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BILL OF COMPLAINT.

(Filed Sept. 13, 1930.)

IN CHANCERY OF NEW JERSEY.

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

Complainants, Henry Schmoele, of the City and County of Philadelphia and State of Pennsylvania, and Charles Schmoele and Ida Schmoele, trustees, also of said City of Philadelphia, State of Pennsylvania, respectfully show:

1. On or about the ninth day of June, one thousand eight hundred and seventy-seven, the Philadelphia and Atlantic City Railway Company, a corporation then existing under and by virtue of the laws of the State of New Jersey, was engaged in the laying out, acquiring and construction of a right of way for steam railroad between the City of Camden, in the County of Camden, said State, and the City of Atlantic City, County of Atlantic, New Jersey. At the time aforesaid, the said Philadelphia and Atlantic City Railway Company obtained from Henry Schmoele and William Ford Schmoele, Charles Schmoele, Sarah Schmoele, William Ford Schmoele, trustee for Sarah Schmoele, Ida Schmoele, Linda Schmoele, Anna Schmoele and Lenna Schmoele, a conveyance to itself, bearing date the ninth day of June, one thousand eight hundred and seventy-seven, for

"a right of way for the purposes of its said railroad in, upon, through and over certain lands belonging to us or any or either of us situate in the Townships of Mullica and Galloway in the County of Atlantic and State of New Jersey, that is to say, in, through, over and upon all lands in Mullica and Galloway Township, Atlantic County, New Jersey, South of the Camden and Atlantic Railroad from the middle of Heidelberg Avenue to the middle of the Pomona and May's Landing Road belonging to us or either of us or in which we or either of us have any estate or interest sixty feet in width from Heidelberg Avenue to New York Avenue and forty feet in width from New York Avenue to the Pomona and Mays Landing Road."

Which said deed of conveyance was duly executed and acknowledged by Henry Schmoele and the other persons above named as grantors and received and recorded in the office of the clerk of Atlantic County, New Jersey, April 5, 1886, and recorded in said office in Deed Book 111 of Deeds, pages 14, &c., a true and correct copy of which deed of conveyance is attached hereto and made a part hereof and marked Exhibit 1.

2. Concurrently with the execution and delivery of the said deed of conveyance by Henry Schmoele and the other grantors above named and as a consideration for the said conveyance to said railway company, said Philadelphia and Atlantic City Railway Company executed an agreement in writing to and with the said Henry Schmoele and the said Wil-

liam F. Schmoele, Charles Schmoele, William Ford Schmoele, trustee for Sarah Schmoele, Ida Schmoele, Linda Schmoele, Anna Schmoele and Lenna Schmoele, dated the 9th day of June, 1877, duly received in the office of the clerk of Atlantic County, October 18, 1877, and recorded in said office in Book No. 1 of Agreements, folio 158, &c., a true and correct copy of which agreement is attached hereto and made a part hereof and marked Exhibit 2.

3. In and by the said agreement in writing, recited in paragraph 2 hereof, and as a consideration for the execution of the conveyance by Henry Schmoele and others above named, as recited in paragraph 1, said Atlantic City Railway Company covenanted and agreed to and with the second parties, as above recited, that it would give to the complainant, Henry Schmoele, or, in the event of his death, to his personal representatives or to such person as he or, in the event of his death, such personal representative, shall designate, annually during the first week in January of each and every year during its occupation of said lands free yearly passes over the line of its railroad for eleven persons to be named by said Henry Schmoele or, in the event of his death, by his personal representative, before said passes are issued, and further that the said corporation, or its successors, would, on the surrender of either or any of the said eleven passes issue a new one or new ones in lieu thereof to such other person as should be named by said Henry Schmoele or in the event of his death by his personal representative, and provided that no pass

surrendered should be renewed more than once in one year.

4. Said deed and agreement, bearing the same date and being executed concurrently, were delivered concurrently and immediately upon their execution and the said railway company was at once put into possession of the premises so conveyed by said grantors. Thereafter and until the year 1930, the said Philadelphia and Atlantic City Railway Company and its successors in title in possession of the said right of way and railroad, complied with the terms and conditions of the said agreement and delivered the eleven passes annually to the complainant, Henry Schmoele, and/or to such person or persons as he annually nominated to receive such passes.

5. Upon and after the execution of the said deed of conveyance by the said Henry Schmoele, *et als.*, to the said Philadelphia and Atlantic City Railway Company, it took possession of the premises so conveyed and proceeded to lay out its right of way over the same and used the same for the purposes of its railroad.

6. Before the execution of said deed of conveyance by Henry Schmoele and others to the Philadelphia and Atlantic City Railway Company and before the execution and delivery of said agreement, the said railway company executed and delivered to William H. Gatzmer and Garret Z. Linderman, as trustees, a mortgage or deed of trust purporting to secure the payment of the sum of $500,000.00, upon

its right of way, rolling stock, etc., and purporting to convey all of said right of way between the City of Camden, in the County of Camden, and the City of Atlantic City, in the County of Atlantic, which said mortgage or deed of trust was recorded on the second day of May, 1877, in Book Y of Mortgages, pages 18, &c. Said mortgage by its terms purported to cover all railroads, rights of way, lands, depots, etc., then held or thereafter to be acquired by the said railway company. Thereafter foreclosure proceedings were had under said mortgage or deed of trust and Peter L. Voorhees, Master, under said proceedings, did by deed dated October 13, 1883, grant and convey to one George R. Kaercher all of the said right of way between the City of Atlantic City and the City of Camden, railroads and property of the said Philadelphia and Atlantic City Railway Company, which deed was thereafter recorded in the office of the clerk of Atlantic County and in the office of the Register of Deeds in and for the County of Camden, the record in the latter office being found in Deed Book 110, page 490, &c.

7. Thereafter, by deed dated May 13, 1884, said George R. Kaercher granted and conveyed all the property mentioned and described in the deed from Peter L. Voorhees, Master, to George R. Kaercher, including said railroad property, right of way, rolling stock, lands and premises, etc., to the Philadelphia and Atlantic City Railroad Company, a new corporation, organized under the laws of New Jersey, which last mentioned deed was recorded in the office of the county clerk of Atlantic County and in the office of the Register of Deeds of the County

of Camden, the latter record being found in Book 113 of Deeds, page 667, &c.

8. Thereafter and in the year 1889, the said Philadelphia and Atlantic City Railroad Company merged and became consolidated with sundry other railroad companies, under the name of "Atlantic City Railroad Company," and thereafter, in the year 1901, said Atlantic City Railroad Company merged and became consolidated with sundry other railroad companies under the title of "Atlantic City Railroad Company." By reason of the said several deeds of conveyance and the said agreements of merger and consolidation, all of the property, franchises, rights of way, stations and other property theretofore owned by the Philadelphia and Atlantic City Railway Company, including the right of way conveyed by Henry Schmoele and others above named to the said Philadelphia and Atlantic City Railway Company by deed of conveyance of June 9, 1877, became vested and are now vested in and the property of the defendant herein, to wit, Atlantic City Railroad Company.

9. The deeds of conveyance mentioned in paragraphs 6, 7 and 8 of this bill of complaint are expressly referred to in this bill and made a part hereof and certified copies thereof will be produced before this Court upon a hearing of this cause.

10. The agreement of the Philadelphia and Atlantic City Railway Company with complainant, Henry Schmoele, and his associates in title under the agreement above recited of June 9, 1877, to issue and

provide passes over its said railroad and upon and over the right of way conveyed by Henry Schmoele and his associates in title to the said Philadelphia and Atlantic City Railway Company, constituted a covenant running with the said land, arose out of and was the consideration for the conveyance by said Henry Schmoele and others of the said land to the said railway company; and the conveyance by the Master upon a foreclosure sale under the said mortgage or deed of trust was under and subject to the rights of Henry Schmoele under the said agreement of June 9, 1877, and the purchaser at said foreclosure sale, to wit, George R. Kaercher, acquired title to said right of way and other property of said railway company subject to the rights of Henry Schmoele under the said agreement of June 9, 1877, and upon taking possession of said railroad property under said deed became obligated to complainant, Henry Schmoele, his legal representatives and assigns, to perform said agreement and issue the passes annually as required by said agreement; and upon a conveyance by the said George R. Kaercher to the Philadelphia and Atlantic City Railroad Company, a corporation of the State of New Jersey, formed to take over the assets, franchises, right of way and property of the Philadelphia and Atlantic City Railway Company, said Philadelphia and Atlantic City Railroad Company likewise became obligated to complainant, Henry Schmoele, to carry out and perform the terms of said agreement and to pay and provide to the complainant, Henry Schmoele, his legal representatives and assigns, the consideration mentioned in the deed for the right of way made by complainant,

Henry Schmoele, and his associates in title to the said Philadelphia and Atlantic City Railway Company, and likewise the present defendant, the Atlantic City Railroad Company, became vested with the title to said right of way and other property of the said railway company and took possession of all the property, etc., of the Philadelphia and Atlantic City Railroad Company, including the right of way conveyed by the complainant, Henry Schmoele, and his said associates in title to the Philadelphia and Atlantic City Railway Company, as aforesaid, and has at all times since its incorporation been in possession of and receiving the full enjoyment and benefit of the property so conveyed as aforesaid by Henry Schmoele and his said associates in title to the said Philadelphia and Atlantic City Railway Company, and is now using the same as a part of its right of way, over which it operates its said railroad between Camden and Atlantic City, in said State.

11. Complainants show that ever since the execution and delivery by Henry Schmoele and his associates in title of the said premises set forth and described in the deed marked Exhibit 1, the Philadelphia and Atlantic City Railway Company and its successors in the title to the said property have been in full and complete possession thereof and have received the full use, benefit and enjoyment thereof, and the defendant is at the present time in possession and enjoyment of the said right of way so conveyed by the complainant, Henry Schmoele, and his associates in title as aforesaid and receives

the full benefits from said conveyance and said property.

12. On or about the seventh day of December, 1894, complainant, Henry Schmoele, and others as parties of the first part, and complainants, Charles Schmoele and Ida Schmoele, as parties of the second part, executed, acknowledged and delivered that certain deed, assignment or trust agreement dated December 7, one thousand eight hundred and ninety-four, a true and correct copy of which is attached hereto and made a part hereof and marked Exhibit 3. In and by said indenture the parties of the first part, namely, Henry Schmoele and others granted, conveyed, assigned, transferred and set over to the said Charles Schmoele and Ida Schmoele as trustees, their successors, executors, administrators and assigns, *inter alia,* all the right, title and interest of the parties therein, including said Henry Schmoele, in and to the aforesaid agreement between Henry Schmoele, *et als.,* and Philadelphia and Atlantic City Railway Company, marked Exhibit 2 herein, and said Henry Schmoele in and by said indenture did further covenant and agree to and with the said Charles Schmoele and Ida Schmoele as trustees, that he or, in the event of his death, his personal representatives, would designate to receive the passes mentioned in said agreement of June 9, 1877, such persons as the said Charles Schmoele and Ida Schmoele, trustees under said indenture, or their assigns or successors in the trust, should from time to time designate and appoint, which said indenture is recorded in the office for Recording of Deeds in

and for the City and County of Philadelphia, in Book J. J. C. No. 133, page 443.

13. All of the successors in title of the Philadelphia and Atlantic City Railway Company to the said property, including the defendant, adopted said agreement and carried out the obligations imposed thereby with respect to said property and its use in favor of the complainants and at all times up to and including the year 1929 carried out and performed the terms and conditions of the said agreement. But the defendant, upon request made by the complainants for the issuing of passes for the year 1930, in accordance with the terms of said agreement and to the persons designated in accordance with the terms of said agreement, has refused to issue the same or any of them and, on the contrary, has notified complainants that it, the said defendant, is not bound by the terms of said agreement of June 9, 1877, and is not required to issue any passes under the said agreement and that it will not in the future issue any more passes over its said railroad under and in compliance with the terms of said agreement; all of which acts of the defendant are in violation of the said agreement of June 9, 1877, by which the defendant is bound, and in disregard of its obligations to complainants under said agreement. Said defendant remains in possession of the said property so conveyed, enjoys the full benefits from its use and occupancy for its railroad purposes, but has now refused to provide and satisfy the consideration which is the basis of such use and occupancy.

14. Complainants charge that the Philadelphia and Atlantic City Railway Company took title to and obtained possession of the lands mentioned in the said agreement of June 9, 1877, for the purposes of its railroad, subject to and burdened with all the covenants therein contained with respect to the issuing of said passes and the delivery thereof in accordance with its terms; that each and every subsequent holder of said lands and each and every successor in title of the said Philadelphia and Atlantic City Railway Company, down to and including the defendant, received title thereto and took possession thereof with full notice of the rights of Henry Schmoele and the other grantors named in said deed and subject to and burdened with the obligations arising thereout and specifically to issue the free yearly passes provided by said agreement to be issued, and that defendant is now legally obligated to carry out and perform said agreement and issue said passes over said railroad and right of way now owned and possessed by the defendant, and the refusal of the defendant so to do is in violation of the rights of complainants under said agreement and is unjust and inequitable, and that the continued occupation, possession and use by the defendant of the lands so conveyed to the defendant's predecessor in title by the said Henry Schmoele and others while refusing to carry out and perform the terms of said agreement of June 9, 1877, and while refusing to issue and deliver said passes, are unjust and inequitable and should be enjoined by this Court.

Complainants are without full, adequate and com-

plete relief in the courts of law and, therefore, pray:

1. That the Atlantic City Railroad Company, who is the defendant to this suit, may answer this bill of complaint and each statement therein made.

2. That the said defendant, Atlantic City Railroad Company, may be required by decree of this Court to specifically perform that certain agreement recited in paragraph 2 of this bill, to wit, the agreement of June 9, 1877, by issuing and delivering to the complainants the passes called for by said agreement and to the persons designated by the complainant, Henry Schmoele, and/or by the complainants, Charles Schmoele and Ida Schmoele, trustees, as aforesaid.

3. That this Court may determine the value of the said eleven passes to the complainants so unissued for the year 1930 and the value of said passes which shall remain unissued pursuant to the terms of said agreement up to the date of the decree of this Court, and that this Court may require by its said decree that the defendant shall pay to the complainants the value of said unissued passes as so to be determined by this Court.

4. That the defendant be enjoined from occupying, possessing or in any way using the lands described in said agreement and in said deed or any part thereof until it shall fully comply with the terms of said agreement and issue and deliver the passes as hereinabove prayed.

5. That a writ of subpoena may issue commanding the said defendant to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

6. That there may issue out of and under the seal of this Court its writ of injunction against the defendant, restraining and enjoining said defendant from further occupation, possession and use of the said premises described in said deed and said agreement until the defendant shall carry out and perform the terms of said agreement and issue and deliver the passes as therein required.

BLEAKLY, STOCKWELL & BURLING,
Solicitors for and of Counsel with Complainants.

EXHIBIT 1.

William F. Schmoele, et al. to The Philadelphia and Atlantic City Railway Company. } Grant of Right of Way.

WHEREAS The Philadelphia and Atlantic City Railway Company have located a route for a Railroad about to be built by said corporation from the

City of Camden through the Counties of Camden and Atlantic to Atlantic City and land belonging to William Ford Schmoele, Henry Schmoele, Charles Schmoele, William Ford Schmoele and Lenna Schmoele, situate in the Townships of Mullica and Galloway in the County of Atlantic and State of New Jersey lie along and near the route which has been selected for the construction of said Railroad. Now Therefore Know All Men by These Presents, That we William Ford Schmoele, Trustee for Sarah Schmoele, Ida Schmoele, Linda Schmoele, Anna Schmoele and Lenna Schmoele and Sarah Schmoele, of the City of Philadelphia in the County of Philadelphia and State of Pennsylvania in consideration of the premises of the sum of one dollar and eight full paid shares of the capital stock of said corporation to us in hand well and truly paid, the receipt whereof is hereby acknowledged and a certain agreement bearing even date herewith have granted and conveyed and do hereby grant and convey to said Philadelphia and Atlantic City Railway Company a right of way for the purposes of its said Railroad in, upon, through and over certain lands belonging to us or any or either of us situate in the Townships of Mullica and Galloway in the County of Atlantic and State of New Jersey, that is to say, in, through over and upon all lands in Mullica and Galloway Township, Atlantic County, New Jersey, south of the Camden and Atlantic Railroad from the middle of Heidelberg Avenue to the middle of the Pomona and May's landing Road belonging to us or either of us or in which we or either of us have any estate or interest sixty feet in width from Heidelberg Avenue to New York Avenue and forty

feet in width from New York Avenue to the Pomona and May's Landing Road. And we do hereby for ourselves, our and each of our heirs, executors, administrators and assigns, covenant and agree to and with the said The Philadelphia and Atlantic City Railway Company, its successors and assigns, that we are seized of an absolute indefeasible estate of inheritance in fee simple of, in and to the hereby granted premises with the appurtenances that the same are freely, clearly and absolutely discharged from all mortgages, judgments and other incumbrances whatsoever, that we have full power and lawful authority to grant, bargain, sell and convey the same to the said The Philadelphia and Atlantic City Railway Company, its successors and assigns, in manner and form as is hereinbefore expressed, that the said The Philadelphia and Atlantic City Railway Company, its successors and assigns, shall and may at all times hereafter peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises and every part and parcel thereof with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of us or any or either of us, our or either of our heirs, executors, administrators or assigns, or of any other person or persons lawfully claiming or to claim the same and that it shall and may be lawful for said corporation, its agents, officers and servants to enter into and upon all lands above described by us or any or either of us owned or occupied and situate in the Township, County and State aforesaid along the line above described for the purpose of building, constructing, maintaining, operating or repairing said railroad and to excavate, re-

move, use, take, occupy, possess and enjoy for the purpose aforesaid so much of said lands along the line aforesaid as may be necessary not exceeding sixty feet in width unless more land shall be required for slopes of cuts and embankments and in that event to excavate, remove, use, take, occupy, possess and enjoy so much more land as shall be required for such slopes of cuts and embankments to have, hold, occupy, possess and enjoy the same for the purposes aforesaid to the use of said corporation, its successors and assigns, as long as the same shall be used for the purpose of a Railroad and no longer. The consideration of this deed being full compensation to each and all of us for the use of our land, for materials in, or on the same, and for all damages present or prospective sustained or to be sustained by us or any or either of us by reason of the construction and operation of said Railroad.

In Witness Whereof we have hereunto set our hands and seals this ninth day of June, in the year of our Lord one thousand eight hundred and seventy-seven.

William Ford Schmoele (Seal)
Henry Schmoele (Seal)
Charles Schmoele (Seal)
William Ford Schmoele (Seal)
Trustee for Sarah, Ida,
Linda, Anna and Lenna Schmoele
Sarah Schmoele (Seal)

Signed, sealed and delivered
in the presence of
F. M. Copeland as to sig.
of William Ford Schmoele
as to Henry, Charles and
Sarah Schmoele
B. F. Moore
Thomas I. Murray

State of New York }
County of New York } ss.

BE IT REMEMBERED that on this ninth day of June, in the year of our Lord one thousand eight hundred and seventy-seven, before me F. M. Copeland, a Commissioner of New Jersey, personally appeared William Ford Schmoele who I am satisfied is one of the grantors mentioned in the within deed and I having first made known to him the contents thereof he did personally and as Trustee acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed. All of which is hereby certified. In witness whereof I have hereunto set my hand and official seal.

F. M. Copeland (Seal)
Commissioner for New Jersey.

State of Pennsylvania }
City of Philadelphia } ss.

Be it remembered that on this eleventh day of June, A. D. eighteen hundred & seventy-seven before me Benjamin F. Moore, a Commissioner for the State of New Jersey, residing in the City of Philadelphia personally appeared Henry Schmoele, Charles Schmoele and Sarah Schmoele, who, I am satisfied are the grantors in the within deed and I having first made known to them the contents thereof they did separately acknowledge that they signed, sealed and delivered the same as their voluntary act

and deed for the purposes and uses therein expressed. All of which is hereby certified.

B. F. Moore (Seal)
Commissioner for New Jersey.

Received and Recorded April 5th, 1886
Lewis Evans, Clerk.

I, LEWIS P. SCOTT, Clerk of the Court of Common Pleas, in and for the County of Atlantic, the same being a Court of Record do hereby certify that the foregoing is a true, full and correct copy of a certain Right of Way made by William F. Schmoele, et al., to The Philadelphia and Atlantic City Railway Company as the same is recorded in my said office in Deed Book #111 page 14 &c.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the (SEAL) seal of said Court and County at May's Landing, N. J. this fifth day of December, A. D. one thousand nine hundred and six (1906).

LEWIS P. SCOTT,
Clerk.

EXHIBIT 2.

THIS AGREEMENT made and entered into this Ninth day of June, in the year of our Lord, one thousand eight hundred and seventy-seven, Between The Philadelphia and Atlantic City Railway Com-

pany, a corporation under and by virtue of the laws of the State of New Jersey, of the first part, and William Ford Schmoele, Henry Schmoele, Charles Schmoele, William Ford Schmoele, Anna Schmoele and Lenna Schmoele, all of the City of Philadelphia, in the State of Pennsylvania, of the second part.

WHEREAS, the said parties of the second part have by a deed bearing even date herewith granted and conveyed unto the said party of the first part, its successors and assigns, a right of way for the purposes of its railroad, through and over all land by them the said parties of the second part or any or either of them owned or occupied, situate in the County of Atlantic, in the State of New Jersey, South of the Camden and Atlantic Railroad and extending from Heidelberg Avenue to the Pomona and Mays Landing Road, and in said grant particularly described, the consideration of said grant being the performance of this agreement and eight full paid shares of the capital stock of the said party of the first part and also the sum of one dollar:

Now therefore this agreement Witnesseth, that the said The Philadelphia and Atlantic City Railway Company, in consideration of the premises doth hereby for itself and its successors covenant and agree to and with the said parties of the second part to give to the said Henry Schmoele or in the event of his death to his personal representatives, or to such person as he, or in the event of his death, such personal representative shall designate annually, during the first week in January of each and every year during its occupation of said lands free yearly passes over the line of its Railroad, for eleven persons to be named by said Henry Schmoele or in the

event of his death by his personal representative, before said passes are issued, and further that the said corporation or its successors will on the surrender of either or any of said eleven passes issue a new one or new ones in lieu thereof to such other person as shall be named by said Henry Schmoele or in the event of his death by his personal representative, provided that no pass (surrendered) shall be renewed more than once in one year.

IN WITNESS WHEREOF the said party of the first part hath caused this agreement to be signed by its President and its Common seal to be set hereto attested by its secretary and the said parties of the second part have hereunto set their hands and seals the day and year first above written.

Samuel Richard, Prest. (Seal)
William Ford Schmoele (Seal)
Henry Schmoele (Seal)
Charles Schmoele (Seal)
Sarah Schmoele (Seal)
William Ford Schmoele,
Trustee for Sarah, Ida,
Linda, Anna and Lenna
Schmoele (Seal)

Sealed and Delivered
in the presence of
F. M. Copeland as to
William Ford Schmoele.
as to Henry, Charles and
Sarah Schmoele
B. F. Moore
Thomas I. Murray

Attest:
W. S. Linman,
Secy. (SEAL)

STATE OF NEW YORK }
CITY AND COUNTY OF NEW YORK } ss.

Be it remembered that on this ninth day of June, A. D. 1877, before me, Francis M. Copeland, a Commissioner of the State of New Jersey in the above city personally appeared William Ford Schmoele, who I am satisfied is one of the grantors of a deed of right of way bearing even date herewith; and I having first made known to him the contents thereof he did acknowledge that he signed, sealed and conveyed the same as his voluntary act and deed for the uses and purposes therein expressed. All of which is hereby certified.

IN WITNESS WHEREOF I have hereunto set my name and affixed seal.

F. M. Copeland,
Commissioner for New Jersey.

(SEAL)

STATE OF PENNSYLVANIA }
CITY OF PHILADELPHIA } ss.

BE IT REMEMBERED that on this Eleventh day of June Anno Domini One thousand eight hundred and seventy-seven, personally appeared before me, B. F. Moore, a commissioner of the State of New Jersey, residing in the City of Philadelphia, Henry Schmoele, Charles Schmoele and Sarah Schmoele, grantors of a deed of right of way bearing even date herewith and who I am satisfied are the grantors mentioned therein; and I having first

made known to them the contents thereof they did separately acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed. All of which is hereby certified.

B. F. Moore,
Commissioner for the State
of New Jersey.

(SEAL)

Received Oct. 18 1877 and recorded in the Clerk's Office of Atlantic County at Mays Landing N. J. in Book No. 1 of Agreements, folio 158 &c.

L. A. Down, Clerk.

EXHIBIT 3.

THIS INDENTURE Made this Seventh day of December A. D. One thousand eight hundred and ninety four between WILLIAM F. SCHMOELE of Antwerp in the Kingdom of Belgium, HENRY SCHMOELE of London in the Kingdom of Great Britain, CHARLES SCHMOELE of the City of Philadelphia, Pennsylvania, and NANSIE M. his wife, IDA SCHMOELE of said City of Philadelphia, WESTON DONALDSON of said City of Philadelphia and ANNA S. his wife in right of said Anna S., GEORGE J. NEWTON of Pottstown, Pennsylvania and LINDA S. his wife in right of said Linda S. and WILLIAM H. FORD, surviving executor and trustee under the will of John M. Ford, late of said City of Philadelphia, deceased, all of the

one part and CHARLES SCHMOELE and IDA SCHMOELE of said City of Philadelphia, Trustees as hereinafter constituted of the other part WITNESSETH: WHEREAS John M. Ford, late of the City of Philadelphia, deceased, by his last will and testament dated the fifth day of June 1866, and a codicil thereto dated the fourteenth day of July, 1875, duly proved and remaining of record in the office of the Register of Wills of Philadelphia County, did inter alia devise and bequeath as follows:

"Second. I give, devise and bequeath to my Executors therein named, and to the survivor of them, and the Heirs, Executors, Administrators and Assigns of the survivor, and to such person or persons, corporation or corporations as may succeed them or him in the said office, all that messuage and lot of ground No. 258 Franklin Street which I recently purchased of Thomas J. Woolfe; in trust, nevertheless, to, for and upon the following uses and trusts, to permit and suffer my niece, SARAH SCHMOELE, to occupy the same with her family as a residence for and during all the term of her natural life, free of rent or other charge, she paying the interest on incumbrances, taxes, water rent, repairs, and all other expenses incident to the said property; or, in case she should desire not to reside in the said property, then to lease and demise the same, and, after paying the interest on incumbrances, taxes, water rent, repairs, and other expenses incident to the same, to pay over the net rents and income from the said property to my said niece for and during all the term of her na-

tural life, for her own sole and separate use, free, clear, and discharged from her debts and engagements, or the debts and engagements of her husband, and not to be liable to anticipation; and from and immediately after the decease of my said niece, I give, devise and bequeath the said property or the proceeds thereof, in case the same may be sold by my Executors, and for this purpose I include the said property under the power of sale giving to my said Executors under my Will, to such of the children of my said niece as may be living at the time of her decease, and the child, children, and issue of any of them then deceased, in equal parts and shares, such issue of any deceased child or children to take only the part or share to which his, her, or their deceased parent would have been entitled if living.

THIRD. Whereas, I have advanced to HENRY and WILLIAM SCHMOELE certain amounts of money, to secure which I hold certain mortgage securities together with other evidences of indebtedness; now I desire it to be fully understood that while I do not wish to formally release the payment of the same, yet, for the purpose of protecting my Executors in the responsibility of their duty, I order and direct that no adverse legal or equitable proceedings of any character shall be taken against them, their heirs, executors, administrators or assigns for the collection of the same, by which they or their families might in any way be harassed. I therefore give, devise and bequeath to my executors named in my said Will all mortgage security or securities, evidence of indebtedness, and other, my

rights, title and interest in any real estate derived through said mortgage security situate in the State of New Jersey or elsewhere, and other claims and demands, with all the powers, options, and directions which I have in the premises, to hold the same intact, as they now exist, provided the same entail no expense to my estate, or to foreclose and collect the same, if necessary to make title to any of the real estate bound by such mortgage security, and to hold such mortgage security evidence of indebtedness; real estate, amounts collected, or to be collected, to and for the sole and separate use of my said niece, SARAH SCHMOELE, for and during all the term of her natural life, for her own sole and separate use, free, clear and discharged from the debts and engagements of her husband, past, present, or future, and not liable to anticipation, and from and immediately after her decease, then I give devise and bequeath the same, and order the same to be paid, divided, and distributed to and among such of the children of my said niece as may be living at the time of her decease, and the said child, children or issue of any of them, then deceased, in equal parts and shares, such issue of any deceased child or children to take only the part or share to which his, her or their deceased parent would have been entitled if living."

AND WHEREAS by indenture dated the Twentieth day of March, 1868 and recorded at Philadelphia in Deed Book J. T. O. 164 page 124 &c. William Schmoele and wife conveyed to John M. Ford a certain four story brick messuage and lot or piece of ground situate at the southwest corner of

Franklin and Vine Streets hereinafter more particularly described in trust for the separate use of Sarah Schmoele during her life and for her children being the issue of her marriage with the said Henry Schmoele.

AND WHEREAS by agreement dated the Ninth day of June 1877, duly recorded in the Clerk's Office of Atlantic County, New Jersey, in Book No. 1 of Agreements folio 158 &c., The Philadelphia and Atlantic City Railway Company covenanted to give to Henry Schmoele, or in the event of his death to his personal representative or to such person as he or in the event of his death such personal representative shall designate, annually during the first week in January of each and every year free yearly passes over the line of its railroad for eleven persons to be named by said Henry Schmoele, or in the event of his death, by his personal representative before said passes are issued as in and by said agreement is more fully set forth.

AND WHEREAS Sarah Schmoele, late of the City of Philadelphia deceased, departed this life the first day of April, 1894, leaving surviving her six children viz: the said William F. Schmoele, Henry Schmoele, Charles Schmoele, Ida Schmoele, Anna Donaldson, wife of Weston Donaldson and Linda S. Newton, wife of George J. Newton and leaving also a will dated the thirteenth day of October 1888 duly proved and remaining of record in the office of the register of Wills for the County of Philadelphia, and by said will did inter alia direct the payment to her daughter Ida Schmoele so long as said daughter re-

mained unmarried, of the sum of Twelve Hundred dollars per annum out of the net income of testatrix's estate. AND WHEREAS the net income of the estate of said Sarah Schmoele deceased is not sufficient to pay the said annuity of Twelve hundred dollars to Ida Schmoele and it is the desire of her brothers and sisters to secure the payment thereof:

NOW THIS INDENTURE WITNESSETH: That the said William F. Schmoele Henry Schmoele, Charles Schmoele and Nansie his wife, Ida Schmoele, Weston Donaldson and Anna S. his wife, George J. Newton and Linda S. his wife and William H. Ford surviving executor and trustee under the will of John M. Ford, deecased (the said William H. Ford joining herein in order to convey the legal title, the trust having become executed and all the cestuisque trust being parties hereto and requesting him to join for and in consideration of the premises and of the sum of one dollar to them in hand paid by Charles Schmoele and Ida Schmoele, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over and by these presents do grant, bargain and sell, assign, transfer and set over unto the said Charles Schmoele and Ida Schmoele, their successors, executors, administrators and assigns all the unexpired term of Nine hundred and ninety nine years from the first day of November, 1893, in All that messuage and lot of ground described in the said codicil to the will of John M. Ford, deceased, as No. 256 Franklin Street, and which is more particularly described as follows: ALL that brick messuage or tenement and lot or piece of ground situate on the West side of

Franklin Street at the distance of fifty nine feet southward from the south side of Vine Street in the City of Philadelphia, containing in front or breadth on the said Franklin Street twenty feet and extending of that breadth in length or depth westward between parallel lines at right angles with the said Franklin Street one hundred and twenty two feet eight inches to a three feet four inches wide alley leading Northward into Vine Street Bounded Northward by ground demised to John Rice. Westward by the aforesaid alley, Southward by ground demised to Nathan Trotter and Eastward by Franklin Street aforesaid (Being the same premises which Thomas J. Woolf and wife by indenture dated the Eighth day of May 1875 and recorded at Philadelphia in Deed Book F. T. W. No. 197 page 384 &c. granted to said John M. Ford.)

ALSO all the mortgage securities and evidences of indebtedness mentioned in the hereinbefore recited codicil to the will of John M. Ford, deceased, and the real estate on which the same is secured and any real estate acquired on account of or through foreclosure of such mortgage securities or indebtedness.

ALSO all the right title and interest of the said William F. Schmoele, Harry Schmoele, Charles Schmoele, Ida Schmoele, Anna S. Donaldson and Linda S. Newton in and to the property conveyed by the hereinbefore recited deed of William Schmoele and wife to John M. Ford and more particularly described as follows: All the balance of the unexpired term of nine hundred and ninety nine years from the

first day of January 1843 in all that certain four story brick messuage and lot or piece of ground situated at the southwest corner of Franklin and Vine Streets in the City of Philadelphia containing in front or breadth on the said Franklin Street twenty feet and in length or depth westward keeping the same width one hundred and twenty two feet eight inches. Bounded southwardly by a messuage or ground now or late of Robert Smith Northward by the said Vine Street, Westward by a three feet and four inches wide alley and Eastward by the said Franklin Street.

ALSO all the right title and interest of the said parties of the first part of in and to the aforesaid agreement with the Philadelphia and Atlantic City Railway Company dated the Ninth day of June 1877 and recorded as aforesaid in the Clerk's Office of Atlantic County, New Jersey in Book No. 1 of Agreements folio 158 &c and the said Henry Schmoele covenants and agrees with the said Charles Schmoele and Ida Schmoele, Trustees as hereinafter constituted that he, or in the event of his death, his personal representatives, will designate to receive the passes mentioned in said agreement such persons as the said Charles Schmoele and Ida Schmoele, Trustees as aforesaid, or their assigns or successors in the trust shall from time to time designate and appoint.

TOGETHER with all and singular the buildings, improvements, streets, alleys, passageways, waters, watercourses, rights, liberties, privileges, hereditaments and appurtenances thereunto belonging or in

any wise appertaining and the reversions, remainders, rents, issues and profits thereof and all the estate, rights, title interest property claim and demand whatsoever of the said parties of the first part in law, equity or otherwise howsoever of in and to the same and every part thereof, subject nevertheless as respects the aforesaid property at the South-
10 west corner of Franklin and Vine Streets to the payment of two ground rents, one of two hundred and forty dollars per annum issuing out of the easternmost ninety-seven feet in length and one of fifty eight dollars per annum issuing out of the westernmost twenty five feet eight inches in lenght and subject as respects the aforesaid property situated on the west side of Franklin Street fifty-nine feet south of Vine Street to the payment of two ground rents, one of two hundred and ten dollars
20 per annum and the other of thirty dollars per annum.

TO HAVE AND TO HOLD the said properties hereby granted or mentioned and intended so to be with the appurtenances unto the said Charles Schmoele and Ida Schmoele, their heirs, executors, administrators and assigns IN TRUST nevertheless for the following uses and purposes to wit: From time to time to rent the said messuages, to sell the
30 said railroad passes, to collect the income or proceeds of all the property hereby conveyed and generally to take charge of and manage said property and out of the net income thereof to pay quarterly to Ida Schmoele for her own use as long as she remains unmarried, a sum sufficient when added to the quarterly sums received by her from

the estate of her mother Sarah Schmoele under the provisions of the latter's will to make up the annual sum of twelve hundred dollars, commencing from the date of the death of said Sarah Schmoele, said payments to Ida Schmoele not to be subject to assignment by way of anticipation, or subject to execution attachment or other legal process for any debts, engatements or liabilities. And in trust as to the balance of the net income after making such quarterly payments to Ida Schmoele to pay the same in equal shares to the aforesaid William F. Schmoele, Henry Schmoele, Charles Schmoele, Ida Schmoele, Anna S. Donaldson and Linda S. Newton in equal shares, and upon the death or marriage of Ida Schmoele whichever shall first happen, then in trust to sell and convert the said properties hereby conveyed into money at such times and in such manner as to said trustees shall seem most advantageous, and to execute conveyances thereof to the purchasers without any liability on the part of such purchasers to see to the application of the purchase money; and to divide the net proceeds of said properties in equal shares among the said William F. Schmoele, Henry Schmoele, Charles Schmoele, Ida Schmoele, Anna S. Donaldson and Linda S. Newton their respective executors or administrators or assigns. And until such sale and division is made to divide the net income accruing subsequent to the death or marriage of said Ida Schmoele in equal shares among said William F. Schmoele, Henry Schmoele, Charles Schmoele, Ida Schmoele, Anna S. Donaldson and Linda S. Newton, their respective executors, administrators or assigns. And upon the further trust at any time prior to the death or marriage of Ida

Schmoele from time to time whenever in the judgment of said trustees it may seem advantageous to do so, to sell the whole or any part or parts of the properties hereby conveyed either at public or private sale and on such terms as to the trustees may seem best and to execute conveyances to the purchasers therefor without any liability on the part of such purchasers to see to the application of the purchase money, and to reinvest the proceeds of such sales in other real or personal property not necessarily confining themselves to what are technically known as legal investments and hold the same upon the trusts of this indenture.

AND the said William F. Schmoele, Henry Schmoele, Charles Schmoele, Ida Schmoele, Anna S. Donaldson and Linda S. Newton for themselves, their respective heirs, executors and administrators do by these presents covenant and agree to and with the said Charles Schmoele and Ida Schmoele, Trustees as aforesaid, their heirs, executors, administrators and assigns that they the said William F. Schmoele, Henry Schmoele, Charles Schmoele, Ida Schmoele, Anna S. Donaldson and Linda S. Newton and their heirs all and singular, the properties herein described and granted or mentioned and intended so to be with the appurtenances unto the said Charles Schmoele and Ida Schmoele, Trustees as aforesaid, their heirs, executors, administrators and assigns against them the said William F. Schmoele, Henry Schmoele, Charles Schmoele, Ida Schmoele, Anna S. Donaldson and Linda S. Newton and their heirs, executors and administrators and against all and every other person or persons whom-

soever lawfully claiming or to claim the same or any part thereof by from or under them or any of them shall and will subject as aforesaid, warant and forever defend. AND the said William H. Ford, surviving executor and trustee under the will of John M. Ford, deceased, for himself, his heirs, executors and administrators doth covenant promise and agree to and with the said Charles Schmoele and Ida Schmoele, Trustees as aforesaid, their heirs, executors, administrators and assigns that he the said William H. Ford has not heretofore done or committed any act, matter or thing whatsoever whereby the premises hereby granted or any part thereof is are or shall be impeached, charged or incumbered in title charge estate or otherwise howsoever.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

Sealed and Delivered
in presence of:
F. A. Christman
witness for the signature
of Henry Schmoele
I. M. Aizpiri
As to Charles Schmoele
Nansie M. Schmoele, Ida
Schmoele, Weston Donaldson
and Anna S. Donaldson,
George J. Newton and Linda S.
Newton
Frank P. Prichard
Arthur C. Snyder

As to Wm. H. Ford, Sur. Exr.
&c.

Frank P. Prichard
A. C. Snyder.

William F. Schmoele (Seal)
Henry Schmoele (Seal)
Charles Schmoele (Seal)
Nansie M. Schmoele (Seal)
Ida Schmoele (Seal)
Weston Donaldson (Seal)
Anna S. Donaldson (Seal)
Geo. J. Newton (Seal)
Linda S. Newton (Seal)
William H. Ford (Seal)
Sole surviving Executor,
Estate of John M. Ford, decd.

City of Antwerp
Kingdom of Belgium } ss.

On this seventh day of December A. D. one thousand eight hundred and ninety-four before me the subscriber Louis Hess, U. S. Vice Consul personally appeared the within named William F. Schmoele, who in due form of law acknowledged the foregoing Indenture to be his voluntary act and deed and desired that the same might be recorded as such. Witness my hand and official seal the day and year aforesaid.

Louis Hess
U. S. Vice Consul.

(SEAL)

City of Antwerp }
Kingdom of Belgium }

On this seventh day of December A. D. one thousand eight hundred and ninety-four before me the subscriber Wm. F. Schmoele personally appeared the within named Henry Schmoele who in due form of law acknowledged the foregoing indenture to be his voluntary act and deed and desired that the same might be recorded as such. Witness my hand and official seal the day and year aforesaid.

(Written in ink across affidavit):

This form filled out and signed by the U. S. Consul in Antwerp by mistake, has been scratched out by him after finding out his blunder

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STATE OF PENNSYLVANIA }
CITY OF PHILADELPHIA }

ON this Twentieth day of March A. D. one thousand eight hundred and ninety-five 1895 before me the subscriber, a Notary Public for the commonwealth of Pennsylvania, residing in the City of Philadelphia, personally appeared the within named Charles Schmoele and Nansie M. his wife, Ida Schmoele, Weston Donaldson and Anna S. his wife and William H. Ford, surviving executor and A.C.S. trustee under the will of John M. Ford, de- N. P. ceased, who severally and in due form of law acknowledged the foregoing indenture to be their vol-

untary act and deed and desired that the same might be recorded as such, and the said Nansie M. Schmoele and Anna S. Donaldson being of full age and separate and apart from their said husbands by me thereon privately examined and the full contents of the said indenture being first by me made known unto them, did thereupon declare and say that they executed, acknowledged and delivered the said indenture voluntarily of their own free will and accord and without any coercion or compulsion of their said husbands. Witness my hand and official seal the day and year aforesaid.

Arthur C. Snyder,
Notary Public.

(SEAL)

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } SS.

ON this Twentieth day of March A. D. one thousand eight hundred and ninety-five 1895 before me the subscriber, a Notary Public for the Commonwealth of Pennsylvania, residing in the County of Philadelphia, personally appeared the within named George J. Newton and Linda S. his wife and in due form of law acknowledged the foregoing indenture to be their voluntary act and deed and desired that the same might be recorded as such, and the said Linda S. Newton being of full age and separate and apart from her said husband by me thereon privately examined, and the full contents of the said indenture having been by me first made known unto

her, did declare and say that she executed acknowledged and delivered the said indenture voluntarily of her own free will and accord without any coercion or compulsion of her said husband. WITNESS my hand and official seal the day and year aforesaid.

Arthur C. Snyder,
Notary Public.

(SEAL)

City of Buenos Ayres } ss.
Argentine Republic }

On this twelfth day of January, Anno Domini, one thousand eight hundred and ninety-five, before me the subscriber, E. L. Baker, Esq., Consul of the United States of America, personally appeared the within named Henry Schmoele, who in due form of law acknowledged the foregoing indenture to be his voluntary act and deed, and desired that the same might be recorded as such. Witness my hand and official seal the day and year aforesaid.

E. L. Baker
U. S. Consul.

(SEAL)

STATE OF PENNSYLVANIA }
County of Philadelphia }

On the fourth day of November A. D. 1895 before me the subscriber a Notary Public for the State of Pennsylvania residing in the County of Philadel-

phia personally appeared the within named William H. Ford sole surviving executor and trustee under the will of John M. Ford deceased who in due form of law acknowledged the foregoing Indenture to be his act and deed and desired the same might be recorded as such.

Witness my hand and notarial seal the day and year aforesaid.

Arthur C. Snyder,
Notary Public.

(SEAL)

Recorded in the Office for Recording of Deeds &c. in and for the City and County of Philadelphia in Deed Book J. J. C. No. 133 page 443 &c. WITNESS my hand and seal of office this Seventh day of November A. D. 1895.

JOHN J. CURLEY,
Recorder of Deeds.

(SEAL)

ANSWER.

(Filed October 6, 1930.)

IN CHANCERY OF NEW JERSEY.

Between
HENRY SCHMOELE, *et al.*,
Complainants,
and
ATLANTIC CITY RAILROAD COMPANY,
Defendant.

On Bill, &c.
Answer.

The answer of the defendant, Atlantic City Railroad Company:

This defendant will object that the bill of complaint discloses no cause of action. It fails to show such facts as will give the Court jurisdiction. It shows that the complainants have received all that they were to receive under their agreement. It shows that the rights of the complainants have been lost.

This defendant, answering the bill of complaint, says that:

1. It is admitted that the instrument, Exhibit 1,

was delivered and received, but this defendant says that the grantors in that deed of conveyance did not, nor did any of them, own or have any right, title or interest in or to the property which they thereby attempted to convey.

2. Paragraph 2 is admitted.

3. Paragraph 3 is denied. This defendant was not in existence when the agreement marked Exhibit 2 was executed, and the company party to said agreement thereby agreed that it would itself issue passes, but only over the line of "*its* railroad."

4. Paragraph 4, so far as it applies to Philadelphia and Atlantic City Railway Company, is admitted, and so far as it applies to its successors in title, is denied. During the period of Federal control, the Director-General of Railroads denied the right of the complainants to passes and refused to issue such passes.

5. Paragraph 5 is admitted.

6. Paragraph 6 is admitted.

7. Paragraph 7 is admitted.

8. Paragraph 8 is admitted, but it is not admitted that the deed from Henry Schmoele and others, dated June 9, 1877, was effective in passing any title.

9. Paragraph 9 requires no answer.

10. Paragraph 10, so far as it alleges that this defendant owns, uses and operates its right of way and property, is admitted, but in all other respects the paragraph is denied.

11. This defendant denies that Henry Schmoele and his associates conveyed any valid title to the premises set forth and described in Exhibit 1, and says that the title of this defendant and its predecessors to said premises was acquired otherwise than by Exhibit 1.

12. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 12.

13. Paragraph 13 is denied. During the period of Federal control the Director-General of Railroads denied the right of the complainants to passes and refused to issue such passes. This defendant, it is true, issued gratuitously prior to 1911 some passes to complainants, the complainants' lawful right, if they ever had any lawful right, to such passes having been in the year 1883 extinguished. Since 1911 this defendant has issued some passes to the complainants but it discontinued the issuance thereof upon being advised that such issuance is against public policy, is forbidden by statute and is made a misdemeanor.

14. Paragraph 14 is denied.

This defendant has been in adverse possession of the land in question continuously since the year 1901.

By the agreement, Exhibit 2, attached to the bill,

the complainants and their predecessors in interest agreed, as the consideration for their conveyance, to take the sum of one dollar, eight full paid shares of the capital stock of The Philadelphia and Atlantic City Railway Company, and the personal covenant of that company to give to Henry Schmoele or to his personal representative "each and every year during its occupation of said lands free yearly passes over the line of its railroad, for eleven persons." The occupation of that company ceased in the year 1883, and that company has not had any railroad since 1883. The complainants and their predecessors in interest were willing to take the consideration named in their said agreement and actually received the full consideration therein named.

The complainants and their predecessors in interest were by law bound to know that in making the agreement, Exhibit 2, they were dealing with a public utility whose first duty was to the public and that there must be read into the agreement, as completely as if it were therein stated, that the contract is at all times subject to the public duty of the company and subject to the right of the State under the police power to enforce a system of public policy which would invalidate the contract.

The complainants and their predecessors in interest lost all right under their contract, Exhibit 2, when The Philadelphia and Atlantic City Railway Company was sold out under foreclosure proceedings in 1883.

In 1911 the Legislature of New Jersey declared the public policy of the State to be against passes

such as those mentioned in the bill of complaint and made the issuance thereof a misdemeanor.

The issuance of such passes as this defendant has issued to the complainants has been without consideration of any kind. Even an express agreement made since the legislation of 1911, whereby this defendant would obligate itself to issue passes, would give no right to the passes in the face of the public policy and the criminal statutes of the State.

The fact that persons in the position of these complainants lose all their right under the contract when the other contracting party is sold out under foreclosure proceedings was by this Court in 1916 declared to be the law in *Perkins v. Public Service Railway Co.*, 87 N. J. Eq. 134, 138, and since 1916 that has stood unquestioned as the law of New Jersey upon this subject, and in fact has become a rule of property.

FRENCH, RICHARDS & BRADLEY,
Solicitors of Defendant.

REPLICATION.

(Filed October 15, 1931.)

IN CHANCERY OF NEW JERSEY.

Between
HENRY SCHMOELE, *et al.*,
Complainants,
and
ATLANTIC CITY RAILROAD COMPANY,
Defendant.

On Bill, &c.
Replication.

The replication of complainants to defendant's answer in the above-entitled cause:

1. This defendant will object that the matters and things set up in said answer constitute no defense to the complainants' bill and no bar to the relief prayed for by that bill.

2. Complainants join issue on the answer of the defendant.

BLEAKLY, STOCKWELL & BURLING,
Solicitors for Complainants.

INTERROGATORIES.

IN CHANCERY OF NEW JERSEY.

Between
HENRY SCHMOELE, *et al.*,
Complainants,
and
ATLANTIC CITY RAILROAD COMPANY,
Defendant.

On Bill, &c.
Interrogatories.

To the defendant, Atlantic City Railroad Company, and to French, Richards & Bradley, its solicitors:

You are hereby required to make answer to the interrogatories hereinafter set, under oath of such of your officers, agents or employees as have personal knowledge of the facts and/or custody of the books, records and/or papers referred to in said interrogatories, within ten days from the date of service of said interrogatories upon you:

1. Did the Philadelphia and Atlantic City Railway Company, prior to June 9, 1877, have title to the premises described in paragraph 1 of the bill

of complaint? If so, by or under what deed or deeds or other instruments? Give names of parties, dates and book and page of record of any such deeds or instruments.

2. Did the Philadelphia and Atlantic City Railway Company, upon and after the execution of the deed set forth in paragraph 1 of the bill of complaint, enter into possession of the premises described in said deed or any part thereof?

3. Did the Philadelphia and Atlantic City Railway Company lay out its railroad right of way across or over the premises described in paragraph 1 of the bill of complaint?

4. Did the Philadelphia and Atlantic City Railway Company, after June 9, 1877, operate its trains over or across or otherwise use the premises described in paragraph 1 of the bill of complaint or any part thereof?

5. Did the Philadelphia and Atlantic City Railroad Company acquire either title or possession to the premises described in paragraph 1 of the bill of complaint from any other person or corporation or from any other source than by or under the deed from George R. Kaercher to it, dated May 13, 1884, and mentioned in paragraph 7 of the bill of complaint?

6. If your answer to Question No. 5 be yes, then state from what other person or corporation or source did said Philadelphia and Atlantic City Rail-

road Company acquire such title or possession, and by what deed, deeds or other instruments.

7. Did the Philadelphia and Atlantic City Railroad Company, between the date of the deed from George R. Kaercher above mentioned and the date of the merger in 1889 (referred to in paragraph 8 of the bill of complaint), operate its trains over or otherwise use the premises described in paragraph 1 of the bill of complaint, or any part thereof?

8. Did the Atlantic City Railroad Company acquire either title or possession to the premises described in paragraph 1 of the bill of complaint from any other person or corporation or from any other source than as a result of the merger and consolidation in the year 1889 mentioned in paragraph 8?

9. If your answer to Question No. 8 be "yes," then from what other person or corporation or source did said Atlantic City Railroad Company acquire such title or possession, and by what deed, deeds or other instruments?

10. Did the Atlantic City Railroad Company, between the date of the merger and consolidation in the year 1889 (referred to in paragraph 8 of the bill of complaint) and the date of the merger in 1901 (referred to in said paragraph 8), operate its trains over or otherwise use the premises described in paragraph 1 of the bill of complaint, or any part thereof?

11. Did the new company of the same name, to

wit, Atlantic City Railroad Company, resulting from the consolidation in the year 1901 (mentioned in paragraph 8 of said bill), acquire either title or possession to the premises described in paragraph 1 of said bill from any other person or corporation or from any other source than as a result of said merger or consolidation in the year 1901 mentioned in said paragraph 8 of the bill of complaint?

12. If your answer to Question No. 11 be "yes," then from what other person or corporation or source did said new company of the same name, to wit, Atlantic City Railroad Company, acquire such title or possession, and by what deed, deeds or other instruments?

13. Has the new company of the same name, to wit, Atlantic City Railroad Company, from the date of the merger and consolidation in the year 1901 (referred to in paragraph 8 of the bill of complaint) down to the present time, operated its trains over or otherwise used the premises described in paragraph 1 of the bill of complaint, or any part thereof?

14. Did the Philadelphia and Atlantic City Railroad Company receive into its possession the deed mentioned in paragraph 1 of the bill of complaint?

15. Did the Philadelphia and Atlantic City Railroad Company receive into its possession the agreement specified in paragraph 2 of the bill of complaint?

16. Did the Philadelphia and Atlantic City Rail-

road Company record or cause to be recorded the deed set forth in paragraph 1 of the bill of complaint?

17. Did the Philadelphia and Atlantic City Railway Company, upon the execution and delivery of the deed mentioned in paragraph 1 of the bill of complaint and of the agreement mentioned in paragraph 2 of the bill of complaint, issue passes over its road to the persons and in number specified in the agreement mentioned in paragraph 2 of said bill of complaint?

18. Did the Philadelphia and Atlantic City Railroad Company, upon its incorporation and taking title to the right of way of the railroad from George R. Kaercher and until the merger of 1889, issue passes over its road to the persons and in number specified in the agreement mentioned in paragraph 2 of the bill of complaint?

19. Did the Atlantic City Railroad Company, from the time of the merger in 1889, specified in paragraph 8 of the bill of complaint, issue passes over its road to the persons and in number specified in the agreement mentioned in paragraph 2 of the bill of complaint and continue so to do from year to year to and including the year 1929?

20. Does the right of way of the Atlantic City Railroad Company at the present time cross the premises described in paragraph 1 of the bill of complaint?

21. Does the Atlantic City Railroad Company at the present time operate its trains over the premises described in paragraph 1 of the bill of complaint, or any part thereof?

22. Does the Atlantic City Railroad Company at the present time occupy or use for purposes other than its right of way the premises described in paragraph 1 of the bill of complaint, or any part thereof?

BLEAKLY, STOCKWELL & BURLING,
Solicitors for and of Counsel with Complainant.

[ENDORSED]

Service of a copy of the within interrogatories is hereby acknowledged this 10th day of April, 1931.

French, Richards & Bradley,
Solicitors for Defendant.

NOTICE OF MOTION TO STRIKE OUT INTERROGATORIES AND TO HEAR AND DISPOSE OF BEFORE HEARING OF THE PRINCIPAL CASE DEFENSES HERETOFORE PRESENTABLE BY PLEA.

IN CHANCERY OF NEW JERSEY.

Between	On Bill, &c.
HENRY SCHMOELE, *et al.*, *Complainants,*	Notice of Motion to Strike Out Interrogatories and to Hear and Dispose of Before Hearing of the Principal Case Defenses Heretofore Presentable by Plea.
and	
ATLANTIC CITY RAILROAD COMPANY, *Defendant.*	

Gentlemen:

Take notice that on the 20th day of April, 1931, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard thereon, before Hon. E. B. Leaming, the Vice-Chancellor to whom the above-stated cause has been referred, at the Chancery Chambers in Camden, we shall move to strike out

as a whole the 22 interrogatories served by you in the above-stated cause, and failing that shall move to strike out each interrogatory separately upon the ground that the interrogatory is irrelevant, immaterial, does not tend to establish complainant's case, is a prying into the defendant's case, and if the defenses had under the prior practice been presented by plea, would not be permissible.

Further take notice that at the same time and place we shall move the Court to hear and dispose of the defenses heretofore presentable by plea but made in the answer, to wit:

1. This defendant was not in existence when the agreement marked Exhibit 2 was executed and the company party to said agreement thereby agreed that it would itself issue passes but only over the line of "*its* railroad."

2. By the agreement, Exhibit 2, attached to the bill, the complainants and their predecessors in interest agreed, as the consideration for their conveyance, to take the sum of one dollar, eight full paid shares of the capital stock of the Philadelphia and Atlantic City Railway Company and the personal covenant of that company to give to Henry Schmoele and to his personal representative "each and every year during its occupation of said lands free yearly passes over the line of its railroad for eleven persons." The complainants and their predecessors in interest were willing to take the consideration named

in said agreement and actually received the full consideration named therein.

3. The complainants and their predecessors in interest were by law bound to know that in making the agreement, Exhibit 2, they were dealing with a public utility whose first duty was to the public and that there must be read into the agreement, as completely as if it were therein stated, that the contract is at all times subject to the public duty of the company and subject to the right of the State under the police power to enforce a system of public policy which would invalidate the contract.

4. The complainants and their predecessors in interest lost all right under their contract, Exhibit 2, when the Philadelphia and Atlantic City Railway Company was sold out under foreclosure proceedings in 1883.

5. In 1911 the Legislature of New Jersey declared the public policy of the State to be against passes such as those mentioned in the bill of complaint and made the issuance thereof a misdemeanor.

6. The issuance of such passes as this defendant has issued to the complainants has been without consideration of any kind. Even an express agreement made since the legislation of 1911 whereby this defendant would obligate itself to issue passes

would give no right to the passes in the face of the public policy and the criminal statutes of the State.

7. The fact that persons in the position of these complainants lose all their right under the contract when the other contracting party is sold out under foreclosure proceedings was by this Court in 1916 declared to be the law, in *Perkins v. Public Service Railway Co.*, 37 N. J. Eq. 134, 138, and since 1916 that has stood unquestioned as the law of New Jersey upon this subject, and in fact has become a rule of property.

Further take notice that at the same time and place we shall move to dismiss the bill for the reasons set forth at the begining of the defendant's answer.

FRENCH, RICHARDS & BRADLEY,
Solicitors for Defendant.

To BLEAKLY, STOCKWELL & BURLING,
Solicitors for Complainants.

OPINION.

81/96.

IN CHANCERY OF NEW JERSEY.

Between HENRY SCHMOELE, *et al.*, *Complainants,* and ATLANTIC CITY RAILROAD COMPANY, *Defendant.*	Bill for Specific Performance of Contract. Hearing on Motion of Defendant to Dismiss Bill. Opinion.

BLEAKLY, STOCKWELL & BURLING, ESQS., for complainants.

FRENCH, RICHARDS & BRADLEY, ESQS., for defendant.

LEAMING, V. C.:

The primary and controlling inquiry herein is whether the averments of the bill of complaint are adequate to sustain the relief sought by complainants. The relief sought is a decree compelling defendant to issue to complainants what is commonly

known as free passes over its line of railway between Camden and Atlantic City.

Complainants' bill is based upon, and seeks a decree for specific performance of, a written contract made by Philadelphia and Atlantic City Railway Company, a predecessor in title of defendant company, wherein, in part consideration for the conveyance of a certain right of way, that predecessor corporation agreed to issue annually the eleven passes now sought, during the period of occupancy of the land so conveyed. The bill alleges that the right of way which was conveyed is still in use by defendant company.

In Perkins v. Public Service Corporation, 87 N. J. Eq. 134, this Court (Backes, V. C.) determined that a contract of the nature of the one here in question is not only forbidden by our Utilities Act of April 21st, 1911 (P. L. 1911, p. 374), but that its performance renders the parties guilty of a misdemeanor. It is there held that the Utilities Act declares and enforces a public policy of this State—which policy was unrecognized at common law—to secure the public against the evil of preference or advantage being extended by a public utility corporation to any person, corporation or locality, and in consequence renders it unlawful for a public utility corporation to barter its transportation or service for land. That decision must be here regarded as conclusive as to contracts of that nature made since the enactment of our Utilities Act.

The present case in all essential respects is the same as the case of Perkins v. Public Service Corporation (*supra*), except in that the contract here sought to be enforced was made prior to the enact-

ment of the Public Utilities Act. This Court is accordingly asked, in the exercise of its extraordinary jurisdiction of specific performance of contracts, by its decree to compel defendant to perform an act which now is not only contrary to the policy of our laws, but is illegal, and the performance of which may subject defendants to criminal liability. The general rule is that in administering the extraordinary equitable remedy of specific performance, private contractual rights must give way to public needs and like considerations leading to hardships of the defendants or others. See Pomeroy on Specific Performance of Contracts (3rd Ed.), Sec. 181a; Sec. 280a; Public Service Electric Co. v. Public Utility Comrs., 87 N. J. Law, 128, at page 13; same case on review, 88 N. J. Eq. 603. But independently of limitations peculiarly incident to the remedy of specific performance, it is established by a long line of well-recognized authorities, both State and Federal, that contracts with public utility corporations are alway subject to reserved authority in the State, under the police power or express statute, to control rates and regulate management of such utilities in the interest of the public welfare. Further than that it is unnecessary to presently inquire; although the authorities appear to adequately support the view that all private contracts are subject to such implied reservations, the later view being expressed in the general formula that in every private contract there is always a reservation to be implied for the performance of a public duty in which the interests of the State are materially involved. In Adkinson v. Ritchie, 10 East, 531—a suit for damages for

breach of a charter party—Lord Ellenborough, C. J., at page 534, says:

> "That no contract can properly be carried into effect, which was originally made contrary to the provisions of the law; or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt. Neither can it be questioned that if, from a change in the political relations and circumstances of this country, with reference to any other contracts which were fairly and lawfully made at the time, they have become incapable of being any longer carried into effect, without derogating from the clear public duty which a British subject owes to his Sovereign and the State of which he is a member; the nonperformance of a contract in a state so circumstanced is not only excusable, but a matter of peremptory duty and obligation on the part of the subject."

In Barker v. Hodgson, 3 M. & S. 267, at page 270, and also in Esposito v. Bowden, 4 El. & Bl. 963, at page 976, the same general views are declared. See also to like effect the opinion of Mr. Justice Cooley in Cordes v. Miller, 39 Mich. 581.

But confining the present inquiry to contracts made with public utility corporations, the rules already stated will be found to have been sanctioned too frequently to justify specific citation of the many cases. The cases are collected in an annotation to Union Dry Goods Co. v. Georgia Pub. Ser. Com., 248 U. S. 372, found in 9 A. L. R., beginning at page

1423, under the caption: "Power of a State to change private contract rates for public utilities." That annotation is supplemented in 11 A. L. R., beginning at page 460. In the Federal case there annotated, as well as in the numerous cases cited in the annotations, it is specifically determined that such contracts must be understood as made in reference to the possible exercise of the rightful authority of the government and no obligation of such a contract can extend to the defeat of legitimate governmental authority, and that rates prescribed by a State in the exercise of its police power are not repugnant to the contract or due process of law clauses of the Federal Constitution merely because, if given effect, they will supersede the rates designated in private contracts between the utility and its customer, entered into at a prior time; that private contract rights must yield to the public welfare where the latter is appropriately declared and defined and the two conflict. Only a few of the numerous cases dealing with this subject will be here specifically cited. Louisville & Nashville R. R. Co. v. Mottley, 119 U. S. 467; Mill Creek & Coke Co. v. Public Ser. Com. (W. Va.), 100 S. E. Rep. 557; Schafer v. Cleveland & E. Ry. Co., 265 Pa. 109; Erie R. Co. v. Pub. Utility Comrs., 89 N. J. Law, 57 (Aff. 90 N. J. Law, 673), in which case the principle is specifically declared (page 88) to the effect that a contract which a utility corporation is empowered by the State to enter into is made subject to the future exercise by the State of its police power, and hence the obligation of such contract is not in a constitutional sense impaired by such future legislation; Edison Stor. Bat. Co. v. Public Utility Board, 93 N. J.

Law, 301; Lehigh Valley R. R. Co. v. United Lead Co., 102 N. J. Law, 545, at page 549; Bayonne v. Passaic Con. Water Co., 99 N. J. Eq. 174, at pages 178-9. It necessarily follows that the contract here in controversy must give way to the provisions of our Utility Act, as the provisions of that Act touching preferential rates has been construed by this Court in Perkins v. Public Service Railway Co., *supra*.

The motion to dismiss the bill must be sustained.

Submitted May 18, 1931.

Determined May 28, 1931.

DECREE DISMISSING BILL.

81-96.

IN CHANCERY OF NEW JERSEY.

Between
HENRY SCHMOELE, *et al.*,
Complainants,
and
ATLANTIC CITY RAILROAD COMPANY,
Defendants.

On Bill, &c.
Decree Dismissing Bill.

A motion having been made by the defendant, Atlantic City Railroad Company, to dismiss the complainant's bill of complaint upon a number of grounds set forth in the notice of the motion given to the complainants, and the Court having heard the arguments of French, Richards & Bradley, solicitors of the defendant, and of Bleakly, Stockwell & Burling, solicitors of the complainants, and being of opinion that the averments of the bill are not adequate to sustain the relief sought by complainants and that the contract set forth in the bill of complaint must give way to the provisions of our Utility Act, as the provisions of that Act touching prefer-

ential rates have been construed by this Court in Perkins v. Public Service Railway Co., 87 N. J. Eq. 134:

It is thereupon, on this 3rd day of June, 1931, ordered, adjudged and decreed that the complainant's said bill of complaint be and the same is hereby dismissed with costs.

E. R. WALKER,
C.

Respectfully advised:
E. B. LEAMING,
V. C.

NOTICE OF APPEAL.

(Filed June 26, 1931.)

IN CHANCERY OF NEW JERSEY.

Between HENRY SCHMOELE, *et al.*, *Complainants,* and ATLANTIC CITY RAILROAD COMPANY, *Defendant.*	On Bill, &c. Notice of Appeal.

The complainants, Henry Schmoele, and Charles Schmoele and Ida Schmoele, trustees, hereby appeal from the final decree dismissing complainants' bill, made by the Chancellor on the advice of Vice-Chancellor E. B. Leaming in the above-entitled cause, on the third day of June, 1931, and from every part thereof, to the Court of Errors and Appeals, in the last resort in all causes.

BLEAKLY, STOCKWELL & BURLING,
Solicitors for and of Counsel with Complainants.

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

HENRY F. STOCKWELL,
Of Counsel with Complainants.

[ENDORSED]

Service of a copy of the within notice is hereby acknowledged this day of June, 1931.

.....
Solicitors for Defendant.

PETITION OF APPEAL.

(Filed July 28, 1931.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

HENRY SCHMOELE, *et al.*, *Complainants-Appellants*, and ATLANTIC CITY RAILROAD COMPANY, *Defendant-Respondent.*	On Appeal from the Court of Chancery. Petition of Appeal.

To the Honorable, the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Henry Schmoele, and Charles Schmoele and Ida Schmoele, trustees, the appellants in the above-entitled cause, respectfully shows that:

Petitioners find themselves aggrieved by an order or decree made in the Court of Chancery of New Jersey by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, dated June 3, 1931, in a certain cause in said Court of Chancery, wherein Henry Schmoele, and Charles Schmoele and

Ida Schmoele, trustees, are complainants and the said Atlantic City Railroad Company is defendant; in the following respects, to wit: in that the decree adjudges that the averments of the bill of complaint are not adequate to sustain the relief sought by the complainants and that the contract set forth in the bill of complaint must give way to the provisions of our Utility Act, as the provisions touching preferential rates have been construed by this Court in Perkins v. Public Service Railway Co., 87 N. J. Eq. 134, and in that it decrees that the complainants' bill be dismissed with costs.

The petitioners appeal from said order or decree of the Court of Chancery, upon the ground that the same is erroneous in that it decrees:

That the averments of complainants' bill are not sufficient to sustain the relief sought by the complainants.

That the contract set forth in the bill of complaint must give way to the provisions of the Utility Act of 1911, as the provisions of that Act touching preferential rates have been construed by the said Court of Chancery in *Perkins v. Public Service Railway* Co., 87 N. J. Eq. 134.

That the complainants' bill be dismissed with costs.

That the Utility Act of 1911 applies to the contract set up in the complainants' bill, whereas said statute applies only to contracts made after said statute became effective.

That the issuing of the passes required by said contract constitutes a preferential rate under said Utility Act.

That the said statute makes illegal the issuing of

the passes to complainants in pursuance of the terms of said contract.

That complainants are not entitled to any relief under their said bill of complaint by reason of the said statute.

Said decree is also erroneous in that it denies to complainants any and all relief under said bill, although the facts disclosed therein entitle the complainants to full and adequate relief from this Court either by compelling defendant to issue said passes or other appropriate and adequate relief.

By said decree the Court deprives the complainants of the consideration moving to them under the said contract, while allowing the defendant to retain, occupy and use the lands conveyed by the complainants pursuant to the terms of said contract. If the Court could not or would not by its decree compel the issuing to complainants of said passes, it was bound to award to complainants adequate alternative relief, either by compelling the defendant to reconvey to the complainants the said lands and premises and by enjoining the use thereof by the defendant, or by fixing the money value of the said passes for the remaining period of said contract and decreeing the payment thereof by the defendant to the complainants.

Petitioners, therefore, pray that the said decree of the Chancellor may be wholly reversed, set aside and for nothing holden, and that the petitioners may have such other relief in the premises as to this Court shall seem proper.

BLEAKLY, STOCKWELL & BURLING,
Solicitors for and of Counsel with Appellants.

[Endorsed]

Consent is hereby given to the filing of the within Petition of Appeal out of time.

French, Richards & Bradley,
Solicitors for Respondent.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Henry Schmoele, *et al.*, *Complainants-Appellants*, and Atlantic City Railroad Company, *Defendant-Respondent.* — On Appeal from the Court of Chancery. Answer to Petition of Appeal.

The answer of Atlantic City Railroad Company, the above-named respondent, to the petition of appeal of Henry Schmoele, *et al.*, appellants:

This respondent, not admitting the truth of all or any of the matters in said petition of appeal contained, for answer thereto nevertheless admits that an order or decree was, on June 3, 1931, made and entered in the Court of Chancery of New Jersey, in the above-stated cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said order or decree, this respondent begs leave to refer thereto when the same shall be produced.

This respondent is advised and believes that the said order or decree is agreeable to equity; and it prays that the same may be affirmed with costs to be taxed in favor of this respondent.

FRENCH, RICHARDS & BRADLEY,
Solicitors for and of Counsel with Respondent.

NOTICE OF HEARING.

(Filed Aug. 21, 1931.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between HENRY SCHMOELE, *et al.*, *Complainants-Appellants,* and ATLANTIC CITY RAILROAD COMPANY, *Defendant-Respondent.*	On Appeal from Court of Chancery Notice of Hearing.

To the respondent, and to French, Richards & Bradley, its solicitors:

Take notice that the argument of the appeal in the above-entitled cause will be brought on at the next term of the Court of Errors and Appeals, to be held at the State House, at Trenton, on Tuesday, the twentieth day of October, A. D. 1931, at the hour of eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard.

BLEAKLY, STOCKWELL & BURLING,
Solicitors for and of Counsel with Appellants.

[ENDORSED]

Service of a copy of the within notice of hearing is hereby acknowledged this 20th day of August, 1931.

French, Richards & Bradley,
Solicitors for Respondent.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
HENRY SCHMOELE, *et al.*,
Complainants-Appellants,
and
ATLANTIC CITY RAILROAD COMPANY,
Defendant-Respondent.

ON APPEAL FROM COURT OF CHANCERY.

BRIEF FOR APPELLANTS.

The decree appealed from dismisses appellants' Bill. Defendant filed its Answer, the cause was set down for final hearing and thereafter complainant served on the defendant twenty-two interrogatories (State of Case, pp. 44 to 50), in support of the averments of the Bill. Defendant thereupon gave notice to strike out the interrogatories (page 51), and included in that notice a motion to

> "dispose of the defenses heretofore presentable by plea" (Case, p. 51).

No proofs, oral or otherwise, were taken in support of defendant's motion.

The defendant, therefore, never answered the interrogatories and defendant's motion resolved itself into a motion to dismiss the Bill. It will be noticed, however, that the defendant, by its Answer, admits the execution and delivery of the deed (paragraph 1, Case, p. 39), and the execution and delivery of the agreement (par. 2, Case, p. 40), possession by the grantee thereof (par. 5, Case, p. 40), the chain of title down to and including the present defendant (paragraphs 6, 7 and 8, Case, p. 40), the possession and use of the right of way by the present defendant (par. 10, Case, p. 41), the issuing of passes to the appellants (par. 13, Case, p. 41).

STATEMENT.

Briefly stated, the facts set up in the appellants' Bill are as follows:

—On June 9, 1877, appellants conveyed to defendant's predecessor, the Philadelphia and Atlantic City Railway Company, a New Jersey corporation, numerous parcels of land and premises in the Townships of Mullica and Galloway, Atlantic County, for the right of way of the railroad, which is the present so-called "Reading Railroad" between Camden and Atlantic City. The grantors therein

> "granted and conveyed and do hereby grant and convey to said Philadelphia and Atlantic

> City Railway Company a right of way for the purposes of its said railroad in, upon, through and over certain lands, &c." (Case, p. 14).

Concurrently with the execution and delivery of that deed of conveyance (Exhibit 1, p. 13, Case), said Philadelphia and Atlantic City Railway Company executed an agreement in writing with the appellants and those represented by the appellants, said agreement bearing the same date, to wit, June 9, 1877 (Exhibit 2, p. 18, Case). This agreement was recorded October 18, 1877, in the office of the Clerk of Atlantic County. By its terms the railway company agreed:

> "to give to the said Henry Schmoele (one of the appellants) or in the event of his death to his personal representatives, or to such person as he, or in the event of his death, such personal representative shall designate annually, during the first week in January of each and every year during its occupation of said lands free yearly passes over the line of its railroad, for eleven persons to be named by said Henry Schmoele or in the event of his death by his personal representative, before said passes are issued, and further that the said corporation or its successors will on the surrender of either or any of said eleven passes issue a new one or new ones in lieu thereof to such person as shall be named by said Henry Schmoele or in the event of his death by his personal representative, provided that no pass surrendered shall be renewed more than once in one year" (Case, pp. 19-20).

Furthermore, this agreement recites the concurrent execution of the deed to the Railway Company by the appellants and states:

> "the consideration of said grant being the *performance of this agreement* and eight full paid shares of the capital stock of the said party of the first part and also the sum of one dollar" (Case, p. 19).

The deed likewise refers to the agreement and recites as the consideration therefor:

> "in consideration of the premises of the sum of one dollar and eight full paid shares of the capital stock of the said corporation to us in hand well and truly paid, the receipt whereof is hereby acknowledged *and a certain agreement bearing even date* herewith, have granted and conveyed, &c." (Case, p. 14).

Immediately upon the execution of the deed and agreement, the Railway Company was put into possession and it and its successors in title have been in possession of those lands and premises ever since, and the present successor in title, Atlantic City Railroad Company, is in possession thereof and operates its line between Camden and Atlantic City over said right of way and the land so conveyed. The Railway Company, which was the grantee in said deed, not only went into possession of said property and laid out its railroad over said premises, but complied with the terms of the agreement and paid the consideration recited therein. All of the successors in title of the grantee named in said

deed have adopted the terms of said agreement and carried out the obligations imposed thereby with respect to said property and its use in favor of the appellants up to and including the year 1929. The defendant, however, for the year 1930, upon request of the appellants to issue the passes called for by the agreement for the year 1930, refused to issue them and notified appellants that the defendant was not bound by the terms of the agreement of June 9, 1877, and asserted that it was not required to issue these passes. Appellants complied with the terms of their agreement and for the year 1930 requested the issuing of passes as theretofore and named eleven persons to receive them.

The Bill further recites that before the execution of the deed by the Schmoeles to the Railway Company and before the execution of the agreement, the Railway Company executed a mortgage of $500,000 upon its right of way from Camden to Atlantic City, purporting to cover all

> "rights of way, lands, depots, etc., then held or thereafter to be acquired by said Railway Company,"

said mortgage being recorded May 2, 1877. Foreclosure proceedings were thereafter instituted and on October 13, 1883, the Master under said proceedings granted and conveyed all the right of way between Atlantic City and the City of Camden to one Kaercher. Kaercher, in turn, conveyed the property to a new corporation formed to take over the road, to wit, Philadelphia and Atlantic City Railroad Company. Thereafter, by sundry mergers and consolidations, the right of way became vested in

the present defendant. Not only the original grantee in the deed, but the successors in title have all retained title to said property and received the benefits therefrom and have recognized and carried out the terms of the Schmoele agreement by issuing the stipulated number of passes until the year 1930.

The Bill prays for a decree of specific performance requiring the defendant to issue and deliver the passes called for in that agreement; that the Court may determine the value of the passes which remain unissued up to a decree in the cause; that the defendants shall be required to pay the value of those unissued passes and that the defendant may be enjoined from occupying or using the lands described in the agreement and deed until it shall have fully complied with the terms of the agreement.

Defendant, without answering the interrogatories served upon it, moved to dismiss the Bill. The learned Vice-Chancellor granted defendant's motion and entered his Decree of Dismissal, from which the appeal is now taken. The Court's Decree of Dismissal is, by the terms of that decree, rested on a theory

> "that the averments of the Bill are not adequate to sustain the relief sought by complainants and that the contract set forth in the bill of complaint must give way to the provisions of our Utility Act, as the provisions of that Act touching preferential rates have been construed by this Court in Perkins v. Public Service Railway Co., 87 N. J. Eq. 134" (Decree, Case, pp. 61-62).

The Court, in its opinion, bases the Decree of Dismissal on the following grounds:

1. That the performance by the defendant of this contract of 1877 is prohibited by the Utilities Act of 1911 and that, therefore, defendant is excused from performance.

2. That the issuing of these particular passes under the contract in question would violate a Public Policy of the State of New Jersey as established by the Utilities Act of 1911, and it might subject the defendant to criminal liability.

3. That, therefore, this Court of Equity should refuse to grant to the appellants the equitable remedy of specific performance.

Appellants contend that the grounds of refusal of relief to appellants set forth in the opinion, and as likewise stated in the Decree itself, are invalid and contrary to established principles, and that the facts stated in the Bill of Complaint, if established at final hearing, would require a decree for the appellants in accordance with the prayer of their Bill.

I.

THE UTILITIES ACT OF 1911 APPLIES TO AND AFFECTS *ONLY* FUTURE ACTS AND CONTRACTS. ITS LANGUAGE IS PROSPECTIVE ONLY AND IN NO SENSE RETROACTIVE. THEREFORE, THE CONTRACT IN QUESTION, MADE IN THE YEAR 1877, UNDER WHICH THE APPELLANTS PAID THE FULL CONSIDERATION BY DEEDING THEIR PROPERTY TO THE RAILWAY COMPANY, AND THE PERFORMANCE OF THAT CONTRACT, ARE ENTIRELY OUTSIDE THE APPLICATION OF THE 1911 STATUTE.

A. This question was directly and expressly decided by this Court in *Public Service Electric Co. v. Board of Public Utility Commissioners,* 88 N. J. L. 603. The cited case dealt with the very law now involved—the Utilities Act of 1911. The Public Service Company there sought to escape performance of an agreement with the City of Plainfield, under which the company had contracted to furnish, without charge, certain lighting service to the City. The Utilities Commission had ordered the Company to carry out the agreement. The Supreme Court, upon certiorari, set aside that order

> "upon the ground that the provision of the agreement for free service to the municipality was avoided by the enactment of the Public Utility Act prohibiting undue and unreasonable discrimination."

This Court, on appeal, held that the Public Utility Act of 1911 was prospective only and not retroactive and that it did not apply to the contract between the Public Service Company and Plainfield. This Court did, however, hold that the Utilities Commission had no power to order specific performance of a contract and that an order or decree of specific performance is an equitable power, "exclusively inherent in the Court of Chancery."

The Sections of the 1911 Statute which are pertinent are as follows:

> "18. No public utility as herein defined shall:
>
> (a) Make, impose or exact any unjust or unreasonable, unjustly discriminatory or unduly preferential individual or joint rate, commutation rate, mileage and other special rate, toll, fare, charge or schedule for any product or service supplied or rendered by it within this State.
>
> (b) Adopt or impose any unjust or unreasonable classification in the making or as the basis of any individual or joint rate, toll, fare, charge or schedule for any product or service rendered by it within this State.
>
> (c) Adopt, maintain or enforce any regulation, practice or measurement which shall be unjust, unreasonable, unduly preferential, arbitrarily or unjustly discriminatory or otherwise in violation of law; nor shall any public utility as herein defined provide or maintain any service that is unsafe, improper or inadequate, or withhold or refuse any service which can reasonably be demanded and furnished when ordered by said board.

(d) Make or give, directly or indirectly, any undue or unreasonable preference or advantage to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic to any prejudice or disadvantage in any respect whatever'' (pages 380-381, chapter 195, Laws of 1911).

''34. Any person who shall knowingly and wilfully perform, commit or do, or participate in performing, committing or doing, or who shall knowingly and wilfully cause, participate or join with others in causing any public utility corporation or company to do, perform or commit, or who shall advise, solicit, persuade, or knowingly and wilfully instruct, direct or order any officer, agent or employe of any public utility corporation or company to perform, commit or do any act or thing forbidden or prohibited by this act, shall be guilty of a misdemeanor.

35. Any person who shall knowingly and wilfully neglect, fail or omit to do or perform, or who shall knowingly and wilfully cause or join or participate with others in causing any public utility corporation or company to neglect, fail or omit to do or perform, or who shall advise, solicit or persuade, or knowingly and wilfully instruct, direct or order any officer, agent or employe of any public utility corporation or company to neglect, fail or omit to do any act or thing required to be done by this act shall be guilty of a misdemeanor.

36. Any public utility corporation which

shall perform, commit or do any act or thing hereby prohibited or forbidden, or which shall neglect, fail or omit to do or perform any act or thing hereby required to be done or performed by it, shall be guilty of a misdemeanor" (pages 387-388).

This Court, in the cited case, construed the 1911 Act and Section 18 as follows:

> "The language of Section 18 of the Act concerning public utilities (Pamph. L. 1911, p. 380) is that 'no public utility as herein defined shall (a) make, impose or exact any unjust or unreasonable, unjustly discriminatory or unduly preferential * * * rate,' &c., or (d) 'make or give, directly or indirectly, any undue or unreasonable preference or advantage to any person or corporation or to any locality,' &c. This language, it will be observed, is entirely prospective and not at all retroactive."
>
> "It has been decided over and over again that statutes are to be given prospective and not retroactive effect unless their language makes them retroactive and admits of no other construction. See Citizens Gas Light Co. v. Alden, 44 N. J. L. 648; Williams v. Brokaw, 74 N. J. Eq. 561; Frelinghuysen v. Morristown, 77 N. J. L. 493; Plahn v. Givernaud, 96 Atl. Rep. 40" (page 607).

And further (at page 608):

> "The language of the statute against unjust discrimination and unreasonable preference is,

> that they 'shall' not be made or given, and there is no language indicative of an intent on the part of the legislature to make provision that contracts already in existence shall come under the ban of this prohibition. The word 'shall' is an irregular auxiliary verb, and used with the verb 'make,' is a verb phrase, which, in this statute, is used to prohibit a contingent future event. See State v. Griffin, 85 N. J. L. 613, 616. It is perfectly clear that the statute is without retroactive effect, and that it cannot operate upon the contract of 1898, which, concededly, was unlawful when made. There is, therefore, no question in the case as to the State's power to impair or abrogate a contract to which a municipality or the public are parties."

This Court, in the cited case, refers to a supplement to the Crimes Act (Pamphlet Laws 1913, p. 27), which make it a misdemeanor for a public utility

> "to discriminate between different persons, firms, associations, &c."

This particular supplement to the Crimes Act, however, was repealed by Chapter 144 of the Laws of 1920, page 286.

The statutory provisions governing this controversy are, therefore, the above recited sections of the 1911 Utilities Act.

The principle of construction laid down in this leading authority followed an unbroken line of decisions of this Court and other Courts of this State.

Citizens Gas Light Co. v. Alden, 44 N. J. L. 648; *Williams v. Brokaw,* 74 N. J. Eq. 561; *Frelinghuysen v. Morristown,* 77 N. J. L. 493; *Plahn v. Givernaud,* 96 Atl. Rep. 40; *State v. Griffin,* 85 N. J. L. 613; *Spencer v. Middlesex Tax Board,* 95 N. J. L. p. 9, Sup. Ct.; *Riesen v. Riesen,* 105 N. J. Eq. 144 (V.-C. Fallon).

B. In the Court below, defendant suggested that the determination of this question in the Court of Errors and Appeals in the leading case (*Public Service Electric Co. v. Board of Public Utility Commissioners,* 88 N. J. L. 603) was mere dictum. With this claim we disagree. The Public Service Company rested its refusal to be bound by the agreement there involved upon the proposition that it was prohibited from performance by the 1911 Statute. That question was directly involved in the appeal from the Supreme Court and was deliberately considered and passed upon by this Court. Whether the point considered was technically "necessary to a decision" or it is to be regarded as "judicial dictum", this decision by this Appellate Court should be considered as final and conclusive on the application of this Utilities Act.

This is clearly demonstrated by the following authorities:

United Globe & Rubber Co. v. Conard, et al., 82 N. J. L. 680 (Court of E. & A.).

Kutschinski v. Thompson, 101 N. J. Eq. 660 (V.-C. Fallon).

Crescent Ring Co. v. Travelers Indemnity Co., (E. & A.), 102 N. J. L. 85.

In *McGraw v. Merryman* (Court of Errors & Appeals for the State of Maryland), 104 Atl. Rep., p. 540, the rule is laid down as follows:

> "All that is necessary, in Maryland, to render a decision of the Court of Appeals authoritative on any point decided is to show there was an application of the judicial mind to the precise question adjudged; and this we apprehend is the rule elsewhere."

C. IF THEN THE 1911 UTILITIES ACT HAS NO APPLICATION TO THE APPELLANTS' CONTRACT, IT NECESSARILY FOLLOWS THAT THE PERFORMANCE OF THAT CONTRACT BY THE DEFENDANT BY THE ISSUING OF THE PASSES IS NOT PROHIBITED BY THAT STATUTE AND NO TAINT OF ILLEGALITY ATTACHES TO THE ISSUING OF THOSE PASSES.

The making of that contract and the issuing of the passes as the consideration for the conveyance of appellants' property to the Railroad Company was not prohibited at common law. The so-called "Public Policy" on this question came into being only with the enactment of the Law of 1911. There was nothing wrongful in the contract, either in morals or in law. The penalties for disobedience of its provisions (Sections 34, 35 and 36, Laws of 1911, pp. 387-388) touch and relate only to the prohibitions laid down in that Act, to wit, Section 18, sub-sections (a), (b), (c) and (d), hereinabove set out in full

(Laws of 1911, pp. 380-381). Since this Statute does not apply to the contract of 1877, the penalty provisions mentioned in that Act (Sections 34, 35 and 36 above recited) do not apply to any act of the defendant in the performance of that contract of 1877.

Therefore, defendant cannot be excused from carrying out that lawful contract on any theory of illegality in the instrument or in the acts of performance thereunder or on any claim that its performance might subject it to some criminal liability.

In view of the definite and conclusive principles laid down by this Court in *Public Service Electric Co. v. Board of Public Utility Commissioners,* governing the application of the Statute of 1911, the reference by the Court below to the question—has the Legislature the power to pass a Utilities Act applying to past contracts and past acts—is purely academic.

II.

A REFUSAL TO GRANT RELIEF TO THE APPELLANTS BY A DECREE OF SPECIFIC PERFORMANCE IS NOT JUSTIFIED ON ANY THEORY THAT THE ISSUING OF PASSES UNDER THE PARTICULAR CONTRACT WOULD VIOLATE ANY PUBLIC POLICY OF THIS STATE OR THAT IT MIGHT SUBJECT DEFENDANT TO CRIMINAL LIABILITY.

The Court below, in its opinion, makes the following statement:

> "This Court is accordingly asked, in the exercise of its extraordinary jurisdiction of specific performance of contracts, by its decree to compel defendant to perform an act which now is not only contrary to the policy of our laws, but is illegal, and the performance of which may subject defendant to criminal liability. The general rule is that in administering the extraordinary equitable remedy of specific performance, private contractual rights must give way to public needs and like considerations leading to hardships of the defendants or others."

But, as we have already shown:

—The contract of 1877 is not affected in any way by the Statute of 1911; and

—The performance of that contract by the parties cannot be governed or affected by that statute:

—And the contract and its performance were and are perfectly lawful by the common law and no criminal liability could attach to any act in the performance of that contract.

Therefore, as a necessary result:

> —There was no Public Policy of this State on this question before the 1911 Statute was enacted; and
>
> —That 1911 Statute did not attempt to create or enforce any Public Policy in relation to *past contracts.*

The learned Vice-Chancellor, in his opinion (page 57, line 9) held:

> "The general rule is that in administering the extraordinary equitable remedy of specific performance, private contractual rights must give way to public needs and like considerations leading to hardships of the defendants or *others.*"

There was no "public need" to be satisfied so far as this old contract of the appellants was concerned. Furthermore, there were no

> "like considerations leading to hardships of the defendants or others"

in any way involved. In short, if we assume that the Statute of 1911 does not apply to this contract, then there appears in the case no element which, by established equitable principles and rules, would justify a refusal to appellants of this equitable remedy of specific performance.

III.

The principles which govern a court of equity in the exercise of a legal discretion, upon any application for relief by specific performance, are as follows:

Fry on Specific Performance, Sixth Ed., page 19, Section 46:

> "But of the circumstances calling for the exercise of this discretion, the Court judges by settled and fixed rules; hence the discretion is said to be not arbitrary or capricious, but

judicial; hence, also, if the contract has been entered into by a competent party, and is unobjectionable in its nature and circumstances, specific performance is as much a matter of course, and therefore of right, as are damages. The mere hardship of the results will not affect the discretion of the Court."

Section 618, page 199:

"The question of the hardship of a contract is generally to be judged of at the time at which it is entered into: if it be then fair and just and not productive of hardship, it will be immaterial that it may, by the force of subsequent circumstances or change of events, have become less beneficial to one party, except where these subsequent events have been in some way due to the party who seeks the performance of the contract. For whatever contingencies may attach to a contract, or be involved in the performance of either part, have been taken upon themselves by the parties to it. It has been determined that the reasonableness of a contract is to be judged of at the time it is entered into, and not by the light of subsequent events, and we have already seen that the same principle applies in considering the fairness of a contract."

In Section 482, page 232, the author touches on the question of the possible illegality of a contract:

" 'The agreement must be legal or illegal, and it is not within the discretion of the Court to refuse specific performance because an agree-

ment savours of illegality. It must be shown to be illegal.' ''

Of course, in the case now before the Court, our contention is that the contract was not illegal and was not made illegal by the 1911 Statute and does not even ''savour'' of illegality.

In *Lean v. Leeds,* 92 N. J. Eq. 459 (Court of E. & A.) the decision adopted the opinion of Vice-Chancellor Leaming in the Court of Chancery. That opinion, at page 459, reads as follows:

> ''Mr. Fry, in his work on Specific Performance, states the rule to be, without limitation or exception, that if a contract is fair and unobjectionable at its inception, no change of circumstances or relations or events, however unexpected, and however much inequality and hardship they may produce in the operation of the agreement, shall constitute a sufficient ground for denying the remedy of specific performance.''

We have failed to find any element of hardship or other element or fact in this case which would bring it within any recognized exception to the rule above outlined.

Pomeroy's Equity, 4th Ed., Section 1404, page 3329, on the question of ''judicial discretion'':

> ''Where, however, the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced wthout hardship to either party, it is as much a matter of course

for a court of equity to decree its specific performance as for a court of law to award a judgment of damages for its breach."

To the same effect is 25 *R. C. L.*, Sec. 15, page 217.

Blake v. Flatley, 44 N. J. Eq. 231 (Court of E. & A.).

Certainly no element of unfairness, hardship, misunderstanding or mistake or lack of consideration can be inferred from the present contract and no element of unfairness or harshness can be raised in favor of the public against this contract because of the enactment of the Utilities Act of 1911. The statement of facts in the Bill presents a *prima facie* case entitling the appellants to relief. To deny that relief would impose an extraordinary hardship upon the appellants, by denying to them the consideration of their contract and leaving the defendant in the possession of the lands conveyed by the appellants.

The contract was in every way fair, the defendant's predecessors and the defendant took and still hold this valuable stretch of right of way, and the defendant maintains its right of way upon it and operates its trains over it. The Railroad Company drove its own bargain and obtained its right of way without payment of cash and, of course, it is the date of the contract we are to consider when we determine the question of fairness. The terms of that contract are clear and unmistakable and it has been recognized and carried out over a period of many years by the defendant and its predecessors. Now defendant would refuse to further perform and

would refuse to deliver to the complainants the consideration stipulated both in the contract and in the conveyance, but would retain, use and enjoy the right of way appellants deeded to them.

Vice-Chancellor Backes, in *Perkins v. Public Service Railway Company,* 87 N. J. Eq. 136, in considering the law as it stood before the enactment of the 1911 Utilities Act made the following statement:

> "The relative rights of the individual were apparently not considered (before the Act of 1911) and, correspondingly, a carrier who bartered his transportation for land or other considerations obviously could not be tolerated to escape the performance on the grounds of failure of a public duty to charge all reasonably equal."

Defendant is seeking to do that very thing, namely, escape performance on the ground of a public duty, which, in fact, did not exist when the contract was made and which, under the authority of this Court, has no application to appellants' contract.

Reference should be made to the case last cited, to wit, *Perkins v. Public Service Railway Company,* 87 N. J. Eq. 134, in view of the language of the Court of Chancery in its decree in the present case, where it says (Case, pp. 61-62):

> "the contract set forth in the bill of complaint must give way to the provisions of our Utility Act, as the provisions of that Act touching preferential rates have been construed by

> our Court in Perkins v. Public Service Railway Co., 87 N. J. E. 134."

The cited case related to a contract made *after* the Statute of 1911. This Court has construed this Act in its own opinion, in *Public Service Electric Co. v. Board of Public Utility Commissioners,* 88 N. J. L. 603. We can, therefore, find no justification for the use of this language in the decree of the Court of Chancery. If the statute in question has no application to this contract, then there is certainly no occasion for this contract "to give way" before that Utilities Statute.

DEFENDANT, ON ITS MOTION TO DISMISS THE BILL, RAISED CERTAIN POINTS WHICH ARE NOT MENTIONED IN THE COURT'S OPINION OR IN THE DECREE. WE ASSUME THAT IT IS NECESSARY TO COVER THOSE POINTS, EVEN THOUGH THEY WERE NOT CONSIDERED IN THE COURT BELOW.

IV.

Paragraph 1 of defendant's notice (p. 52, Case) asserts that:

> "Defendant was not in existence when the agreement was made"

and that the passes were to be issued only over the line of "*its railroad.*"

Paragraph 4 in the notice (page 53) asserts that

> "complainants lost all right under their contract"

when the Philadelphia and Atlantic City Railway Company was sold out under foreclosure proceedings in 1883.

In other words, these three paragraphs of the notice make the point that the successors in title of the original grantee (including the present defendant) are not bound by the contract in question and that whatever rights appellants had were lost by reason of the foreclosure of the mortgage covering the Corporation's right of way, etc.

1. APPELLANTS' BILL EXPRESSLY AVERS AN ADOPTION OF THAT CONTRACT BY THE DEFENDANT, AS WELL AS BY HIS PREDECESSORS IN TITLE FOLLOWING THE ORIGINAL CORPORATION, THE USE AND OCCUPATION OF THE PREMISES PURSUANT TO THE TERMS OF THE ORIGINAL AGREEMENT, AND THE CARRYING OUT OF ITS TERMS BY THE SUCCESSORS OF THE ORIGINAL CORPORATION AND EVEN BY THE DEFENDANT CORPORATION.

2. THE COVENANT TO ISSUE PASSES CONTAINED IN THE SCHMOELE AGREEMENT AMOUNTS TO A COVENANT RUNNING WITH THE LAND AND ATTACHED THERETO IN THE HANDS OF EACH SUCCEEDING OWNER.

A. The Schmoele deed recited the contract with the railroad and the contract recited the agreement as consideration for that deed. The agreement,

therefore, became a part of the deed, and the deed a part of the agreement. The deed further recited:

> "to have, hold, occupy, possess and enjoy the same for the purposes aforesaid to the use of said corporation, its successors and assigns, as long as the same shall be used for the purpose of a railroad and no longer" (Case, p. 16, lines 11 to 15).

In the agreement, the Railroad Company covenants

> "for itself and its successors" (Case, p. 19, line 28).

B. Paragraphs 6 and 7 of the Bill (Case, pp. 4 and 5) recite the execution of a large mortgage before the execution of the Schmoele deed and agreement, with a provision therein for after-acquired property. There was a foreclosure a few years after the Schmoeles parted with their title and the property bid in by an individual and transferred to a new corporation of similar name. Paragraph 14 (page 11) avers that each of the successors in title to the original grantee, down to and including the present defendant

> "received title thereto and took possession thereof with full notice of the rights of Henry Schmoele and the other grantors named in said deed and subject to and burdened with the obligations arising thereout and specifically to issue the free yearly passes provided by said agreement to be issued, &c."

C. THERE IS NO AVERMENT IN THE ANSWER THAT THE SCHMOELES WERE MADE PARTIES DEFENDANT IN THAT FORECLOSURE PROCEEDING. IN FACT, ONE OF THE PROOFS WE SHALL SUBMIT AT THE FINAL HEARING IS THE RECORD IN THAT FORECLOSURE SUIT WHICH SHOWS THAT NONE OF THE GRANTORS IN THAT SCHMOELE DEED WERE MADE PARTIES DEFENDANT IN THAT FORECLOSURE SUIT. NOT ONLY SO, BUT AS SHOWN BY THE BILL, THE DEED FROM THE SCHMOELES TO THE RAILROAD WAS NOT RECORDED UNTIL AFTER THE SALE UNDER THE FORECLOSURE PROCEEDINGS, SO THAT THAT RECORD MUST HAVE BEEN MADE BY AND FOR THE BENEFIT OF THE PURCHASER AT THAT SALE AND THE CORPORATION SUCCEEDING IT. WHILE THE DEED IS DATED JUNE 9, 1877, IT IS NOT RECORDED UNTIL APRIL 5, 1886 (page 2, line 24, Case), AND THE DEED UNDER THE FORECLOSURE PROCEEDING WAS DATED OCTOBER 13, 1883 (p. 5, line 16, Case).

D. THE COVENANT TO ISSUE THE PASSES IS THE EQUIVALENT OF A COVENANT TO PAY RENT BY A RESERVATION IN THE DEED. A PLAIN READING OF BOTH DOCUMENTS SHOWS THAT THE PASSES WERE TO BE ISSUED DURING OCCUPANCY AND THAT IT WAS TO BE A CONTINUING COVENANT WITHOUT LIMIT OF TIME. UNDER

THOSE CIRCUMSTANCES, THE COVENANT IS IN REALITY ONE TO PAY RENT OR THE EQUIVALENT OF RENT, AND, THEREFORE, A COVENANT RUNNING WITH THE LAND.

Munro v. Syracuse, Lake Shore & N. R. Co., 200 N. Y. Rep. (N. Y. Court of Appeals) 224, &c.

Here the Court held that the agreement to issue the passes was in the nature of a covenant real; that the deed with the covenant amounted to a grant with rent reserved; and a covenant to pay rent set up in a deed, or in an instrument made a part of that deed, attaches to the land into whomsoever's hands that land may come.

It is to be noted, too, that in the cited case,

> "neither the plaintiffs nor their predecessors were parties to the action" (foreclosure proceedings).

In *Mayor of Boonton v. Boonton Water Co.*, 69 N. J. Eq. 23, &c. (V. C. Pitney), a covenant by a Water Company with the City of Boonton was enforced against the purchaser at the foreclosure sale, in the face of an objection that the rights of the town were avoided by the foreclosure suit, and the Court held (page 32):

> "I am clearly of the opinion that all the covenants in the contract which are of a continuing nature—and all those here relied on are of that nature—run with the works and are binding on the new company, *much on the same*

> *principle as covenants for rent are binding on the assignee of the lessee.''*

It was even urged in that case that the absence of the word "assigns" made the covenant inapplicable to the party purchasing at the foreclosure sale. The Court held otherwise. This case was affirmed by this Court in 70 N. J. Eq. 692.

In *Brewer v. Marshall,* 18 N. J. Eq. 337, affirmed by this Court in 19 N. J. Eq., p. 537, the Court clearly recognizes a covenant between landlord and tenant as one running with the land, even where mere *legal* remedies are under consideration. And the Court makes it also plain that:

> "There is a class of cases in which equity will charge the conscience of an alienee of land with an agreement relating to such land, where clearly the agreement neither creates an easement nor runs with the title, &c."

Other cases in point are: *Conover v. Smith,* 17 N. J. Eq. 51; *Spencer's Case,* 3 Coke's Rep. 16; *Bally v. Wells,* 3 Wilson 25; 15 *C. J.,* 1241.

Under the facts shown in the appellants' bill, the covenant arose out of and related to the land covered by the deed. The passes were for transportation over the railroad running across that land, and, therefore, it is to be considered a covenant running with the land and binding upon all successors in title from the original grantee. In this connection, it should be noted that "successors" as used in the instrument must refer to "successors in title".

The word "successors" is so used in the following cases:

—*Mayor of Boonton v. Boonton Water Co.*, cited above.
—*78th St. &c., Co. v. Pursell Mfg. Co.*, 155 N. Y. S. 259.
—*Dallas Compress Co. v. Liepold*, 205 Ala. 562.

The word "successors" would naturally be used to apply to a new corporation which should succeed to the rights, franchises, etc., of a railroad corporation under our statute. Under the laws of our State, in force at that time and at present in force, an individual might be the purchaser of the railroad's property, franchises, etc., at a foreclosure sale, but that individual is simply a conduit for the transmission of title to a new corporation, which by our law must be organized to take over and operate the road. The statute in force at the time of the foreclosure in question and at present in force is found in General Statutes of N. J., pp. 2676-2677. "An Act Respecting Railroads, etc.", governing the foreclosure of a mortgage on railroad property and the rights acquired by a purchaser thereunder, contains the following proviso clause:

> *"Provided, that no such sale and conveyance, and organization of such new corporation shall in any wise affect or impair any right or rights in law or equity, of any person or persons, body politic or corporate, not a party or parties to the suit or suits, action or actions, in which the aforesaid decree or decrees was or were made, nor of the said party or parties, except so far forth as determined by said decree or decrees."*

It is made clear that the rights of persons not parties to the suit are not affected, but follow the land into the hands of the new purchaser.

3. EVEN IF THIS COVENANT TO ISSUE PASSES SHOULD BE HELD NOT STRICTLY ONE RUNNING WITH THE LAND, YET IT IS SO RELATED TO THE USE AND OCCUPANCY OF THAT LAND AS TO MAKE IT INEQUITABLE THAT DEFENDANTS SHOULD TAKE AND HOLD THE BENEFITS OF THAT COVENANT AND WITHHOLD THE CONSIDERATION FORMING THE BASIS OF THAT OCCUPANCY.

Midland Railroad Co. v. Fisher (Ind.), 8 L. R. A. 604:

This is a case somewhat similar to the present one. The covenant was to build a fence as a condition of the right to enjoy the easement granted by the owners of the land. The Court held:

> "The appellant is in the possession of the right of way as the grantee of the original contractor, and it must take the benefit it enjoys subject to the burden annexed to it by the contract which gave existence to that benefit. It cannot enjoy the benefit and escape the burden, for the burden and the benefit are so interlaced as to be inseparable."

Under the reasoning of the U. S. Supreme Court in *Wiggins Ferry Co. v. Ohio & Mississippi Railway*

Co., 142 U. S. 396, &c., appellants in the present suit are entitled to enforcement of this covenant against the defendant.

4. BUT EVEN APART FROM OTHER CONSIDERATIONS, THE BILL CLEARLY SHOWS AN ADOPTION OF THE CONTRACT BY THE OCCUPANTS OF THIS LAND SUCCEEDING THE ORIGINAL GRANTEE FROM SCHMOELE AND BY THE PRESENT DEFENDANT.

Among other things recited in the Bill showing this adoption are:

—The use of the property by defendant and all of its predecessors in title:

—The recording of the deed by the new corporation following the foreclosure and three years thereafter:

—The issuing of passes for over twenty years by the succeeding companies, including the present defendant.

Other proofs of adoption are in the possession of appellants, to be produced at final hearing.

Under the language of the U. S. Supreme Court, in *Wiggins Ferry Co. v. Ohio and Mississippi Railroad Company,* 142 U. S. 396, the covenant to issue passes in this case would be held to have been adopted by the defendant and its predecessors in title.

Appellants by their Bill present a case which should, to a peculiar degree, appeal to a Court of Equity. Appellants come into Court with clean hands. The defendant is in the possession of the

property which formed the consideration for the covenant sought to be enforced. To refuse performance of that covenant would seem to violate the fundamental principles of justice and fair dealing controlling a Court of Equity.

Appellants pray for a reversal of the decree of the Court of Chancery.

Respectfully submitted,

BLEAKLY, STOCKWELL & BURLING,
Solicitors for and of Counsel with Complainants-Appellants.

I. F. Huntzinger Co., *Appellate Printers,* Camden, N. J.

New Jersey Court of Errors and Appeals

Between

HENRY SCHMOELE, *et al.*,
Complainants-Appellants,

and

ATLANTIC CITY RAILROAD COMPANY,
Defendant-Respondent.

APPEAL FROM CHANCERY.

VICE-CHANCELLOR LEAMING
Sat Below.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

This is an appeal from a decree dismissing the complainants' bill.

The bill seeks to compel the defendant to issue to the complainants free passes over the defendant's railroad. As a basis for such relief the complainants set forth a written contract made with a predecessor in title.

The defendant at the beginning of its answer set forth some objections to the bill which would formerly have been raised by demurrer, and in the body of the answer set forth a number of defenses heretofore presentable by plea.

The complainant served 22 interrogatories. Thereupon the defendant gave notice of a motion to strike out the interrogatories, to dismiss the bill for the reasons set forth at the beginning of the defendant's answer and to have heard and disposed of, before the hearing of the principal case, the defenses heretofore presentable by plea. Such a preliminary disposition of all issues, formerly presentable either by demurrer or by plea, is in accordance with the federal equity practice, after which our present chancery practice is modeled.

The whole question, as to the right of relief of any kind under the bill and as to the sufficiency of the various defenses, was argued before and considered and determined by the Vice-Chancellor.

He reached the conclusion that the bill must be dismissed, placing his decision squarely upon the Statute of 1911, as interpreted in the Perkins case.

The other defenses then and here made, on behalf of the defendant, the Vice-Chancellor found it unnecessary for him to consider. *Schmoele v. Atlantic City R. Co.* (not officially reported), 155 Atl. 143.

A decree was entered dismissing the bill, from which decree the complainants appeal.

BRIEF OF THE ARGUMENT.

1. If any ground exists upon which the decree can rest, there should be an affirmance.

2. The defendant is not a party to the contract and is not bound by it.

3. The question appellants now seek to raise, as to whether or not the Schmoeles were parties to the foreclosure suit, cannot here be raised and, if it could, it would have no bearing on the controversy.

4. There was no covenant with the Schmoeles running with the land.

5. The Schmoeles received the full consideration that they were to receive under the contract.

6. The foreclosure sale in 1883 terminated all rights of the Schmoeles and of those claiming under them to passes.

7. The Statute of 1911 prohibits and makes a misdemeanor the issuance of these passes.

8. The Schmoeles and those claiming under them are fully bound by the action of the State in declaring a public policy against passes and in making the issuance thereof a misdemeanor.

9. In the face of the public policy declared by the State and the statute making issuance of passes a misdemeanor, an express promise to issue passes would be unenforceable and previous issuance of passes could create no obligation to issue them in the future.

ARGUMENT.

I.

IF ANY GROUND EXISTS UPON WHICH THE DECREE CAN REST, THERE SHOULD BE AN AFFIRMANCE.

A decree in equity is presumed to be right. *Manhattan L. Ins. Co. v. Wright,* 61 C. C. A. 138; 126 Fed. 88. *Big Six Development Co. v. Mitchell,* 1 L. R. A. (N. S.) 332; 70 C. C. A. 569; 138 Fed. 280.

It sometimes happens that the Court below will give a wrong reason for a right ruling, but the appellate court will never reverse, if it can discover any sound reason for the ruling.

Accordingly this Court, at times, declares that the decree should be affirmed, but not for the reason given below. *Canda v. Canda,* 92 N. J. Eq. 423; *Allen v. Francisco Sugar Co.,* 92 N. J. Eq. 431. At

other times the Court expresses its dissent from some of the conclusions reached by the Vice-Chancellor and affirms upon others. *Oleson v. Somogyi,* 93 N. J. Eq. 506; *Rice v. Mitsch,* 92 N. J. Eq. 692; *Mackie v. Cain,* 92 N. J. Eq. 631; *Turner v. Ridge,* 92 N. J. Eq. 706; *Prindeville v. Johnson,* 93 N. J. Eq. 425; *Prudential Ins. Co. v. Fidelity &c., Co.,* 103 N. J. Eq. 279; *Van Buren v. Fine,* 103 N. J. Eq. 327.

II.

THE DEFENDANT IS NOT A PARTY TO THE CONTRACT AND IS NOT BOUND BY IT.

Upon this point the facts are admitted. Paragraph 2 of the bill (page 2), sets forth the contract generally and refers to Exhibit 2 which is made a part thereof. Exhibit 2 (page 18), shows that this contract was made in 1877 with a different company, The Philadelphia and Atlantic City Railway Company. Paragraph 6 (page 4), of the bill shows that foreclosure proceedings were had and the property of that company, party to the contract, was conveyed by Peter L. Voorhees, Master, to one George R. Karcher in 1883. Paragraph 7 (page 5), shows that a new corporation was formed in 1884 and the property conveyed to it and paragraph 8 (page 6), shows that in 1889 and 1901 some mergers resulted in the formation of the defendant company.

Consequently, it is admitted that the defendant was not in existence in 1877 when the contract was

made. It, therefore, was not a party to and is not bound by the contract of the foreclosed company.

III.

THE QUESTION APPELLANTS NOW SEEK TO RAISE, AS TO WHETHER OR NOT THE SCHMOELES WERE PARTIES TO THE FORECLOSURE SUIT, CANNOT HERE BE RAISED AND, IF IT COULD, IT WOULD HAVE NO BEARING ON THE CONTROVERSY.

Counsel for appellants, in their brief, seek to set up and argue a case different from that presented in their bill of complaint. In their bill (page 7), they show that there was a foreclosure sale, without naming any of the parties. In their brief they allege that the Schmoeles were not parties to the foreclosure.

Even if such a supposititious situation could be here considered, why should anyone make the Schmoeles parties to a foreclosure suit? They had neither title to nor a lien upon the land. They never had any equity of redemption. Moreover, as we shall show, they did not even have a covenant running with the land.

The most that a foreclosure can do is to foreclose and pass title to the equity of redemption. 1 C. S. 430, Sec. 54.

Indeed, this attempt to inquire into the details of the foreclosure suit, we submit, grows out of a misinterpretation of the Perkins decision, 78 N. J. Eq.

138. Perkins was not a party to the foreclosure there considered. He had no equity of redemption and there was no occasion to make him a party, just as there was no occasion to make the Schmoeles parties to this foreclosure.

IV.

THERE WAS NO COVENANT WITH THE SCHMOELES RUNNING WITH THE LAND.

In order that a covenant may run with the land, it must respect the thing demised, and the Act covenanted to be done or omitted must concern the land or the estate conveyed. 15 C. J. 124, Sec. 54.

Counsel for appellants, in support of their claim, cite *Wiggins Ferry Co. v. Ohio & Mississippi Railway Co.*, 142 U. S. 396. That case, however, holds that a conveyance of land could not support a covenant to be performed over an adjoining ferry and is authority for holding that this agreement would not be specifically enforced, to the extent of requiring that the Schmoeles be carried over land other than the land conveyed.

Counsel cite and comment upon *Munro v. Syracuse L. & N. R. Co.*, 200 N. Y. 224; 93 N. E. 516. There, however, the issuance of passes was set forth in the deed itself as a condition (it was even declared to be a condition precedent), and upon failure to keep and perform that condition the estate granted was to revert to the grantors.

It will be noted that the deed or grant, Exhibit 1 attached to the bill, might have made the issuance of

the passes a condition or limitation upon the title, but it did not. Indeed, passes are nowhere mentioned, even by way of covenant, in the deed.

The deed recites a consideration consisting of one dollar, eight full paid shares of the capital stock of the corporation and "a certain agreement bearing even date herewith." The grantors did not consider it necessary to name the parties to the agreement, state its subject-matter, state whether or not it was in writing, nor to identify it in any way. In such circumstances a Court cannot point to any particular agreement and speculate as to whether that was the agreement which was a part of the consideration.

Even if the agreement were positively identified in the deed as a part of its consideration, however, that would not make it a covenant, much less a covenant running with the land.

Assuming for the purposes of argument that this was a covenant, the rule is that "covenants as a general thing, will not run as a burthen upon land." The remedy, if any, is by suit against the original covenantor. *Brewer v. Marshall,* 19 N. J. Eq. 537, 545.

A covenant not to sell marl from a designated tract of land will not be enforced in equity against a purchaser. *Brewer v. Marshall,* 19 N. J. Eq. 537.

A covenant by a tunnel company not to condemn additional land was not one running with the land and did not bind a purchaser at a foreclosure sale. *Morris &c., v. Hoboken &c.,* 68 N. J. Eq. 328.

As a consideration for the Schmoele deed the company then in existence promised to give $1, eight

shares of stock in the company and a collateral agreement.

If the promise had been to purchase at a designated date government bonds and deliver them to the Schmoeles, would anyone contend that there would be anything more than a personal obligation on the part of the covenantor?

Again if the promise had been to purchase and deliver to the Schmoeles passes over the Santa Fé road to the Pacific Coast would it be more than a personal obligation?

Why does it become more than a personal obligation merely because the passes are to be over this particular railroad?

V.

THE SCHMOELES RECEIVED THE FULL CONSIDERATION THAT THEY WERE TO RECEIVE UNDER THE CONTRACT.

Here also the facts are admitted. Exhibits 1 and 2, attached to the bill and made part of it (pages 13 to 22), show that the complainants and their predecessors in title agreed, as the consideration for their conveyance, to take, according to Exhibit 1 (the grant or deed), "the sum of one dollar and eight full paid shares of the capital stock of said corporation." Exhibit 2 (pages 18 to 22), under the same date, refers to Exhibit 1 and says "the consideration of said grant being *the performance of this agreement* and eight full paid shares of the capital stock of the said party of the first part and

the sum of one dollar." Exhibit 2 binds the contracting company and its successors ("Successors" applies only to a corporation sole. A corporation aggregate has no successors. *Chancellor v. Bell,* 45 N. J. Eq. 538), to give to the Schmoeles "during the first week in January of each and every year *during its occupation of said lands* free yearly passes *over the line of its railroad,* for eleven persons to be named," &c.

Exhibit 1 expressly acknowledges receipt of the one dollar and 8 shares of stock. This receipt is nowhere denied.

Paragraph 4 of the bill (page 4) admits that the passes were issued and delivered up until 1883 when, as appears by paragraph 6 (page 4) the contracting company ceased to occupy the lands and ceased to have any railroad.

Consequently after the foreclosure sale in 1883, the agreement had been fully carried out by the contracting company.

VI.

THE FORECLOSURE SALE IN 1883 TERMINATED ALL RIGHTS OF THE SCHMOELES AND OF THOSE CLAIMING UNDER THEM TO PASSES.

The fact that there was such a foreclosure sale in 1883 is admitted (page 4) by paragraph 6 of the bill. The effect of this sale is, of course, a matter of law.

In 1916 the Court of Chancery, speaking through Vice-Chancellor Backes, in the case of *Perkins v.*

Public Service Railway Company, 87 N. J. Eq. 134, at page 138, declared:

> "The complainants lost all right under the earlier contract when the Camden and Trenton Railway Company was sold out under foreclosure proceedings in 1910."

That has stood as the law of the State since 1916 and the fact that such rights are lost by foreclosure has become a rule of property in New Jersey. *Zabriskie v. Wood,* 23 N. J. Eq. 541, at page 553; *Lippincott v. Smith,* 69 N. J. Eq. 787, at page 792; *Warburton v. White,* 176 U. S. 484; *Dooley v. Pease,* 180 U. S. 126; *Frances v. Frances,* 203 U. S. 233; *Nadal v. May,* 233 U. S. 447.

VII.

THE STATUTE OF 1911 PROHIBITS AND MAKES A MISDEMEANOR THE ISSUANCE OF THESE PASSES.

Counsel allege that the 1911 statute (Laws of 1911, page 380, Section 18, paragraphs (a) and (b) and Sections 34, 35 and 36) is prospective only. That was conceded in the Perkins case, at page 138.

They quote at some length from the opinion of this Court in *Public Service Electric Co. v. Board of Public Utility Commissioners,* 88 N. J. L. 603. That opinion does not challenge or affect the decision in the Perkins case. In the instant case, as in the Perkins case, there was first an agreement and then a foreclosure.

In the Public Service Electric case (88 N. J. L. 603), there was no foreclosure. The Utility Board made an order that the company perform its contract. The Supreme Court set that order aside and this Court affirmed the judgment. The opinion, it is true, contained a statement to the effect that the Statute of 1911 is prospective only (that was conceded in the Perkins case, 87 N. J. Eq. at page 138), and it will readily be seen that such an observation could in no way affect the decision of the case. The decision sets aside an order to perform the contract and, if it has any bearing at all on the present controversy, it supports a refusal to perform the Schmoele agreement.

Paragraphs (a) and (b), Section 18, of the statute, as interpreted in the Perkins case, 87 N. J. Eq. 136, prohibit the issuance of such passes and Sections 34, 35 and 36 make the issuance a misdemeanor.

VIII.

THE SCHMOELES AND THOSE CLAIMING UNDER THEM ARE FULLY BOUND BY THE ACTION OF THE STATE IN DECLARING A PUBLIC POLICY AGAINST PASSES AND IN MAKING THE ISSUANCE THEREOF A MISDEMEANOR.

When they entered into the contracts, Exhibits 1 and 2 (pages 13 to 22), they knew they were dealing with a public utility whose first duty was to the public and that there must be read into the agreement, as completely as if it were there stated, the

fact that the contract was at all times subject to the public duty of the company and subject to the right of the State under the police power to enforce a system of public policy which would invalidate the contract. *Swift v. D. L. & W. R. R. Co.*, 66 N. J. Eq. 452; *Ocean Grove Assn. v. Public Utility Comrs.*, 92 N. J. L. 309; *Bayonne v. Passaic Consolidated Water Co.*, 98 N. J. Eq. 174.

In 1911, the Legislature declared the public policy of the State against such passes and made the issuance thereof a misdemeanor. Laws of 1911, page 380, Section 18, paragraphs (a) and (b) and pages 387 and 388, Sections 34, 35 and 36. Ever since 1916 it has been the law of this State that a contract similar to the Schmoele contract could not be successfully defended in the face of this statute. *Perkins v. Public Service Railway Co.*, 87 N. J. Eq. pages 137 and 138.

IX.

IN THE FACE OF THE PUBLIC POLICY DECLARED BY THE STATE AND THE STATUTE MAKING ISSUANCE OF PASSES A MISDEMEANOR, AN EXPRESS PROMISE TO ISSUE PASSES WOULD BE UNENFORCEABLE AND PREVIOUS ISSUANCE OF PASSES COULD CREATE NO OBLIGATION TO ISSUE THEM IN THE FUTURE.

It is alleged that this defendant has issued passes to the Schmoeles. Any passes, so issued, were gifts, issued in ignorance of the fact that such gifts were

forbidden and the fact that the issuance thereof, was declared to be a misdemeanor. Certainly it is not alleged that consideration of any kind passed to the defendant for the issuance of such passes.

Even in the absence of statute, a gift of a free pass would create no obligation to give another. And since 1911, even an express agreement to issue passes would give no right to the passes, in view of the legislative prohibition.

CONCLUSION.

Whether we rest the case upon the ground upon which the Vice-Chancellor rested it or upon the grounds upon which he might have rested it, the result is the same, the decree should be affirmed.

All of which is respectfully submitted.

FRENCH, RICHARDS & BRADLEY,
For Respondent.

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Plaintiff's Exhibits.

Defendant's Exhibits.