, Case, p. 17; also see decision of the Board of Public Utility Commissioners, Case, p. 26, *et seq.*) The agreement between the Prosecutors and the Hackensack Improvement Commission will be found at p. 20, *et seq.* of the Printed Case.

No notice of the pendency of the ordinance or of the hearings of the Commissioners of Assessment or of the Hackensack Improvement Commission with respect to the confirmation thereof were received by the Prosecutors, and the first notice the Prosecutors had of the improvements or the assessments was the receipt of the bills for the assessments which were received upon January 3, 1930. (See par. 7 of Stipulation, pp. 18 and 19.)

It is conceded by the stipulation (par. 8, p. 19, Printed Case) that the assessments were based upon a supposed increase in value of the land comprising the right of way, without regard to the use to which the lands were dedicated, and

were made upon the same basis as other assessments for the same improvement made against other lands adjacent to and in the vicinity of the said right of way, and that the said assessments were made without regard to the fact that the lands in question constituted a right of way for electric street railway and were dedicated to such public use; also that the improvements for which the said assessments were made do not in any way benefit or increase the value of the lands constituting the aforesaid right of way.

The suspension of railway service on the right of way in pursuance of the agreement between the Hackensack Improvement Commission and the Prosecutors, and the decision of the Board of Public Utility Commissioners, is a temporary suspension, reserving the right to Prosecutors to resume railway service and to construct, reconstruct, maintain and operate its track and other structures for that purpose. (See par. 2 of Contract, Case, p. 23, and pars. 3 and 4, p. 24; also decision of Board of Public Utility Commissioners, pp. 28, 29 and 30.)

### **ARGUMENT.**

It is contended by appellants that the judgment of the Supreme Court appealed from is utterly unsustainable. It is admitted, and indeed stated, in the opinion of the Supreme Court that the assessments were based upon a supposed increase in value without regard to the use to which the lands are dedicated, and are upon the same basis as other assessments made for the same improvements against other adjacent lands, and were made without regard to the fact that the lands in question were part of the right of way for a street railway. This statement in the

opinion of the Supreme Court is an accurate statement, based upon the stipulated facts in the case.

In *New York Bay R. R. Co., v. Newark*, 82 N. J. L. 591, Mr. Justice Garrison stated the unanimous opinion of the Court of Errors and Appeals in the following language: "The proper rule with respect to assessments for local improvements is that the right of way of a railroad company being in legal contemplation land used for railroad purposes cannot be assessed upon the basis of the enhancement of its market value, but may be assessed to the extent of actual benefits conferred upon such land for railroad purposes."

In the case *sub judice*, it is a confessed fact that the assessment for the local improvement upon the right of way of the railroad company was laid upon the basis of the enhancement of its market value, and that it was not assessed to the extent of the actual benefits conferred upon such land for railroad purposes. If, therefore, the land assessed was in legal contemplation the right of way of a railroad company and land used for railroad purposes, it is likewise confessed that the assessment was laid upon a wrong and illegal basis and is unsustainable in law.

The question, therefore, which emerges for solution is—Is the right of way of the railway company which was assessed in the proceedings brought here for review land devoted to public use for a right of way?

The Supreme Court determined, as we contend, erroneously, that the assessment was proper, because there was no present operation over the right of way in question or any part thereof; that there is an entire suspension of public use; that

the lands in question might in the future be used for railway purposes, but they might also be sold or devoted to some other public use. It is contended by appellants that this finding is in utter disaccord with the uniform and invariable rulings of our Supreme Court and the Court of Errors and Appeals.

The language used in the opinion of the Supreme Court in the case *sub judice* was taken from 44 C. J. 535, section 2899. A reading of that entire section, which is entitled "Property Not used for Railroad Purposes," will go a long way toward demonstrating that the Supreme Court wrested certain expressions in that section from their context which, if read in connection with their context, would assert a ruling contrary to that adopted by the Supreme Court. I therefore set down the complete section, which reads as follows:

"As a general rule property owned by a railroad but not used for railroad purposes is subject to special assessment for local improvements in the same manner and to the same extent as property owned by an individual, especially where the property is actually devoted to other business purposes in like manner as property is so devoted by private individuals, or where the property has been leased to private individuals who use the same for ordinary business purposes. Where the property is actually devoted to ordinary business purposes, it will be assessable if benefited by local improvements whether its use is restricted by grant to railroad purposes or not. So it has been held that land of a railroad company not necessary to the exercise of its franchise, nor within projected plans contemplating its use for such purposes, is properly assessed for local improvements, although in the exigencies of its legitimate business the company may at some future time need the

property for railroad purposes; and some cases have gone even further and hold that property not a part of the right of way nor used for railroad purposes is subject to assessment, even though it is probable that in the near future it will be required for such purposes. But where an authorized right of way has been acquired by a railroad company over which it has constructed and is operating its road, and such right of way is not devoted to any other use, it is in legal contemplation land used for railroad purposes, although the entire right of way may not, for the time being, be occupied by tracks or other railroad appliances.”

The language of the last sentence in the above quotation is taken from the opinion of Mr. Justice Garrison in the aforequoted case of *New York Bay R. R. Co. v. Newark*, 82 N. J. L. 591. In that case the opinion of the learned Justice contains expressions which completely contradict the finding of the Supreme Court in the case now under consideration. The opinion starts by saying,

“In the case of *United New Jersey Railroad Co. v. Jersey City*, 26 Vroom 129, we held that ‘where an authorized right of way has been acquired, over which a railroad has been constructed and is in good faith operated, which right of way is not devoted to another purpose, it is used for railroad purposes within the meaning of the statute considered, although it may not, for the time being, be wholly occupied by tracks or other railroad appliances.’

“The statute referred to was ‘An act for the taxation of railroad and canal property’ (Pamph. L. 1884, p. 142); and while the matter directly adjudged was that the land in question was not subject to local assessment for taxation the broader point decided was that the right of way of a railroad company, although at the time not wholly occupied by railroad appliances, was

nevertheless and to its entire extent, in legal contemplation, 'land used for railroad purposes.' \* \* \*

"The practical effect therefore of the rule in question is to eliminate enhancement of the market value of the land included in a railroad right of way either as a ground for its assessment for local improvements or as a basis for the estimation of benefits.

"The sound reason upon which this rule rests is that land acquired under a legislative sanction that implies its permanent devotion to a public use cannot, without a violation of such public use, have a market for any other purpose and hence, as such a violation will not be presumed, such land has, in legal contemplation, no market value to be enhanced. Of course if such land is actually put to an alien use the rule in question does not apply."

Further on he says,

"The rule, therefore, with respect to assessments for local improvements is that the right of way of a railroad company, being in legal contemplation land used for railroad purposes, cannot be assessed upon the basis either of the general or special enhancement of its market value, but only for actual benefit to such land for the public uses for which it was acquired."

It will thus be observed that it is entirely settled in our jurisprudence that the right of way of a railroad company is *in legal contemplation* land used for railroad purposes. It will also be noticed that Justice Garrison uses in the opinion the expression that the sound reason upon which this rule rests is that land acquired under a legislative sanction that implies its permanent devotion to a public use cannot, without a violation of such public use, have a market for any other purpose, and hence, as such a violation will not

be presumed, such land has in legal contemplation no market value to be enhanced.

If it be true that land acquired under a legislative sanction, as the land in the case now *sub-judice* was acquired, implies its *permanent devotion* to a public use, it necessarily follows that a mere suspension of service by trolley over such right of way does not absolve the street railway company from the performance of its obligations and duties to the public, nor is it tantamount to an abandonment of the right of way for street railway purposes.

The term *suspension* etymologically considered means a mere delay, interruption, ceasing or stopping for a time. We thus speak of a suspension of judgment or opinion; a suspension of the *habeus corpus* act; a suspension of the rules; etc. That this suspension is in no sense an abandonment is manifest from innumerable considerations. Chapter 52 of the Laws of 1928, which permits a suspension of railway service and the substitution therefore of auto buses, distinctly and expressly provides for the resumption of such service, and if tracks or overhead structures have been removed, for their reconstruction and restoration. The act also provides for a complete coordination where auto buses and street railway lines are operated by a company to the end that such system shall be deemed in all respects and for all purposes a single utility, furnishing a single service, subject to the regulation and control of the Board of Public Utility Commissioners.

It is obvious, therefore, that such street railway line, being under the regulation and control of the Public Utility Board, may be ordered by such Board to resume service upon said line, inas-

much as its suspension was a mere temporary interruption thereof, and may compel the coordinated and unified company to resume the performance of its duties to the public on such line.

Another consideration which shows the distinction between a temporary interruption of service and a complete abandonment thereof is, that practically every street railway in the country is burdened by a mortgage which secures an issue of bonds used in the construction, maintenance, or operation thereof, and that any abandonment by such company of its right of way would in all likelihood entail serious consequences with the bondholders or their trustee.

Another consideration of great importance in the case is that the language of the Courts is uniform to the effect that the acquirement under legislative sanction of a right of way implies its *permanent devotion* to a public use. Unless Mr. Justice Garrison was inaccurate in his use of language in the case hereinbefore specifically quoted, the acquirement by appellant of the right of way now sought to be assessed implied its *permanent* devotion as a right of way; and furthermore, one must never leave out of view the meaning to be attributed to the word *devotion*. A devotion is a definite setting apart and appropriation or consecration of a thing to a given use. The dictionaries also tell us that *devotion* means consecration, dedication. The first meaning of the word given in the *Century Dictionary* is, "The act of devoting; a definite setting apart, appropriating, or consecrating; the devotion of one's means to a certain purpose, *e. g.*, the devotion of one's life to the service of God."

If, then, as Mr. Justice Garrison says, land acquired under a legislative sanction implies its

permanent *devotion* to a public use, and that it cannot, without a violation of such public use, have a market for any other purpose, hence, as such a violation will not be presumed, such land has, in legal contemplation, no market value to be enhanced. Of course, if such land is actually put to an alien use, the rule in question does not apply.

In the case now under consideration, there never has been any putting of the land in question to an alien use, nor is there any suggestion of any purpose to subject the land to any other use than that as a right of way. The Court will not presume, where the State thru its legislature has permitted a suspension of service, with a right on the part of the company to resume the same, and on the part of the State to require such resumption, that the company will sell the land, or so use it as to incapacitate itself from the performance of its duties as a street railway under its charter and its ability to respond to any order that may be made at any time by the Utility Board for resumption of service on said right of way.

\* \* \* \* \*

The conclusive answer to the position of the City of Hackensack is that the Hackensack Improvement Commission, the governing board of that City, is stopped by its own contract, which will be found on pages 15 and following of the State of Case, to deny that the land in question is still the right of way of the appellant, and that all that has occurred is a mere temporary suspension of service thereon.

On page 24 of the State of Case, there appears in said contract, over the seal of the City and

the signatures of its Mayor and Clerk the following:

“3. It is expressly understood and agreed by and between the parties hereto that the suspension of railway service herein provided for and the removal of any track and /or overhead structure, is *temporary* and is not to be construed or deemed to be an abandonment or surrender by Transport of its rights, franchises or privileges to construct, re-construct, maintain or operate its track and other structures and to operate street cars thereon, and it is also understood and agreed that in case of the resumption of railway service by Transport as herein provided, the consent hereby given to the operation of auto buses in substitution of railway service shall, at the option of Commission, thereupon cease and terminate.”

In the light, therefore, of all the above considerations it is perfectly manifest that appellant acquired the right of way in question for a right of way, and thereby permanently dedicated the same to its use as such right of way; that it has not subjected the same to any alien or other use than that as a right of way; that the suspension of service thereon was a mere temporary interruption thereof, with a right on the part of the company to resume and power in the Utility Board to require it to resume, and a duty on the part of the company to comply with the orders of the Utility Board in this respect, and that therefore the company could not incapacitate itself by parting either permanently or temporarily with the right of way or subject it to an alien use without a violation of its duties to the public and perhaps creating friction with its bondholders and their trustee; and that the Hackensack Improvement Commission has contracted and bound itself by its contract to the proposition that the suspension of railway service on said

right of way is merely temporary, and is not to be deemed an abandonment or surrender by the Transport company of its rights, privileges, etc. Under such circumstances, the cases in our State are uniform that the property, in contemplation of law, to use the apt phrase of Mr. Justice Garrison, is still a right of way and non-assessable.

That the position of the Supreme Court is erroneous is further made manifest by a consideration of the New Jersey cases upon the subject.

Bearing in mind always, as it is laid down in *City of Barre v. Barre & Chelsea R. Co.*, 123 Atl. 428, that "the burden is on the taxing power to establish the validity of the tax," and that "assessments are a form of taxation—the only legal basis therefor is the special benefit conferred by the improvements—such benefits as the landowner receives therefrom in excess of the benefits enjoyed by the general public," and finally, that the evidence in this case is conclusive that there are no tenants on the property, no structures of any kind alien to its use as a railway right of way, and that the company is deriving no profit therefrom and subjecting the same to no alien use, as was being done in the cases cited in the Supreme Court opinion, we proceed to a consideration of the cases.

The rule of law which the Company desires to invoke to set aside the assessments in this matter is first clearly stated in the case of *Morris & Essex R. R. Co. v. J. C.*, 36 N. J. L. 56. In this case the Supreme Court laid down the rule that

"Lands acquired for a public use by a corporation under legislative powers, and in good faith held for that purpose, must be

regarded for purposes of taxation as devoted to that public use.”

The Court also held

“In assessing lands so circumstanced for such benefits (local improvement benefits), the enhancement of their present market value is not the proper basis of assessment.”

This question came into the Court of Errors and Appeals in the case of *United N. J. R. R. & Canal Co. v. J. C.*, 55 N. J. L. 129. The Railroad Company owned a tract of land for its right of way in the City of Jersey City 100 feet in width. In the years in question, tracks had been constructed upon the southerly 35 feet of the land and the remaining 65 feet were vacant and unused. The Company had returned the property for assessment by the State Board of Taxes and Assessment under the Railroad Tax Law for the years 1884 to 1887. The City of Jersey City, however, had also assessed locally the 65 foot strip which was unused. Subsequently the City undertook proceedings under the Martin Act to adjust the taxes on this property. These proceedings were brought into Court by a writ of certiorari alleging that the assessments made by the City were invalid. The Supreme Court sustained the assessment. The Court of Appeals reversed the Supreme Court. The opinion above referred to was written by Chancellor McGill and was concurred in by Chief Justice Beasley and Justices Garrison, Magie, Reed, Brown and Smith.

In discussing the facts the Court said:

“From the time of acquiring the right of way until after the levying of the taxes considered, that portion of the right of way which was unoccupied by tracks was held vacant in anticipation of demand for increased trackage and other structures inci-

dent to the operation of the branch road and for use in the process of the construction of the elevated tracks, but for no other purpose. It was not rented or otherwise used for profit.”

The Court referred to the Railroad Tax Act which provides that all property of any railroad company “*used for railroad purposes*” is to be assessed by the State Board of Assessors and not locally and states the proposition to be determined in the following language:

“Whether a portion of the right of way of a railroad company which is not, for the time being, actually covered by tracks, erections or appliances necessarily incident to the operation of a railroad, although acquired and strictly held for that purpose and use in railroad construction, is, within contemplation of the act of 1884, ‘used for railroad purposes’?”

The Court then referred to the fact that the entire right of way of a railroad company is never occupied in full by the tracks and said:

“Are we to say that each of those portions is not used for railroad purposes merely because it is not presently and all the time in actual occupation? Such a construction of the statute appears to us to be too literal and narrow. We think that where an authorized right of way has been acquired, over which a railroad has been constructed and is in good faith operated, which right of way is not devoted to another purpose, it is used for railroad purposes within the meaning of the statute considered, although it may not, for the time being, be wholly occupied by tracks or other railroad appliances. That part of it which awaits railroad occupation upon the demand of necessity is in use, like the curtilage to a dwelling house or the sides of a country highway. \* \* \* It is the land which the legislature in its wisdom has deemed to be reasonably necessary to

answer the ordinary and emergent uses of a railway and insure the continued, convenient and safe accommodation of the public."

The Court then proceeded to state the converse of the proposition to the effect that

"when any part of the lands which lie within such a right of way are used or appropriated to purposes not incident to the proper construction, maintenance and management of the railroad or to the use of it by the corporation as a carrier of goods and passengers, it cannot then be said to be used for railroad purposes."

In the case of *E. R. R. Co. v. Paterson*, 72 N. J. L. 83, the rule is again recognized and discussed and it was held that when land of a railroad company used for railroad purposes is benefited for those purposes, it may be assessed to the extent of such benefit, and in an explanation of this rule the Court said:

"But if the property be not saleable, facilities of using it may, nevertheless, be increased, and when they are by means of municipal improvements, assessable benefits exist."

In the case of *N. Y. Bay R. R. Co. v. Newark*, 82 N. J. L. 591, the Court of Errors and Appeals was again called upon to review a judgment of the Supreme Court sustaining an assessment for local benefits against property of the railroad. The judgment of the Supreme Court was reversed as the result of an opinion written by Justice Garrison and concurred in unanimously.

The opinion in this case reviews the law and explains the opinion in the case of *United N. J. R. R. & Canal Co. v. J. C.*, as follows:

"This decision, which was reached, not upon the circumstances of the particular case, but upon public considerations arising from the given state of facts, lays down

the legal rule to be applied in all cases where such state of facts exists and the matter for determination is the assessment of the right of way of a railroad company; and hence is equally applicable to assessments for local improvements with this practical difference, viz., that the determination that lands are used for railroad purposes which in the case of general taxation removes them altogether from local assessment, in the case of local improvements permits such lands to be assessed to the extent of the actual benefit conferred upon them for their present use, *i. e.*, for railroad purposes.

“The practical effect therefore of the rule in question is to eliminate enhancement of the market value of the land included in a railroad right of way either as a ground for its assessment for local improvements or as a basis for the estimation of benefits.

“The sound reason upon which this rule rests is that land acquired under a legislative sanction that implies its permanent devotion to a public use cannot, without a violation of such public use, have a market for any other purpose and hence, as such a violation will not be presumed, such land has, in legal contemplation, no market value to be enhanced. Of course if such land is actually put to an alien use the rule in question does not apply.”

The Court then proceeded to say,

“The rule, therefore, with respect to assessments for local improvements is that the right of way of a railroad company, being in legal contemplation land used for railroad purposes, cannot be assessed upon the basis either of the general or special enhancement of its market value, but only for actual benefit to such land for the public uses for which it was acquired.”

After discussing earlier cases the Court proceeded to say,

“An examination of the opinion filed in the court below shows that the court based

its judgment upon the conclusion reached by it that the right of way of the prosecutor, because not wholly devoted to present railroad use, was as to such part land not used for railroad purposes, and hence sustained as to such unused part of the right of way an assessment for an improvement that enhanced the market value of such part of the right of way, but was of no benefit to the prosecutor's land for railroad uses."

"This conclusion violates the established rules illustrated by the cases cited, and especially that laid down by this court in *United N. J. R. R. Co. v. J. C.*, 26 Vroom 129 (55 N. J. L. 129). For upon the precise state of facts upon which this court in that case laid down the rule that a right of way, although but partially in use, is in legal contemplation land used for railroad purposes, the court below decided that, as to such unused part, the right of way was land not used for railroad purposes."

In the case of *Philadelphia & Reading R. R. Co. v. Woodbridge*, 91 N. J. L. 180, the Court of Errors speaking by Chief Justice Gummere, sustained a judgment of the Supreme Court setting aside an assessment against certain ties of the railroad company which were being treated in a creosoting plant located in Woodbridge Township operated by the Reading Company in conjunction with the C. R. R. of N. J. The Court said:

"That the ties in question were not in use for railroad purposes on the taxing date is apparent \* \* \*. The primary question, therefore, is what is the scope to be given to the words 'use for railroad purposes' as this phrase appears in section 1 of the Railroad Tax Act? That question, however, is no longer an open one."

Since the decision by this Court in 1892 in the case of *United N. J. R. R. & Canal Co. v. J. C.*,

55 N. J. L. 129, it has been consistently held, whenever a matter has come up for judicial consideration, that property owned by a railroad corporation, which has been acquired and is held for a railroad use to which it is intended to be subjected in the near future, is property used for railroad purposes within the meaning of the Railroad Tax Law, although such use has not actually been begun; and, therefore, is taxable under that act and not under the General Tax Law of the State.

In the case of *Erie R. R. Co. v. Newark*, 2 Misc. Rep. 220, the Supreme Court followed the foregoing rule and set aside assessments for local improvements.

The Supreme Court also in the case of *Delaware River, etc. Co. v. Haddon*, 5 Misc. 210, followed the foregoing rule in setting aside an assessment for local benefits against the railroad for paving and guttering, etc. In this case the municipality contended that the prosecutor was not entitled to the writ of certiorari because it was in laches both under the certiorari act and the municipalities act, in that a period of nearly 8 months had elapsed between the date of the assessment and the date of the allowance of the writ and the Court said:

“This would be so if the ground urged for setting aside the assessment was some irregularity in the proceedings, or for an undue or excessive amount of assessment or mistake in the manner of making them, but these limitations do not apply and laches cannot be successfully urged, where, as here, the lands are not subject to assessment.”

citing *Benedictine Sisters v. Elizabeth*, 50 N. J. L. 347; *Meredith v. Perth Amboy*, 63 N. J. L. 520; *Winants v. J. C.*, 42 N. J. L. 349.

The case of *Morris & Essex R. R. Co. v. J. C.*, 64 N. J. L. 148 (affirmed 65 N. J. L. 683) has been cited as an argument against our position and as an authority showing that the lands in question are subject to assessment for local benefits.

A careful examination of this opinion, as well as the opinion in another case between the same parties (64 N. J. L. 151) shows that these cases in fact sustain our position.

In both of these cases the facts are that the Railroad Company had constructed a tunnel through the Bergen hill through the lands in question; that the surface of the property was in no way used for railroad purposes, and the language of the Court on this is as follows:

“The arch of the tunnel is, in some places ninety feet below the surface of the ground, and in some places less. The lands are not used at all in connection with the tunnel for any purpose, except that there is a shaft from the tunnel for ventilation on parcel No. 4, nor are there any structures on any of these lands except a shanty on lot No. 9 occupied by an employee of the prosecutors, to prevent boys throwing stones in the shaft. Elsewhere there are many buildings on the prosecutors' lands, over its tunnel, in Jersey City—on Waverly street, Palisade avenue, Prospect avenue and Oakland avenue—and there is evidence tending to show that it was practical to erect houses on the property in question, the same as elsewhere over the tunnel.”

The Court then said

“They are not lands essential to the exercise of the corporate franchise of the prosecutors as the railroad is now constructed and operated within the decision of *Morris & Essex R. R. Co. v. Jersey City*, 36 N. J. L.

56, nor are they within projected plans for a change in the tunnel.”

“They are lands lying vacant not at this time necessary for the company’s railroad, but are held as a matter of convenience to the company, which the company in the exigencies which its legitimate business may, at some future time, require for opening its tunnel, the contention which is held to be decisive on the question of the Company’s liability to general taxation. \* \* \* In this respect the case is distinguished from *Morris & Essex R. R. Co. v. J. C.*, *supra*. and *N. J. R. R. & Transp. Co. v. Eliz.*, 73 N. J. L. 330. It is quite clear that these lands are not so irrevocably appropriated to the use of the prosecutors in the operation of their railroad that they might not be applied to other uses or sold.”

In the other case between the same parties, 64 N. J. L. 151, the lands assessed were four City lots which were acquired by the Company with the intention of using them sometime in the future for the purpose of enlarging its yards. The lands have not been so used and no plans to that end have been made. The Court said:

“They are not within the present or proposed lines of the Company’s right of way, nor are they at all necessary for the enjoyment of its franchises. They are simply held as a matter of convenience so that the Company may hereafter utilize them for yard purposes if the exigencies of its business shall make it advisable so to do.”

In the opinion in the case of *N. Y. Bay R. R. Co. v. Newark*, *supra*, the Court after laying down the rules as hereinbefore set forth, refers to the case of *Morris & Essex R. R. Co. v. J. C.*, 64 N. J. L. 148, and says:

“This case \* \* \* involves no derogation from this rule, since in that case the land assessed consisted of City lots *underneath* which the railroad ran through a

tunnel constructed at so great a depth that the lots were left available for ordinary building purposes and has a market value as such.”

The Court in the opinion in the case of *Morris & Essex R. R. Co. v. J. C.*, 64 N. J. L. 148 (hereinbefore discussed) cited as a basis for its determination in that case that under the facts the property was assessable, the case of *Morris & Essex R. R. Co. v. Jersey City*, 36 N. J. L. 56 and the case of *Morris & Essex R. R. Co. v. Haight*, 35 N. J. L. 40, 45. The Court of Errors in the opinion in the New York Bay case, *supra*, says:

“The cases relied upon by the Court below (in affirming the assessment) viz. *Morris & Essex R. R. Co. v. J. C.*, 7 Vroom 56 (36 N. J. L. 56) and *Morris & Essex R. R. Co. v. Haight*, 6 *Id.* 40, were cases not of a railroad right of way but of other property held under the special charter of the same company upon the terms of which the decision was rested. Had it been otherwise, they must be deemed to be overruled by the more recent case of the *United N. J. R. R. Co. v. J. C.* (55 N. J. L. 129).”

In our case, the lands in question are not held for the convenience or profit of the Railway Company but, on the contrary, until such time as the franchises of the Railway Company with respect to this line of railway between Hackensack and Newark are legally surrendered and the Railway Company's obligation with respect thereto terminated, the lands in question are irrevocably appropriated to railway use and cannot be applied to other uses or sold. In the present case it is an undisputed fact that the municipality is estopped from disputing such fact by reason of the agreement entered into by it with the Railway Company for providing for the temporary

suspension of this railway with the right to resume the same as and when the Company might so desire or be required so to do.

Further, the Substitution Act of 1928 is an express authorization by the Legislature for the temporary suspension of railway service and the temporary removal of structures in connection therewith, with the right to restore the same without an abandonment of the franchise rights of the Company. Even if a question might have been raised that in the absence of the 1928 Act the suspension of service and removal of structures with the consent of the Board of Public Utility Commissioners would have been construed as a legal abandonment of the franchises, the Substitution Act of 1928 is inconsistent with any such construction, and completely negatives the same.

There is another case of *N. Y. Bay R. R. Co. v. Newark*, reported in 77 N. J. L. at 270. This is a decision of the Supreme Court setting aside an assessment for local benefits alleged to have accrued from the paving of Hillside avenue. In this case, as in the case of *United N. J. R. R. & Canal Co.*, 55 N. J. L. 129, the northerly part of the right of way was not occupied by tracks and it was therefore contended that it was subject to the assessment.

The Court set aside the assessment and said:

“The land assessed was acquired for railway purposes and is held for such public use under legislative authority. Lands so acquired are regarded for purposes of assessment of benefits as permanently devoted to public use.”

This is not the case which went to the Court of Errors and Appeals which has hereinbefore been discussed, but is cited in the opinion of the

Court of Errors and Appeals as a precedent for that decision.

It has been abundantly established in the above consideration of our cases, that the basis of the rule is that land acquired under a legislative sanction that *implies* its *permanent devotion* to a public use cannot, without a violation of such public use, have a market for any other purpose, and hence its value cannot be enhanced by an improvement.

Several considerations invite attention: Why was the service merely *suspended* and the right to resume reserved? If the land devoted to that use should be *sold*, such sale would amount to an abandonment; it would be a parting with the ability to perform its public duties, which no corporation has a right to abandon without the consent of the State. The right of way *implied* a *permanent devotion* to public use, which could only be contradicted by evidence of an abandonment. The land was not *in fact* utilized in any inconsistent way; it was not devoted to any other purpose. Such service under Chapter 52 of the Laws of 1928 is coordinated with bus service, and the whole is subjected to regulation by the Utility Board, which can control the whole as a unified service and order restoration of street railway service if and whenever public interest demands. Moreover, all bonds secured by mortgage would forbid an abandonment of the right of way. Furthermore, the intention to have a mere suspension and not an abandonment is made crystal-clear by the statute and by the contract with Hackensack.

Concerning the agreement between Hackensack Improvement Commission, of the first part, and the New Jersey and Hudson River Railway and

Ferry Company and Public Service Coordinated Transport, of the second part, dated November 22, 1928, and to be found on page 20 *et fol.* of the State of Case, it can be confidently asserted that this contract is, by itself, dispositive of this case. It expressly *recites* that the Hackensack Improvement Commission has *requested* Transport to suspend the operation of this line and to substitute buses therefor; that Transport is willing to *suspend* the service and substitute auto buses, if Hackensack Improvement Commission will agree that the said railway service may be resumed, and that in case the track and/or overhead structures or any part thereof necessary for such railway service shall have been removed, that Transport may reconstruct and restore the same, etc. It then proceeds to contract to the following effect, "Commission hereby approves of and requests the suspension of railway service upon the portion of the Hackensack-Newark line in the City of Hackensack, and hereby grants consent to Transport to operate auto buses in substitution for such street railway service over the following described routes," etc. Then follows paragraph 2 thereof, to the following effect:

"2. Transport shall furnish such number of auto buses operating upon the aforesaid route as may be necessary from time to time to furnish the public safe, adequate and proper services, and during the period of such suspension of railway service will, if requested by Commission, remove its track and/or overhead structures in conjunction with any proposed improvement of the streets whereon the same are located, at such time and in such manner as not to delay any such improvement, provided that no part of the cost of improvement or paving such street shall be borne by or charged to Transport; if Transport shall so desire it

may at any time during such suspension of railway service, without notice from Commission, remove such track and/or overhead structures, provided in such case Transport shall properly restore the surface of any street disturbed by such removal; provided however, that in case at any time hereafter resumption of railway service over such portion of said line shall be deemed advisable by Transport, it may re-construct and restore the said track and/or overhead structures in such manner as to properly resume railway service, and in the event of such re-construction and restoration Transport will properly restore the surface of any street disturbed thereby and will save Commission harmless from any cost, expense or damage which may be occasioned by such re-construction and restoration."

Then comes paragraph 3, hereinbefore quoted, which completely demonstrates that the suspension is temporary, and is in no sense to be construed or deemed to be an abandonment or surrender.

The opinion of the Supreme Court says, "Further, the assessment in question was affirmed December 2, 1929, and the present writ was not granted until February 8, 1930. Probably under P. L. 1907, p. 109, and P. L. 1921, p. 515, the application came too late. *United Owners R. R. Co. v. Lodi*, 99 N. J. L. 529." This objection has been entirely answered by the consideration mentioned by this Court in *Beattie Mfg. Co. v. Little Falls Township*, 7 N. J. Misc. Reports, p. 163, and the cases there cited.

In the light of all the above considerations,  
it is respectfully contended that the judgment  
of the Supreme Court should be reversed.

Respectfully submitted,

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