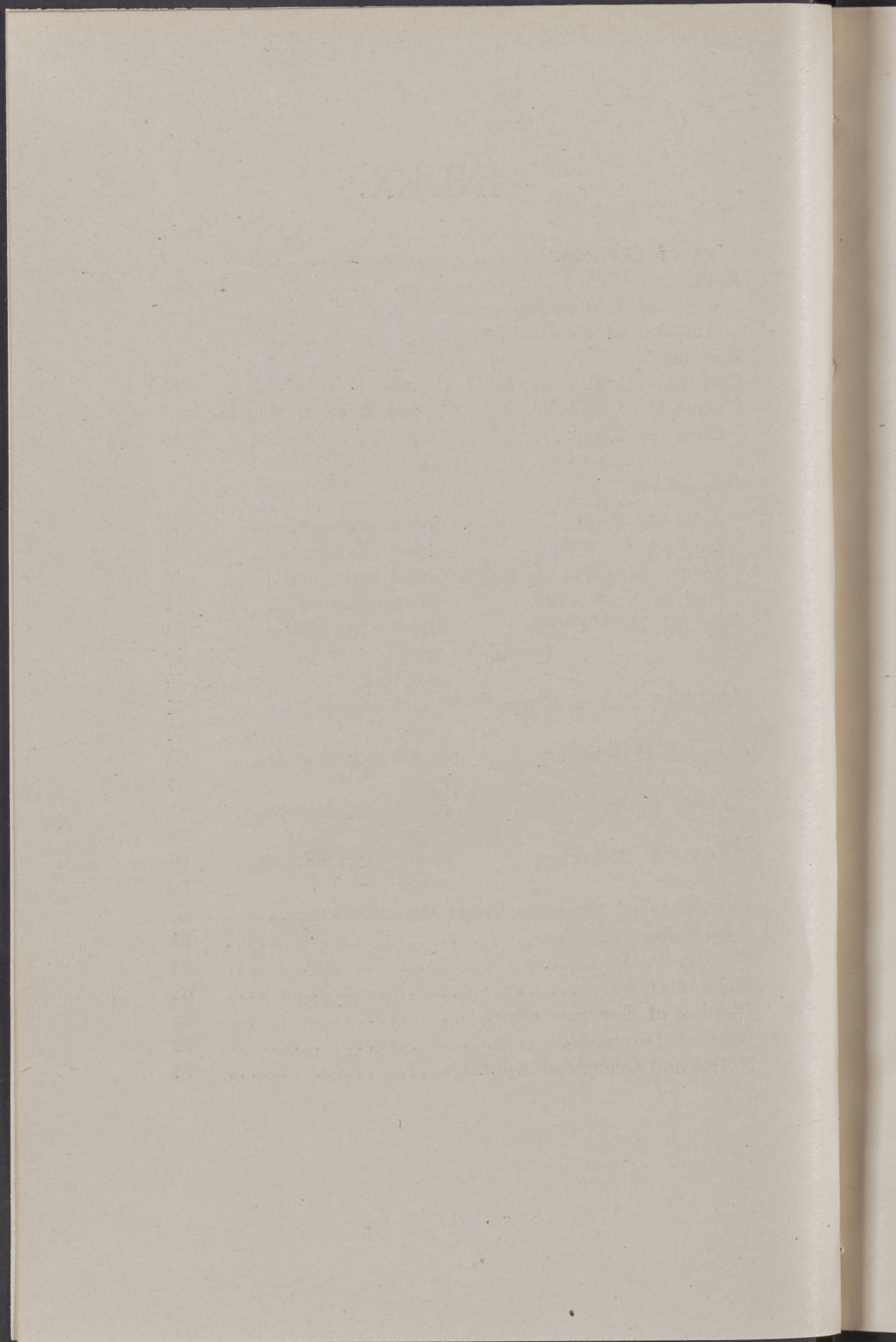


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Writ of Certiorari.

WRIT OF CERTIORARI.

Returnable February 14, 1923.

NEW JERSEY, ss.

The State of New Jersey to the Mayor
and Board of Aldermen of the Town of
Morristown and Vincent G. Roche, Town

(SEAL) Clerk of the Town of Morristown, GREETING:

We being willing for certain reasons to be
certified of a certain ordinance entitled

“An Ordinance to regulate traffic on the
driveway lying on the east side of the shelter house of
the Delaware, Lackawanna and Western Railroad Com-
pany in Morristown, extending from the American Rail-
way Express office to Lackawanna Place,” adopted and
passed by said Mayor and Board of Aldermen of the
Town of Morristown on the 7th day of February, 1923.

Do command you that the said ordinance together with
all proceedings and matters touching and concerning the
same as they remain before you or any of you or under
your control, do certify and send to the Justices of our
Supreme Court at Trenton, on the 14th day of February,
1923, together with this writ that therein may be done
what of right and according to the laws and constitution
of this State ought to be done.

Witness, William S. Gummere, Chief Justice at Tren-
ton, this 10th day of February, 1923.

ENOCH L. JOHNSON,

Clerk.

M. M. STALLMAN,

Attorney.

Return to Writ.

On terms that the writ be made returnable February 14, 1923, and argued or submitted at defendants' option February, 1923, Term.

I allow this writ. Let it be sealed.

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

10

Dated February 10, 1923.

RETURN TO WRIT.

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

20

I, VINCENT D. ROACHE, Town Clerk, of the Town of Morristown, in obedience to the command of the writ hereto annexed, on behalf of the Mayor and Board of Aldermen of the Town of Morristown and myself, Town Clerk, do hereby certify and send to you, the said Justices, the record of a certain ordinance entitled, "An Ordinance to regulate traffic on the driveway lying on the East side of the shelter house of the Delaware, Lackawanna and Western Railroad Company in Morristown, extending from the American Railway Express office to Lackawanna Place," adopted and passed by the Mayor and Board of Aldermen of the Town of Morristown on

30

February 7, 1923; together with all proceedings and matters touching and concerning the said ordinance, as they remain on the record of the said town in my hands and possession, as by the said writ is commanded, and as appears by certificate hereto annexed.

IN WITNESS WHEREOF, I have hereto set my hand and seal the fifteenth day of February, Nineteen Hundred and Twenty-three.

VINCENT D. ROACHE,
(L. S.)

40

(Corporate Seal)

Return to Writ.

TRANSCRIPT OF PROCEEDINGS

Relative to introduction and passage of ordinance entitled, "An Ordinance to regulate traffic on the driveway lying on the East side of the shelter house on the Delaware, Lackawanna and Western Railroad Company in Morristown, extending from the American Railway Express office to Lackawanna Place." 10

Special meeting of the Mayor and Board of Aldermen held January 22, 1923, at the Vail Building at 5:30 P. M.

Present:

Mayor Potts, Aldermen Todd, Hawkes, Drake and Muchmore.

Absent:

Aldermen Coggeshall, Smart, Bockoven and Lidgerwood.

* * * * *

20

Alderman Todd offered for first reading an ordinance entitled, "An Ordinance to regulate traffic on the driveway lying on the East side of the shelter house of the Delaware, Lackawanna and Western Railroad Company in Morristown, extending from the American Railway Express office to Lackawanna Place," and the same was placed on first reading.

Alderman Drake moved that the ordinances introduced at this meeting be advertised according to law for public hearing and final passage at a meeting to be held January 29, 1923, at the Vail Building at 8 P. M. 30

Motion seconded and carried.

Special meeting of the Mayor and Board of Aldermen held January 29, 1923, at 8 P. M., at the Vail Building.

Present:

Mayor Potts, Aldermen Todd, Hawkes, Smart, Drake, Muchmore and Lidgerwood.

40

Return to Writ.

Absent:

Aldermen Coggeshall and Bockoven.

10 Alderman Todd moved that the ordinances introduced at the meeting of January 22, 1923, and advertised for public hearing and final passage at a meeting to be held on this date be laid over until February 2, 1923, at the next regular meeting.

Motion seconded and carried.

Regular meeting of the Mayor and Board of Aldermen held February 2, 1923, at the Vail Building at 8 P. M.

Present:

Mayor Potts, Aldermen Coggeshall, Todd, Hawkes, Smart, Drake, Muchmore and Lidgerwood.

Absent:

20 Alderman Bockoven.

Alderman Coggeshall moved that the ordinances which were laid over until this meeting be again laid over until a meeting to be held on Wednesday, February 7, 1923, at 8 P. M.

Motion seconded and carried.

Special meeting of the Mayor and Board of Aldermen held February 7, 1923, at 8 P. M., at the Vail Building.

30 Present:

Mayor Potts, Aldermen Coggeshall, Hawkes, Smart, Drake, Muchmore and Lidgerwood.

Absent:

Aldermen Todd and Bockoven.

40 The ordinance entitled, "An Ordinance to regulate traffic on the driveway lying on the East side of the shelter house of the Delaware, Lackawanna and Western Railroad Company in Morristown, extending from the

Return to Writ.

American Railway Express office to Lackawanna Place," was read in full for information.

The Mayor then declared the meeting open to the public for discussion of said ordinance.

No one appearing either for or against said ordinance, the ordinance was then placed on second reading and read in sections for amendment. 10

There being no amendments, the ordinance was then placed on third and final reading and upon motion regularly made, seconded and carried, the title was read for the ordinance.

The ordinance was adopted by the following vote:

Yeas:

Aldermen Coggeshall, Hawkes, Smart, Drake, Muchmore, Lidgerwood and Mayor Potts.

Nays:

20

None.

(Copy of Ordinance)

An Ordinance to regulate traffic on the driveway lying on the East side of the shelter house of the Delaware, Lackawanna and Western Railroad Company in Morristown, extending from the American Railway Express office to Lackawanna Place.

WHEREAS the Mayor and Board of Aldermen of the Town of Morristown, being the governing body of said town, determines that the proper exercise of its police power over the driveway mentioned in the title of this ordinance that vehicles be not allowed to park or stand along certain parts of said driveway: 30

THEREFORE, BE IT ORDAINED, by the said Mayor and Board of Aldermen as follows:

1. No automobile or other vehicle, either private or that which may be engaged in the transportation of passengers for hire, shall be parked or shall be allowed 40

Return to Writ.

10 to stand for a longer time than is necessary to take on and let off passengers, expressage or baggage, and in no case for longer than two minutes, along the curb on the westerly side of the driveway mentioned in the title of this ordinance from the southerly side of the entrance way to the shelter house or the tunnel leading under the depot, northerly to the turn of said driveway under the railroad.

2. No automobile which may be engaged in the transportation of passengers for hire shall be so parked or so allowed to stand as prohibited in Section 1 hereof on the remaining part of the westerly side of said driveway.

20 3. Any person or corporation found guilty of violating this ordinance shall be liable to a fine of not exceeding Fifty Dollars or to confinement in the County Jail for not more than five days, in the discretion of the magistrate imposing the same.

Introduced January 22, 1923.

Passed, approved and signed February 7, 1923.

CLYDE POTTS,
Mayor.

Attest:

30 VINCENT D. ROACHE,
Town Clerk.

Return to Writ.

STATE OF NEW JERSEY, }
COUNTY OF MORRIS. } *to wit:*

ORDINANCE

An Ordinance to regulate traffic on the driveway lying on the East side of the shelter house of the Delaware, Lackawanna and Western Railroad Company in Morristown, extending from the American Railway Express office to Lackawanna Place. 10

WHEREAS, the Mayor and Board of Aldermen of the Town of Morristown, being the governing body of said town, determines that the proper exercise of its police power over the driveway mentioned in the title of this ordinance that vehicles be not allowed to park or stand along certain parts of said driveway.

THEREFORE, BE IT ORDAINED, by the said Mayor and Board of Aldermen, as follows: 20

1. No automobile or other vehicle, either private or that which may be engaged in the transportation of passengers for hire, shall be parked or shall be allowed to stand for a longer time than is necessary to take on and let off passengers, expressage or baggage, and in no case for longer than two minutes, along the curb on the westerly side of the driveway mentioned in the title of this ordinance from the southerly side of the entrance way to the shelter house or the tunnel leading under the depot, northerly to the turn of said driveway under the railroad. 30

2. No automobile which may be engaged in the transportation of passengers for hire shall be so parked or so allowed to stand as prohibited in Section 1 hereof on the remaining part of the westerly side of said driveway.

3. Any person or corporation found guilty of violating this ordinance shall be liable to a fine of not exceeding Fifty Dollars or to confinement in the County Jail for not 40

Return to Writ.

more than five days, in the discretion of the magistrate imposing the same.

Introduced January 22, 1923.

NOTICE

10 The above ordinance was introduced January 22, 1923, and will be considered for final passage by the Mayor and Board of Aldermen at a meeting to be held January 29, 1923, at 8 P. M., at the Vail Building, South street, Morristown, New Jersey.

Dated January 23, 1923.

VINCENT D. ROACHE,
Town Clerk.

20 ALVA E. LAMBERTON, Treasurer, of full age, being duly sworn according to law, does depose and say: that he is concerned with the publication of "The Jerseyman" which is one of the public newspapers printed in the State of New Jersey and published at Morristown, the County seat in and of the County of Morris in this State, and circulating in said County; and that the notice, of which a printed copy is hereto annexed, has been published one time in said newspaper, "The Jerseyman," during one consecutive calendar week, at least once in each week; that the first of said weekly publications was made on the 30 24th day of January, A. D. 1923, and the last of said weekly publication was made on the 24th day of January, A. D. 1923.

ALVA E. LAMBERTON.

Sworn and subscribed this 24th
day of January, A. D. 1923,
before me,

M. A. G. HURTZIG,

(SEAL)

Notary Public of New Jersey.

Return to Writ.

I, VINCENT D. ROACHE, Clerk of the Town of Morristown in the County of Morris and State of New Jersey, do hereby certify that the foregoing is a true copy of the records and transcript of proceedings as the same remains of record in the minutes and records of the Town of Morristown, relative to an ordinance entitled, "An Ordinance to regulate traffic on the driveway lying on the East side of the shelter house of the Delaware, Lackawanna and Western Railroad Company in Morristown, extending from the American Railway Express office to Lackawanna Place." 10

Dated February 15, 1923.

VINCENT D. ROACHE,
Town Clerk.
 Town of Morristown, New Jersey.

20

30

40

Reasons.

New Jersey Supreme Court

LACLARE L. WELSH,

Prosecutor,

vs.

THE TOWN OF MORRISTOWN, *et al.*,

Defendants.

REASONS.

The prosecutor assigns the following reasons why the ordinance herein should be set aside.

1. Said ordinance is beyond the power of the Town of Morristown to enact.

2. Said ordinance deprives the prosecutor of his property without due process of law.

3. Said ordinance attempts to take the property of the prosecutor for public use without compensation.

4. Said ordinance denies to the prosecutor the equal protection of the laws.

M. M. STALLMAN,
Attorney of Prosecutor.

Contract—D. L. & W. R. R. Co. and L. L. Welsh.

CONTRACT—D., L. & W. R. R. AND L. L. WELSH.

THIS AGREEMENT, made this 28th day of December, in the year of our Lord, One Thousand Nine Hundred and Twenty-two, between THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a corporation existing under the laws of the State of Pennsylvania, hereinafter called the Railroad Company, party of the first part, and LACLARE L. WELSH, party of the second part. 10

WHEREAS, the Railroad Company is desirous of establishing an adequate and efficient cab service for the accommodation of its patrons with their accompanying baggage at Morristown, in the County of Morris, State of New Jersey, and to regulate the said service and the solicitation of business in its station and upon its station grounds, and to regulate the parking of cabs and other vehicles upon said grounds, and the said Laclare L. Welsh being willing to undertake to furnish service of that character upon the terms and conditions hereinafter set forth: 20

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

That in consideration of the premises and the covenants and undertakings hereinafter contained on the part of the respective parties hereto to be kept, observed and performed, it is hereby covenanted, stipulated and agreed by and between the parties hereto as follows: 30

I. The Railroad Company does hereby grant to the said Laclare L. Welsh during the term of this agreement:

(1) The exclusive right to solicit business as a cabman in the station and on the station grounds of the Railroad Company at Morristown, New Jersey.

(2) The privilege, to the exclusion of all other cabmen or cab companies, of installing and maintaining in said station building a cab stand with telephone facilities, subject, however, to the direction and approval of the 40

Contract—D. L. & W. R. R. Co. and L. L. Welsh.

General Manager of the Railroad Company and without expense to it.

(3) The exclusive privilege of parking vehicles employed in said cab service when not in actual use in the spaces shown in green on the blueprint map hereto attached.

10

II. Laclare L. Welsh hereby agrees to furnish and operate for the convenience of the patrons of the Railroad Company at Morristown, New Jersey, motor-driven vehicles in such numbers, design and with such equipment in the way of taximeters and other automatic devices, and with such drivers as shall be approved by the General Manager of the Railroad Company. He further agrees that the entire equipment shall be uniform and attractive in appearance.

20

III. Laclare L. Welsh does hereby agree that such service shall receive at all times his personal attention and that it shall be maintained at the highest standard of efficiency and that he will endeavor in all reasonable ways to avoid all causes for complaint in connection with such operation and that such service shall at all times be prompt, regular and reliable and shall be conducted in all respects in a manner satisfactory to the General Manager of the Railroad Company. He does further agree that his employes while on the premises of the Railroad Company shall at all times conform to its general rules and regulations and any further rules or regulations which may be prescribed by the General Manager of the Railroad Company and in case any of such employes shall for any reason be or become objectionable to the General Manager of the Railroad Company, he shall be removed on written request of such General Manager.

30

IV. Laclare L. Welsh hereby covenants and agrees that he will assume any and all liability for any and all

40

Contract—D. L. & W. R. R. Co. and L. L. Welsh.

injuries, loss or damage that may arise out of or result from the operation of said cab service or from the presence of his employes or vehicles upon the premises of the Railroad Company, either to his own person or property, or to the person or property of any persons in his charge, to passengers or employes of the Railroad Company, or to others lawfully in or upon the premises of the Railroad Company, or to their property, or to the property of the Railroad Company, or any property in its charge, and will save harmless and indemnify the Railroad Company from and against all claims, demands and actions that may be presented or instituted against it and from and against all costs, loss or expenses that may be incurred by it by reason of such injuries, loss or damage and will also indemnify and save harmless the Railroad Company against any and all claims and suits which may be made or brought against it for injury, although it may result in death, or for damage or loss sustained by any of the employes of Laclare L. Welsh, whether the same may occur through the negligence of the Railroad Company, its employes, or otherwise. 10 20

V. Laclare L. Welsh hereby agrees that the rates which shall be charged for the services herein provided for shall be as follows; provided, however, that such rates shall in no wise exceed the rates now or hereafter prescribed by municipal ordinance: 30

Schedule of Rates

For not more than one passenger in town limits.....	35¢	
For each additional passenger, over one, in town limits	15¢	
For the first one-third mile, or any fraction thereof outside of town limits.....	25¢	
For each succeeding one-third mile, or any fraction thereof, outside of town limits.....	10¢	
For each four minutes' waiting.....	10¢	
For each package or piece of baggage carried outside.	20¢	40

Contract—D. L. & W. R. R. Co. and L. L. Welsh.

A schedule of such rates shall be placed in a conspicuous place in each of the vehicles employed in the service herein provided for for the information of the travelling public, which rates shall not be changed without the written approval of the General Manager of the Railroad Company.

10 VI. Laclare L. Welsh agrees to pay to the Railroad Company as compensation for the privileges herein granted, a sum equal to ten per centum upon the gross receipt from all business to and from the said Morris-
town Station, payments to be made monthly on or before
the 15th day of each month on all amounts accruing dur-
ing the preceding month, and the said Laclare L. Welsh
does hereby covenant and agree to well and truly render to
the Railroad Company monthly, not later than the 10th
day of each month a statement of the vehicles in service
20 during each day of the preceding month and the daily
gross receipts from each of such vehicles during such
month and to permit the authorized representatives of the
Railroad Company to have access to his books, accounts
and records in order to verify the accuracy of all such
statements.

VII. Laclare L. Welsh hereby covenants and agrees
that he will not assign this contract or any part thereof
without the written consent of the Railroad Company.
30

VIII. This agreement shall take effect upon the day of
the execution thereof and shall continue in force until
such time as either party hereto shall give to the other
ninety days' written notice of intention to terminate the
agreement, whereupon at the expiration of said ninety
days this agreement shall terminate; provided, however,
that upon failure of said Laclare L. Welsh to keep and
perform any of the covenants herein contained on his
part to be kept and performed, the Railroad Company, or
40 its successors or assigns, shall have the right to terminate

Contract—D. L. & W. R. R. Co. and L. L. Welsh.

this agreement upon thirty days' written notice to the said Laclare L. Welsh.

IX. This agreement shall not be so construed as to prevent persons or corporations from entering upon the premises of the Railroad Company for the purpose of removing baggage or other property from its said station or grounds under contracts heretofore made or which may be hereafter made with the said Railroad Company. 10

X. All differences and disputes arising between the Railroad Company and Laclare L. Welsh in connection with this agreement shall be submitted to the General Manager of the Railroad Company and his decision shall be final, conclusive and binding upon each of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed the day and year first above written. 20

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,

By R. M. WHITE, Supt.

LACLARE L. WELSH.

Form Approved

W. S. JENNEY,
General Counsel.

A. E. DEMOTT,
Witness.

30

40

Contract—D. L. & W. R. R. Co. and Town of Morristown.

**CONTRACT BETWEEN D., L. & W. R. R. AND
MORRISTOWN.**

Exhibit D. 2.

10 On September 24, 1912, a contract was made between the Mayor and Board of Aldermen of the Town of Morristown, New Jersey, party of the first part, and The Morris and Essex Railroad Company, owner, and The Delaware, Lackawanna and Western Railroad Company, its lessee, party of the second part, under which the tracks of the Railroad Company through the town were elevated and a new passenger station and grounds constructed during the years 1913 and 1914.

20 AGREEMENT, Made this twenty-fourth day of September, Nineteen Hundred and Twelve;

Between THE MAYOR AND BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN, NEW JERSEY, a municipal corporation of the State of New Jersey, party of the first part, hereinafter called the "Town," and THE MORRIS AND ESSEX RAILROAD COMPANY, a corporation of the State of New Jersey, Owner, and THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a corporation of the State of Pennsylvania, its lessee, parties of the second part, hereinafter called the "Railroad Companies."

30 WHEREAS, the railroad of the Railroad Companies extends through the Town of Morristown, Morris County, New Jersey, and crosses Ford Avenue and Morris Street in said Town at the grade thereof, and has been so located, constructed and operated for many years past, and

WHEREAS, for the purpose of securing greater safety to persons and property, and to facilitate the construction and maintenance of other than grade crossings in said Town, the parties hereto desire to have the main tracks

Contract—D. L. & W. R. R. Co. and Town of Morristown.

of said railroad relocated and elevated, so as to cross said Ford Avenue and Morris Street over and above the same, and

WHEREAS, to relocate and elevate said railroad and to change the grade of said Ford Avenue and Morris Street to effectuate the purposes aforesaid is practicable and would, in the judgment of the Mayor and Board of Aldermen of said Town be best adapted to secure the safety of lives and property, and provide for other than grade crossings of the streets in said Town, and promote the interest of said Town, and

WHEREAS, the following statutes of the State of New Jersey, namely, an act approved April 14, 1903, being Chapter 257 of the session laws of that year, and an act approved March 20, 1901, being Chapter 63 of the session laws of that year, and an act approved March 30, 1904, being Chapter 209 of the session laws of that year, have authorized such contracts as shall be made in pursuance thereof, and

WHEREAS, The Mayor and Board of Aldermen of the Town of Morristown, has, by its ordinance passed the fourth day of October, 1912, authorized the making and entering into of this agreement:

NOW THIS AGREEMENT WITNESSETH, that pursuant to said statutes and other statutes of the State of New Jersey, and in consideration of the premises, and of the covenants, terms and conditions hereinafter set forth to be severally kept and performed by the parties thereto, it is agreed between the parties hereto as follows:

I.

LOCATION AND GRADE OF TRACKS.

The main tracks of the Railroad Companies shall be relocated and elevated as shown upon the attached map and profile, by and at the expense of the Railroad Com-

Contract—D. L. & W. R. R. Co. and Town of Morristown.

panies, crossing over and above the grade of Ford Avenue and Morris Street to be established as hereinafter provided. The Railroad Companies' main tracks shall be carried across said streets and a new driveway west of station upon suitable steel girder bridges erected upon concrete masonry abutments, placed as shown on annexed plans. Said bridges shall have water-tight floors, which shall be so maintained; the bridge floors on the structures over the two streets, the driveway and the subway shall be made with a concrete base encasing the steelwork of the bridge floor, and the concrete shall be waterproofed on its upper surface, and the waterproofing protected; ballast being placed between the bottom of the ties and top of the protected waterproofing, making water-tight floors over the sidewalks and driveways; said bridges shall be so constructed to provide a minimum clearance at the intersection of the railroad center line and the center line of the said streets as follows:

Clearance of centre of street	Elevation underside of bridge (Town datum)	Elevation underside of bridge (Railroad datum)	Elevation of street when de- pressed (Town datum)	Elevation of street when de- pressed (Railroad datum)
Ford Ave. 12.5		340.16		327.66
Morris St. 13.0		335.86		322.86

Where necessary, the Railroad Companies may place columns upon the curb lines of said streets for the support of said bridges.

II.

MAPS AND PLANS.

Annexed hereto are maps, plans and profiles properly attested by the Mayor of the Town of Morristown, on behalf of the Town, and by the Chief Engineer of the Railroad

Contract—D. L. & W. R. R. Co. and Town of Morristown.

Companies on behalf of the Railroad Companies, showing the location of the tracks and lines of the Railroad, bridges and structures, and profile showing elevation and grade of the tracks and streets and the various structures to be erected, also floor plans and elevations of the station to be erected in accordance with the terms of this agreement. Said maps, plans and profiles are as follows: 10

(1) Map showing the general location of tracks and streets, relocated tracks, new street, driveways and depot, entitled D. L. & W. R. R.—Morris and Essex Railroad—Map of Station Grounds and Yards—Ford Avenue to Emmet Avenue, Morristown, Morris County, New Jersey, dated the twenty-second day of July, 1908.

(2) Profile showing grade and elevations to be established for the tracks and streets, entitled, D. L. & W. R. R.—Profile of Morristown Track Elevation, Morristown, New Jersey, dated the fourteenth day of May, 1912. 20

(3) Profile of temporary and permanent grades to be established upon and along Morris Street, entitled, D. L. & W. R. R.—M. & E. Div., Morristown, N. J., Sketch showing proposed temporary grade to be used during the erection of the steel girder bridge over Morris Street, dated the twenty-second day of May, 1912.

(4) General details of new station location, layout and approaches, entitled, Station Grounds for Morristown, dated the sixteenth day of March, 1911. 30

(5) Details of plans, Elevation and sections of new passenger station, respectively entitled:

(5) Proposed Passenger Station at Morristown, New Jersey, Track Level Floor Plan, dated the seventeenth day of March, 1911.

(6) Proposed Passenger Station at Morristown, New Jersey, Transverse Section, dated the seventeenth day of March, 1911.

Contract—D. L. & W. R. R. Co. and Town of Morristown.

(7) Proposed Passenger Station at Morristown, New Jersey, Morris Street Elevation, dated the seventeenth day of March, 1911.

(8) Street Profile, dated the twenty-second day of May, 1912.

10 (9) Plan entitled proposed construction at the expense of the Town of Morristown, dated the twenty-second day of May, 1912.

Each and all of said maps, plans and profiles are hereby declared to be made a part of this agreement.

20 As it may be found necessary by both parties hereto, during the progress of said work, to make changes in plans or parts of plans, or in the construction of said work, it is hereby agreed that when such changes are agreed upon by the parties hereto, and approved by resolution of the Mayor and Board of Aldermen of the Town of Morristown, the work shall proceed in accordance therewith. A copy of such resolution shall be made a part of this agreement, and a certified copy thereof shall be furnished to the Railroad Companies.

III.

CLOSING OF STREETS AND TEMPORARY WORK.

30 As it will be found necessary during the progress of the work to temporarily obstruct streets, permission is hereby given by the Town to the Railroad Companies to temporarily obstruct and use during the progress of the work herein mentioned both Ford Avenue and Morris Street, but both of said streets shall not be closed and obstructed at the same time, that is to say: Ford Avenue shall not be closed and obstructed while Morris Street is closed to public travel, and Morris Street shall not be closed and obstructed while Ford Avenue is closed to public travel. The Railroad Companies shall, at their
40 own expense, remove such obstructions and restore said

Contract—D. L. & W. R. R. Co. and Town of Morristown.

streets to public travel as expeditiously as the progress of the work will permit.

For the purpose of facilitating the work of construction and reconstruction to be performed by the Railroad Companies, and to prevent interruption to their traffic during the progress of said work, the Railroad Companies are hereby given the right to construct and maintain during such time as may be required, an additional temporary track or tracks across Ford Avenue, Elm Street and Morris Street crossed by the Railroad Companies' railroad in said Town and at the grade thereof; but such temporary track or tracks shall be so constructed, maintained and operated as not to impede the public travel on said streets, except where a street is to be temporarily closed; provided, however, that a safe passage for persons on foot desiring to cross the tracks on Morris Street shall at all times be maintained with proper safeguards, and provided such additional temporary track or tracks shall be removed as soon as the said work shall permit, which shall be not later than six weeks after the finishing of the work at the particular point or points affected.

As the Railroad Companies may be unable to properly maintain their telegraph lines upon their right of way during the period of reconstruction of their tracks, the right is hereby given the Railroad Companies, so far as the Town is able to give such rights to temporarily construct and maintain the same along convenient streets during the progress of the work; provided, however, that in the exercise of such right there shall be no interference with the rights in such streets of any other person or persons, corporation or corporations, to whom privileges or rights have heretofore been granted, the Railroad Companies hereby agreeing to restore such streets to their original condition and to replace such telegraph lines upon their right of way as soon as the said work shall permit.

Contract—D. L. & W. R. R. Co. and Town of Morristown.

The Railroad Companies shall have the right to erect false work upon Ford Avenue and Morris Street for the construction of the railroad bridges over the same, which false work shall be removed as soon as the bridges are completed.

10 The Town shall take all official and other action possible to accomplish these purposes.

IV.

CHANGES IN GRADE OF STREETS.

Ford Avenue, where the same crosses the right of way of the Railroad Companies shall be depressed not to exceed six (6) feet three (3) inches. Morris Street, where the same crosses the right of way of the Railroad Companies shall be depressed not to exceed five (5) feet. Elm Street shall be depressed from its intersection with
20 Morris Street southwesterly for a distance of about one hundred and fifty-eight (158.0") feet to conform to the new grade of Morris Street. Blatchley Place shall be depressed on its easterly side only at its two ends to conform to the adjacent depression of Morris Street and Elm Street respectively.

V.

VACATION OF STREETS.

30 The Town shall vacate Saw Mill Lane from its intersection with Morris Street to the northerly terminus, or so much thereof between said points as now exists as a public street or highway of said Town.

VI.

NEW STREET.

The Town shall lay out and construct a new street running upon and along the northeasterly side of the
40 Railroad Companies' retaining wall from Morris Street

Contract—D. L. & W. R. R. Co. and Town of Morristown.

north for a distance of approximately three hundred and fifty (350) feet, having a width of forty-eight (48) feet as shown in yellow shading on the map herein attached, to connect with the station grounds in the rear of the Railroad Companies' shelter house.

The Railroad Companies shall dedicate any lands owned by them necessary for the laying out of such new street as above mentioned, and the Town shall, at its own expense, acquire all lands other than the lands to be dedicated by the Railroad Companies, which shall be necessary for the laying out and establishment of such new street. 10

The Railroad Companies shall also lay out, locate and construct a new driveway and station grounds approach extending northerly at right angles from Morris Street, between the Railroad Companies' proposed new passenger station grounds and the Railroad Companies' present freight house tracks, to the westerly side of their tracks as relocated, and extending thence under and across the said tracks and easterly at right angles therefrom to the easterly and southerly lines of the lands of the Railroad Companies, as shown in white shading upon the annexed map. Said driveway shall be forty-eight (48) feet in width. Where said driveway shall intersect the Railroad Companies' relocated main tracks, the Railroad Companies shall construct a passageway beneath their said tracks with a width of forty-eight (48) feet, and said forty-eight foot roadway and passageway shall have a sidewalk eight (8) feet wide as shown on the map annexed hereto. The height of said passageway shall be twelve (12) feet six (6) inches, and the Railroad Companies shall carry said tracks over and across said passageway on steel girders resting upon masonry abutments. The Railroad Companies shall provide all lands necessary for the laying out and establishing said driveway. Said driveway shall be kept open at all times for 20 30 40

Contract—D. L. & W. R. R. Co. and Town of Morristown.

passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds on the easterly side of said Railroad and for the use of those now having rights of egress to Morris Street in Saw Mill Lane, but this contract shall not be construed as a dedication of said driveway as a public
 10 highway.

VII.

PASSENGER STATION.

The Railroad Companies shall erect a new Passenger Station north of Morris Street, as shown upon the annexed plans, with a shelter house on the easterly side of the tracks, which shelter house shall be connected with the main station by a subway twelve (12) feet in width. Said
 20 shelter house to have a waiting room forty (40) feet in length and sixteen (16) feet in width, as shown on attached plan.

It is further agreed that the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto.

30

VIII.

DIVISION OF COST.

All expense of filling for the elevation of the tracks and of the erection and maintenance of the retaining walls and other masonry, stations, bridges and structures to be erected or constructed by the Railroad Companies as herein provided, and for lands and right of way of the Railroad Companies' structures shall be borne and paid for by the Railroad Companies.

40

Contract—D. L. & W. R. R. Co. and Town of Morristown.

The Railroad Companies shall, at their own expense, maintain their railroad bridges and supports thereof on Ford Avenue and Morris Street and the driveway to cross under tracks west of depot, and the Town shall do all the work and assume the expense of drainage, reconstruction and maintenance of the streets beneath such bridges, except the cost of storm water sewer in Morris Street, as hereinafter stated. 10

The Town shall, at its own expense, under usual proceedings provided by statute, acquire or cause to be acquired, all lands necessary for the establishment and location of the new street herein mentioned, outside of the lands owned and to be dedicated by the Railroad Companies as herein provided. The Town shall also, at its own expense, under usual proceedings provided by statute, do all the work of grading and regrading, paving and repaving, construction and reconstruction of all the streets and highways herein provided to be opened, located and constructed, and depressed, or otherwise altered, and of other streets intersecting and affected by said changes, including the proper drainage thereof, and shall also, at its own expense, make or cause to be made, all necessary provision for and change the location of all sewers, gas mains, water pipes, and other sub-surface conduits and structures, which shall be necessary for the proper completion of the provisions and purposes of this agreement. 20 30

The Town shall pay all damages resulting from the laying out, vacation, or alteration of the grades of streets pursuant to this agreement and all expenses and costs of litigation or legal proceedings in connection therewith, but shall not be held liable for damages resulting from the actual elevation of the tracks.

Upon the attached plans is shown in dotted red lines a proposed storm water sewer, its approaches and catch-basins, the construction cost of which shall be divided 40

Contract—D. L. & W. R. R. Co. and Town of Morristown.

equally between the Town and the Railroad Companies, but said storm water sewer shall be maintained by and at the expense of the Town.

10 It is further understood and agreed that the Railroad Companies shall not be required to assume or participate in any expense or pay any sums of money whatever, or do any work whatever, or contribute any lands or property, in connection with any of the work, matters or things in this agreement mentioned or referred to or shown upon the annexed plans, except the expenses, moneys, work, lands and property which in this agreement are specifically provided to be borne, paid, done, performed or contributed by said Railroad Companies unless the same shall be hereafter otherwise agreed to by a supplemental agreement duly executed.

IX.

20

MISCELLANEOUS.

The Railroad Companies' rights and privileges, and the lawful use and operation of their property and franchises shall not be limited or modified other than as specifically set forth herein.

30 The Town shall take all official action necessary to facilitate the work herein provided for, at such time as the Railroad Companies may request, and as may be necessary for the proper prosecution of the work. The Town shall adopt and pass such ordinances or resolutions as shall be necessary to cause the necessary changes to be made in all electric light, telephone, telegraph and other wire lines and appurtenances thereof, and all other surface or over-head structures or transmission lines in such manner and at such times as to not interfere with the work covered by this agreement.

40 The work to be performed by the Town as provided herein shall be performed and completed by the Town

Contract—D. L. & W. R. R. Co. and Town of Morristown.

as promptly as the reconstruction work by the Railroad Companies will permit or make necessary.

As the Railroad Companies may be able to use for the construction of their embankment, a part of the material excavated for the depression of Ford Avenue and Morris Street and Elm Street, it is agreed that the Railroad Companies shall pay to the Town twenty-five (25) cents per cubic yard for all such material which they can use for such purposes, provided the same is delivered upon such embankment without additional expense to the Railroad Companies. 10

The work of track elevation and the other changes to be made by the Railroad Companies as provided in this agreement shall begin not later than ninety (90) days after the first day of January, 1913, and shall be pressed forward vigorously to completion.

The Railroad Companies will do, or cause to be done, all or any part of the work in this agreement provided to be done by and at the expense of the Town, (except the purchase of lands for street purposes), the total cost of which is estimated to be \$17,034.66, as per estimate attached hereto; and the Town shall pay the Railroad Companies the actual cost of all such work, at the unit prices named in the said estimate; payment therefore to be made as follows: \$5,000.00 with interest at 4 per cent. on the total costs, at the end of one year from date of this agreement; \$5,000.00 with interest at 4 per cent. on said total cost less \$5,000.00 at the end of two years from date hereof; \$5,000.00 with interest at 4 per cent. on the total sum less \$10,000.00, at the expiration of three years from the date hereof and the balance, with interest at 4 per cent., at the expiration of four years from the date hereof. 20 30

If any legislation shall prove to be or be deemed necessary in order to carry out this contract or any of its pro-

Contract—D. L. & W. R. R. Co. and Town of Morristown.

visions, each party hereto shall join the others in earnest efforts to obtain such legislation as promptly as possible.

It is further stipulated and agreed that the present building occupied by the First Ward Hose Company may be moved back and left on the lot on which it is now situated, but nothing herein contained is to be construed
 10 as being a lease to the Town of said building or the lot whereon the same is located.

It is further stipulated and agreed that each and every of the acts and things to be done and performed by each of the parties hereto is essential consideration for the acts and things to be done and performed by the other party, and that each of the terms of this contract is a necessary and proper part of the work of improvement herein provided for, and in case either party to this contract shall refuse, neglect or omit to do any act, or
 20 take any proceedings herein required to be done or taken by such parties, or which shall be necessary to be done in order to accomplish the objects contemplated by this agreement, proper action may be taken in the proper court by the other party hereto to compel specific performance of any such acts or proceedings, or to restrain any violation of the terms thereof, in addition to the right to enforce any legal claim for damages on account of such refusal, neglect or omissions.

30 IN WITNESS WHEREOF, the party of the first part has by authority of an ordinance of its Mayor and Board of Aldermen caused this agreement to be executed on its behalf by the signature of the Mayor of the Town of Morristown and the corporate seal of said Town to be hereunto affixed, attested by the Clerk of said Town; and the parties of the second part have each caused this agreement to be signed by their respective Presidents and their respective corporate seals to be affixed here-

Contract—D. L. & W. R. R. Co. and Town of Morristown.

unto, attested by their respective secretaries, the day and year first above written.

THE MAYOR AND BOARD OF ALDERMEN OF THE
TOWN OF MORRISTOWN, NEW JERSEY,

(SEAL)

By Arthur S. Pierson,
Mayor.

10

Attest:

Nathaniel C. Toms,
Town Clerk.

THE MORRIS & ESSEX RAILROAD COMPANY,

(SEAL)

By W. H. Truesdale,
President.

Attest:

A. D. Chambers,
Secretary.

20

THE DELAWARE, LACKAWANNA AND WESTERN
RAILROAD COMPANY,

(SEAL)

By W. H. Truesdale,
President.

Attest:

A. D. Chambers,
Secretary.

30

Approved and signed, June 6, 1912.

.....,

Mayor.

Attest:

.....,

Town Clerk.

40

John J. Todd, direct.

NEW JERSEY SUPREME COURT.

	LACLAIRE L. WELSH,	} <i>Prosecutor,</i>
	<i>vs.</i>	
10	THE TOWN OF MORRISTOWN, <i>et als.</i> , <i>Defendants.</i>	

Transcript of testimony taken on behalf of the defendants, by consent, before Nicholas W. Bindseil, a Supreme Court Commissioner of New Jersey, at the residence of the witness, John J. Todd, 56 Hill street, Morristown, New Jersey, on Wednesday, March 28, 1923, at 11 A. M.

Appearances:

20 Mr. Nathaniel C. Toms and Mr. Conover English for defendants.

Mr. Maximilian M. Stallman for prosecutor.

It is stipulated and agreed by and between the attorneys for the respective parties that the testimony of the witness may be taken stenographically and afterwards reduced to typewriting, the signature of the witness to his said testimony being waived.

30 JOHN J. TODD, a witness called on behalf of defendants,
being duly sworn according to law, on his oath testified
10 as follows:

Direct examination by Mr. English.

Mr. English. I offer in evidence an act entitled, "An act to incorporate the Morris and Essex Railroad Company," passed January 29, 1835, as found in the public acts of New Jersey, bound volume, indexed on the back 1828-1835.

40

John J. Todd, direct.

Mr. Stallman. I object to it as being incompetent, irrelevant and immaterial.

(Marked Exhibit D. 1.)

Q Mr. Todd, you are a resident of Morristown? A I am.

Q Did you ever hold an official position in Morristown? 10
A Yes.

Q Were you ever mayor? A Yes.

Q From what year to what year? A January 1, 1913, to January 1, 1915.

Q At the time you were mayor was the construction under way of the change of the grade of the Lackawanna Railroad tracks? A It was.

Q Pursuant to an agreement which had been entered into between the town and the railroad, dated September 24, 1912? A Yes. 20

Q You knew of the existence of that agreement? A I did.

Q Were you a member of the governing body at that time? Were you an alderman or city official at that time? A Mayor.

Q You were mayor in 1912 when that contract was made? A No, I misunderstood you.

Q Did you know of the making of the contract at the time? A From what I derived from the newspapers. 30

Q General knowledge about it? A General knowledge.

Mr. English. I offer in evidence a copy of the contract between the mayor and board of aldermen of the Town of Morristown and the Morris and Essex Railroad Company and the D., L. & W. Railroad Company, dated September 24, 1912. I will have marked a copy, subject to correction, if that is satisfactory. 40

John J. Todd, direct.

Mr. Stallman. It is.

(Marked Exhibit D. 2.)

Q Mr. Todd, I produce a paper edition, entitled, "Charter and Ordinances of the Town of Morristown, 1908," are you familiar with that book? A Yes, I am.

10 Q That is the official publication of the Town Ordinances? A It is.

Q In particular are you aware of an ordinance published in this book, beginning on page 71, entitled, "An ordinance concerning licenses to hackmen and others," approved and signed July 16, 1878, and I call your particular attention to section 14 of that ordinance, on page 73 of the printed book? A Yes, I am.

20 *Mr. English.* I offer in evidence the ordinance, and call particular attention on the record to section 14 of the ordinance just mentioned, found on page 73 of the printed book.

Mr. Stallman. I object to the offer of the ordinance or any particular section thereof, on the ground that the existence of any ordinance at this time, or any prior time, is incompetent, immaterial and irrelevant on the question of the legality of the ordinance under review.

30 *Mr. English.* You have no objection to the form of the proof of this book?

Mr. Stallman. No.

"Sec. 14. The Mayor is hereby authorized to designate such places within the town of Morristown as public stands for hacks, cabs, omnibuses, stages, carriages and other licensed vehicles, as he may deem expedient and proper, and to make such regulations and give such directions respecting the places or positions to be occupied by carriages or vehicles of any description, at the

John J. Todd, direct.

public stands or at the railroad stations, or elsewhere, as may be necessary to preserve order and promote public convenience; any person who shall neglect or refuse to obey any regulations or directions of the Mayor, authorized to be made or given by him, shall forfeit and pay a sum not exceeding Ten Dollars for each and every offense.” 10

Q Mr Todd, this section 14 of the ordinance, now in evidence, authorizes the mayor to designate such places within the Town of Morristown as public hack stands, as he may deem expedient and proper, and authorizes him to make such regulations and any such directions respecting the places or positions to be occupied by carriages or vehicles of any description at public stands at the railroad station or elsewhere, as may be necessary to preserve order and promote the public convenience. Did you, pursuant to that section of the ordinance, make any designation of a hack stand on the plaza of the Lackawanna Railroad after the construction of the improvement had been completed, pursuant to the agreement D. 2 in evidence? 20

Mr. Stallman. I object to the question on the ground that whether or not any such designation was made by the mayor at that time is immaterial and irrelevant to the question of the validity of the ordinance under review. 30

A I did.

Q Where did you designate such hack stands to be?

Mr. Stallman. I object to that question on the same ground stated in the objection to the preceding question.

A At the main station, at the wall at the end of the terrace. 40

John J. Todd, direct.

Q On the east or west side of the tracks? A I think that is the west side—the main entrance to the station.

Q Where else? A There was a walk in between, and the east side I designated as a hack stand and cab stand.

10 Q Did you designate any other stand? A I did, on the opposite side, the east side, so-called, just opposite the railroad station. First, that did not work out satisfactorily, making a confusion and congestion of traffic. I abolished the stand opposite, and made a new stand alongside of the station, between the express office and the entrance.

Q By the side of the station, you mean where? A Right up against the sidewalk.

Q Which runs along the— A Yes.

20 *Mr. Stallman.* May I inquire whether these designations were made in any official way in writing?

The Witness. They were not, sir; it wasn't the custom, in those days, to put them in writing.

Q I show you blue print, entitled, "Station Grounds at Morristown, N. J.," which outlines in yellow what we call the station plaza.

30 *Mr. Stallman.* I think, Mr. English, that your interpretation of the yellow lines is a little incorrect. The yellow lines are intended to show the boundary of all of the property of the railroad company, and includes property which cannot be designated as plaza.

Mr. English. I will accept the correction in my statement, but it does, incidentally, include the station plaza.

Mr. Stallman. Exactly.

40 Q I call your attention to this map and point out to you the driveway on the west side of the station, which

John J. Todd, direct.

you just mentioned as having designated cab stands; there appear to be two places outlined in green here—do they indicate about where you designated the cab stands? A Yes.

Q On the east side of the track there is outlined in green, on this map, along the driveway by the easterly wall, between the entrance to the passenger tunnel and the express office, a parking place; is that the place which you designated on the easterly wall? 10

Mr. Stallman. I object on the ground that whatever taxicab stand the mayor may have designated at that time, under the ordinance which has been offered in evidence, is immaterial and irrelevant to the issues in this case.

A Yes.

Q That, as I understand it, is the second designation you made on the easterly side of the track? A That is correct. 20

Q Can you indicate on the map where you made the first designation? A It was directly opposite the green designation.

Q Along what was designated on this map "Concrete Walk" by the flower bed? A There is a little triangular park.

Q This map has the words "Flower Bed" written in there. A There are no flower beds there. 30

Q That is what is on the map? A Yes.

Q Was it along by the concrete walk, by that place labeled "Flower Bed"? A It was.

Q On the easterly side of the railroad track? A Yes.

Q That was the first designation on the easterly side?

A Yes.

Q And the second one is the one now outlined in green?

A Yes.

Q You said, in answer to Mr. Stallman's question, that this designation was not in writing. Was it called to the 40

John J. Todd, direct.

attention of anybody in the city government; the police department, for example? A The police were notified.

Q And were any instructions given to them to enforce this regulation or ordinance? A They were instructed.

Q And to your knowledge did they enforce it? A They did.

10 Q So that during your term as mayor all cabs were required to park at the place you outlined on this station plaza? A Yes.

Q What steps were taken by the city government to enforce that; what instructions were given to the police?

20 *Mr. Stallman.* Objected to on the ground that any evidence taken by the Town of Morristown to carry out the use of the taxicab stands as indicated by the mayor is irrelevant and immaterial to the issues of this case, and on the further ground that any instructions issued by the mayor to the police of the Town of Morristown are not binding in any way upon the prosecutor in this writ, or upon the railroad company, under whose license this prosecutor is operating.

Mr. English. I won't press that question.

Q What did the policemen do, to your knowledge, with respect to regulating the use of these taxicab stands or hack stands?

30 *Mr. Stallman.* Objected to on the ground that whatever the policemen may have done pursuant to any instructions received from the mayor is immaterial and incompetent on the issues of this case.

A The police were instructed by myself to see that the cabmen occupied the space which I had allotted to them.

Q To your knowledge did they carry out those instructions? A They did.

Q Did you make yourself familiar with the situation?

40 A I carried them out sometimes, when I caught them in-

John J. Todd, direct.

fringing, and suspended their licenses, which I had authority to do under the ordinance.

Q And did you do that in more cases than one? A I suspended quite a number.

Q For infringements of the regulations on the station plaza? A Yes.

Q What was the fact with respect to the police patrolling of that station plaza; did the police officers do that; was it included in their beats? A Yes. 10

Q And do you know to what extent the police had an oversight over this station plaza? A As much as in any city streets.

Q You are familiar with this contract between the town and the railroad, Exhibit D. 2; I call your attention to that part of it under the caption, "Passenger Station," and particularly to the second paragraph under that caption, which says that "it is further agreed that the town may and shall exercise all necessary police powers in and upon the station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station." Did you know of that provision in the contract when you made your designation of these cab stands? A I did. 20

Q Did you know that when you gave instructions to the police with respect to regulating the traffic on the station plaza? A I did. 30

Q Since you have retired from the office of mayor, have you kept yourself informed of the situation generally in Morristown at the station platform? A I have.

Q Have you been down there frequently? A Yes.

Q To your knowledge has the city exercised police jurisdiction over this plaza?

Mr. Stallman. I object on the ground that that calls for a conclusion of law.

A It has.

John J. Todd, direct.

Q What have you seen with your own eyes to indicate that the town is exercising jurisdiction over that station?

Mr. Stallman. I also object to that on the ground that it calls for a conclusion.

10 A I have observed policemen on duty on the station property almost continuously at any time, day or hour, that I happened to be in that locality.

Q About how often would you say that you have been around the station plaza? A Since I have been mayor?

Q Yes, while you were mayor and since you retired. A One hundred or two hundred times.

Q Would you go down there as often as once a week, on an average? A Yes.

Q Have you observed whether the public cabs have occupied those cab stands which you created, during all this period? A I have; they have done so.

20 Q Do you know whether there are any traffic signs set up on the station plaza? A There are.

Q Were they put up during your term, do you remember? A I am not positive of that fact. They were either put up in my time or very shortly thereafter.

Q And they have been there for a long time, to your personal knowledge? A Yes.

Q During your term of mayor was any question ever raised by the railroad of the right of the town to regulate passenger traffic on that station plaza?

30

Mr. Stallman. That is objected to on the ground that it is immaterial to the issues of this case.

A Never.

Q This contract, Exhibit D. 2, was signed on September 24, 1912, about the time, I imagine, you were a candidate for office, were you not? A Yes.

Q And I presume you took a lively interest in the discussion which was then on with respect to this elevation?

A I did.

40

Herbert C. Wildey, direct.

Q Did you have any conference or conversation with railroad officials or town officials, preliminary to the signing of this agreement or the making of it? A No, not preliminarily.

Mr. English. I offer in evidence the blue print, entitled "Station Grounds at Morristown, N. J.," which was referred to by the witness in his testimony. 10

(Marked Exhibit D. 3.)

Mr. Stallman. No cross examination.

Continuation of testimony in the foregoing cause, before Nicholas W. Bindseil, Supreme Court Commissioner, at the Vail Building, Morristown, New Jersey, on Wednesday, March 28, 1923, at 12 o'clock noon, in the presence of Mr. Nathaniel C. Toms and Mr. Conover English for defendants, and Mr. Maximilian M. Stallman for prosecutor. 20

It is stipulated and agreed by and between the attorneys for the respective parties, that the testimony may be taken stenographically and afterwards reduced to typewriting, the signing of the same being waived.

HERBERT C. WILDEY, being duly sworn according to law, on his oath testifies as follows: 30

Direct examination by Mr. English.

Q Mr. Wildey, you are the chief of police of Morristown? A Yes, sir.

Q And you have been how long? A Short period over a year, about a year and three months.

Q And how long have you been connected with the Morristown police department? A Going on sixteen years.

Q What was your first position in the police department beginning with the first of January, 1913? A Motorcycle officer. 40

Herbert C. Wildey, direct.

Q Motorcycle officer? A Yes, sir.

Q Did you cover all beats in the city at that time? A Yes, sir.

Q Did that include the concourse of the Lackawanna Railroad? A Yes, sir.

Q Do you know Mayor Todd? A I do.

10 Q Was he mayor of Morristown beginning January 1, 1913? A He was.

Q Who was chief of police at that time? A James Holloway.

Q Is he dead now? A Yes, sir.

Q At that time, I assume, you acted under directions of the chief of police? A I did.

Q Who acted under the mayor? A Yes, sir.

Q Did Mayor Todd designate any cab stands on the station plaza? A He did.

20 Q I show you a blue print which includes the station plaza, Exhibit D. 3. Does that show the lay-out? A Yes, sir; it does.

Q There is indicated on this map on the west side of the tracks, two little places in green? A That is the green there.

Q And do these green spaces indicate cab stands? A Yes, they do.

Q Designated by whom? A By the mayor.

30 Q One of those stands is to the east of that green space which on this map is marked "Flower Bed"? A Yes, sir.

Q Have you any knowledge as to what is now marked in green was the first stand? A It was over here on the westerly side of this flower bed. There was some confusion about them being mixed up with private cars and then it was moved over to the other side.

Q Along the easterly side of the elevation? A Yes, sir.

40 Q Now, did you, when you were a motorcycle policeman, patrol the whole of this plaza? A Yes, sir.

Herbert C. Wildey, direct.

Q And enforce the regulations of the mayor? A Enforced the regulations of the mayor by orders of the chief, issued to me.

Q Part of the work was to see to it that the cabs obeyed the regulations with respect to parking? A Yes, sir.

Q And were signs put up? A Yes, sir.

10

Q And were they enforced? A They were.

Q Since you have been chief of police of Morristown have you assigned men to see that the station grounds are policed? A Same as they have always been.

Q And is it part of the duty of those policemen to include that in their beat? A Yes, sir.

Q And those policemen, to your knowledge, do what? A Enforce the traffic regulations that have been existing there.

Q Ever since this elevation has been put through? A Ever since the elevation.

20

Q Now, let me call your attention to this map, Exhibit D. 3 and to the part on the westerly side of the tracks where the driveway is located, alongside the main entrance of the station. Is there any place there where owners were allowed to park their cars? A Not to my knowledge.

Q Where did private owners park? A They were allowed to drive up and take on or discharge passengers.

30

Mr. Stallman. That calls for a conclusion of law.

Q You say they were allowed to discharge passengers?

A Yes, sir.

Q Were they allowed to let their cars remain there?

Mr. Stallman. I object, that calls for a conclusion of law.

Q What did the private owners do there—what were they allowed to do?

40

Arthur N. Meeker, direct.

Mr. Stallman. I object, that is incompetent and immaterial to the issues of this case.

A They drove up to discharge their passengers and drove out again.

Q And that was regulated by the policemen? A Yes.

10 *Mr. Stallman.* No cross examination.

LIEUT. CORNELIUS J. HOLLY, being duly sworn according to law, on his oath testifies as follows:

Direct examination by Mr. English.

Q Lieutenant Holly, are you connected with the police force of Morristown? A I am.

Q And have been how long? A Over twenty-five years.

20 Q And what position have you now? A Lieutenant.

Q In charge of headquarters? A At times.

Q When you were in charge was it your duty to send out officers? A Yes, sir

Q Did you ever send them to the station plaza? A Yes, sir.

Q Was that included in their regular beat? A Yes.

Q And what did you instruct them to do?

30 *Mr. Stallman.* I object. It is immaterial and irrelevant to the question of the legality of the ordinance so far as looking after things in general and regulating traffic is concerned.

ARTHUR N. MEEKER, being duly sworn according to law, on his oath testifies as follows:

Q You are a police officer of Morristown? A Yes, sir.

Q How long have you been? A Going on sixteen years.

Arthur N. Meeker, direct.

Q Have you ever been detailed to the railroad station, platform and grounds of the Lackawanna Railroad? A I have.

Q And how often, do you suppose? A Well, every little while we make our trips and have to go there.

Q Is it part of your regular beat? A Yes, sir.

Q And when you made this trip as police officer, what did you do? 10

Mr. Stallman. I object on the ground that the performance of any duties of police officer in the neighborhood of the police station are incompetent and irrelevant and immaterial to the question of legality of the ordinance under review.

Q What did you do there? A Looked after everything in general, any violations of traffic rules and everything.

Q Did you regulate parking? 20

Mr. Stallman. I object to that question not only because it is leading, but also because it calls for an answer on matters that are incompetent and irrelevant.

Q Are you familiar with this little blueprint of the station grounds, Exhibit D. 3? A Yes, sir.

Q Do you know whether there were cab stands as shown in green, on both sides of the track, on this map? A Well, all I know, over there where they used to drive in and discharge passengers. 30

Q Are there traffic signs showing the way to go? A Yes, sir.

Q And was there a cab stand on the easterly side of the tracks, on the westbound side of the track? A Yes, sir.

Q And when you were on duty there you would attend to the regulation of the traffic and see that these rules were adhered to? A Yes, sir. 40

Daniel E. Murphy, direct.

Q And that has been going on ever since you have been a police officer? A Yes, sir; under orders of the chief.

Q Do you know when the elevation was put through, about ten years ago? A Yes, sir.

Q And you have been there as police officer ever since then? A Yes, sir.

10

DANIEL E. MURPHY, being duly sworn according to law, on his oath testifies as follows:

Direct examination by Mr. English.

Q Mr. Murphy, you live in Morristown? A Yes, I do.

Q How long have you lived here? A All my life.

Q What is your business? A Taxicab business.

20 Q And how old a man are you? A Between twenty-three and twenty-four years.

Q You drive a taxi now? A Yes, sir.

Q What was your father's business before you? A Same business.

Q Taxicab? A Cab business with horses.

Q Can you remember when the Lackawanna tracks were put through—the elevation? A Yes, sir; I can.

Q Did you drive around with your father in those days? A Yes, sir; I did.

30 Q Do you know where the parking space was on the side of the westbound tracks?

Mr. Stallman. Are you now referring to the conditions after the new station was built?

A After the elevation was completed it was right across from where Welsh's cars stand.

Q Is there a triangular space there? A Yes, sir.

Q I show you map in which a triangular space is outlined. Was it moved after that? A Yes, sir.

40 Q To where the green outline now is? A Yes, sir.

Michael James Murphy, direct.

Q And did your father use to park his wagon there, or whatever he drove? A Yes, sir.

Q You were with him and saw him do it? A He just gave it up about that time and my brother and I took it over.

Q How long have you been driving a cab for yourself? A I have been driving a cab, I suppose, about practically all my life—since I was a small kid. 10

Q Since this elevation? A Yes, sir.

Q Did you park your cab over where this space we have referred to now is? A Yes, sir.

Q Did you see police officers there directing traffic? A Yes, sir.

MICHAEL JAMES MURPHY, being duly sworn according to law, on his oath testifies as follows: 20

Direct examination by Mr. English.

Q You live in Morristown? A Yes, sir; and lived here all my life.

Q How old are you? A Twenty-eight years old.

Q What business are you in? A Taxi driver.

Q How long have you been such? A Taxi driver ever since the new station was built and worked that as a side line before that, too.

Q Ever since the track elevation has been completed, you have been driving taxicabs? A Yes, sir. 30

Q You are familiar with the station grounds are you not? A I was born here.

Q Just look at this map, Exhibit D. 3; do you see this space on the side of the westbound tracks, outlined in green? A That is where Welsh is now.

Q Was that formerly a public parking place? A The chief put the cars there and we was put over here against this curb and then we objected and the chief put us back here again. 40

Michael James Murphy, cross.

Q How long ago was it? A Since the station was first built.

Q From that time until the controversy now at present arose you went along here, where it is now marked in green? A Yes, sir; and by the westerly side of the station.

10 Q Have you seen police officers down there? A Every train.

Q To do what? A Traffic duty. If you didn't go around that park you would get a summons or a call-down from the officer.

Q Have they got signs up? A Yes, sir.

Q And did the officers enforce the signs? A Yes, sir.

Cross examination by Mr. Stallman.

20 Q Your name is Mr. Murphy? A Yes, sir.

Q You said in answer to a question asked by Mr. English that you have been parking somewhere else since the present controversy arose? A What do you mean, sir?

Q Did you say to Mr. English that you have been parking somewhere else since the present controversy arose? A You mean since that station was built?

30 Q Did you understand what I said when I said present controversy? Did you understand what I meant when I asked you about the practice since the present controversy? A I didn't bring that out.

Q (Question repeated.) A That is where the green mark is.

Q And did you understand what I said, that you parked there until the present controversy arose? A That means they put us over on the other side.

Q You don't park there now? A No, we went off this railroad property altogether.

40 Q You went off the railroad property altogether? A Yes, sir.

Michael James Murphy, cross.

Q And the railroad company has excluded you from that property?

Mr. English. I object, that is immaterial to the controversy.

A Yes, sir.

Q And you are one of the cab men which have been served with an injunction order to keep you off this property? A My boss has. 10

Q You are a driver for some taxicab owner who has been enjoined to keep off this railroad property? A Yes, sir; before that I was a driver for myself.

Q And so far as you know, the only reason that you are not now using the railroad property is because the railroad company has stopped the use of this property for general taxicab use?

Mr. English. I object to that as immaterial and incompetent and having no bearing on this issue. And on the further ground that where these parks are now has been designated by the municipal authorities as a public hackstand. 20

A That is what I hear from the boss, to stay away from there—his orders.

Q And it is a fact within your personal knowledge that a taxicab owner by the name of Welsh is now using for a taxicab stand these spaces that you formerly used? A Yes, sir. 30

Mr. English. I object to that on the same ground.

Q And Mr. Welsh has always used these taxicab stands to which you have referred and which are shown in green on this map ever since this trouble arose?

Mr. English. Same objection.

A Yes, sir. 40

Daniel E. Murphy, cross—re-direct.

DANIEL E. MURPHY, duly recalled for

Cross examination by Mr. Stallman.

Q You identified on this map, two little areas shown in green, where you say you have, up to last December parked your taxicab? A Yes, we have.

10 Q On the railroad company's property? A Yes.

Q And since last December or January you have not been parking on these places? A No, I have been parking on those places when I have got orders from people to meet them.

Q Not generally? A No soliciting.

Q And you are not using the railroad property for that purpose because the railroad company has ordered you off from there, isn't that correct? A Yes, sir.

20 Q Are you one of the taxicab men who have been enjoined by the Court of Chancery of this State against the use of this railroad property for taxicab purposes?

Mr. English. I object. It is incompetent and immaterial.

A Yes, sir.

Q You have been served with the injunction, have you?

A Yes, sir.

Re-direct examination by Mr. English.

30

Q The town, by ordinance abolished that old parking place which used to be on the westbound track, as outlined in green in this map?

Mr. Stallman. I object to that question, because the action of the town in that connection calls for a conclusion of law on the part of this witness.

A Yes, sir.

40 Q Do you know whether there has been a cab stand created by municipal authority along Lackawanna Place?

Daniel E. Murphy, cross—re-direct.

Mr. Stallman. I object to that question because the fact which it seems to elicit is immaterial, irrelevant and incompetent to the case and on further ground that the establishment of a taxi stand is a municipal act and so far as this witness is concerned is a conclusion of law.

A Yes, by the mayor and board of aldermen of the town. 10

Q That parking place on Lackawanna Place was created by the town after the Court of Chancery made an injunction against parking on the station grounds?

Mr. Stallman. I object on the grounds that I have stated in the objection to the previous question.

A Yes, sir.

Q And as I understand your testimony, you got off the old parking place because of the injunction of the Court?

A Yes, sir.

20

Q Is that right? A Yes, sir.

Q Before that injunction was issued by the Court of Chancery, did the Lackawanna Railroad people try to put you off that cab stand?

Mr. Stallman. I object. That is immaterial.

A Yes, they did.

Q Did you go at their behest? A No, sir.

Q Did you finally go? A Yes, by the Court order.

30

Cross examination by Mr. Stallman.

Q That is the Lackawanna Railroad issued instructions ordering you to go off and you refused to obey those instructions until you received the Court order? A Yes, sir.

Re-direct examination by Mr. English.

Q Did the mayor tell you to stay there until the Court ordered you to get off? A Yes, sir; we were put there and licensed by the mayor.

40

Anson R. Durling, direct.

ANSON R. DURLING, being duly sworn according to law, on his oath testifies as follows:

Q Mr. Durling, you live in Morristown? A Yes, sir.

Q How long have you lived there? A Since 1885.

Q You are a cab driver? A Yes, sir.

10 Q For yourself or somebody else? A For myself.

Q And how long have you been driving a cab? A Thirty-two years the twenty-fourth of next month.

Q I suppose you have been down at the station a good many times? A Never followed any other business.

Q Do you remember when the elevation was completed? A Yes, sir.

Q Do you remember following the completion of that work, whether any cab stands were designated down there? A I do.

20 Q Where? A To back up against that triangular little park towards Swift's Beef House.

Q On the side of the westbound tracks? A Yes, sir; and then I don't think it remained that way, only two or three weeks on account of when anyone came out three or four cabs would drive out and the mayor and board of aldermen thought that made a great deal of confusion so then they designated the stand on the westbound side of the subway.

30 Q Who was mayor at that time? A I think Mayor Todd.

Q Have you seen police officers around there? A Always, regulating the traffic around the station for the last thirty-two years.

Q Are there traffic signs around there? A Yes, sir.

Q And the police officers carry them out? A Yes, sir.

Q Have you ever seen private cars drive up to the main station on the other side of the track? A On the east-bound side?

Q Yes. A Yes, sir.

40 Q Do they park out there? A No, sir.

Clyde Potts, direct.

Q How long do they stay? A Only a few minutes to take on or discharge passengers.

Cross examination by Mr. Stallman.

Q Are you one of the taxi operators who were the defendants in a Chancery suit brought by the Railroad Company and Laclare L. Welsh, to compel the discontinuance of the use of the railroad property for taxi purposes? 10

Mr. English. I object. It is not cross examination and is also incompetent, immaterial and irrelevant, and further that there is no proof in the case that this is railroad property, as implied in the question.

A Yes, sir.

CLYDE POTTS, being duly sworn according to law, on his oath testifies as follows: 20

Direct examination by Mr. English.

Q You are the present mayor of Morristown, Mr. Potts? A I am.

Q And you took office when? A January first.

Q 1923? A Yes, sir.

Q You have lived in Morristown how long? A Seventeen years.

Q You are, of course, familiar with the station grounds at the Lackawanna Station? A I am. 30

Q There has been some reference in the testimony to a restraining order issued by the Court of Chancery, do you know about that? A I do.

Q It restrains cabmen from parking in a certain place? A Yes, sir.

Q There has also been some reference to an ordinance creating a parking place on Lackawanna Place? A Yes, sir. 40

Clyde Potts, direct.

Q Was that ordinance passed after the Court of Chancery had acted in the matter, or was it designated by you as mayor? A It was designated by me as mayor following the receipt of the injunction order.

Q You are, of course, familiar with the ordinance which is the subject matter of this suit? A Yes, sir, I am.

10 Q That was passed by the board of aldermen? A It was.

Q And for what purpose?

Mr. Stallman. I object to the question of the purpose, because interpretation of the ordinance is incompetent, irrelevant and immaterial.

A It was passed for the purpose of excluding that portion of the thoroughfare down there as a public hackstand in order to avoid the confusion at the depot.

20 Q Have you examined the records of the town with respect to the contribution made by the city at the time the elevation was put through? A The so-called contract between the D., L. & W. R. R. Co. and the city?

Q Yes. A Yes, sir.

Q Do you know whether the town contributed?

30 *Mr. Stallman.* I object to that question. The knowledge of this witness being entirely computed from records, his testimony is not the best evidence and the facts sought to be elicited are irrelevant, incompetent and immaterial to the issue of this case.

A Yes, sir.

Q How much, do you know? A I am not sure of the amount.

Q You might refresh your recollection from the affidavit here. I show you copy of your affidavit in the Chancery suit stating between twenty and twenty-five thousand, is that accurate as stated, from your recollection?

40 A Yes, sir.

Clyde Potts, cross.

Cross examination by Mr. Stallman.

Q Now, Mayor Potts, is it not true that the purpose of the ordinance which is under review is to prevent the prosecutor, Welsh, from using that part of the railroad company's property which it has set aside for his use?

A It may have that effect, but I would not say that was the purpose of the ordinance. (10)

Q And as you say, the ordinance under review was not even introduced into the council until the railroad company had taken steps to exclude other cabmen than Welsh from the property? A I don't know as I said that, but it is the truth. That is the fact. The dates speak for that.

Q And is it not a fact that you, as mayor, had knowledge of the railroad company's notice to these taxi men that they should not any longer park their cars on the railroad company's property, before the Chancery proceedings were instituted? (20)

Mr. English. I object to the reference to the Chancery proceedings as stated, because they are immaterial to this issue.

A I had information from Mayor Bartman that the railroad company had intended to exclude the hackmen from this plaza and then I had a letter from him from the railroad company in which they withdrew this order excluding the hackmen, saying that they did not intend to go on with it. Later, before I became mayor a telegram came that they had made up their minds to go ahead with the exclusion. (30)

Q And you, about that time had knowledge of the fact that the railroad company had made a contract with Lacleare L. Welsh, giving him the exclusive right to conduct a taxi service on its property? A I didn't know that until Mr. Seager read the contract to the mayor and aldermen here at a conference of the board, some time late in January. Mr. Seager, being attorney for the railroad company, came before our board. (40)

Clyde Potts, cross.

Q The board of aldermen? A Yes, sir; and read what purported to be a contract between the Lackawanna Railroad Company and Laclare L. Welsh.

Q And the purport of that contract was to give Welsh the taxi privileges on the railroad company's property and to exclude other taxi men from it? A I gathered the
10 purport of that contract was for the Lackawanna Railroad Company to get ten per cent. of the gross receipts for the privilege of standing on the plaza.

Q Didn't you, as mayor, understand that what the contract provided for was to give Welsh the exclusive right and exclude the other taxicab men?

Mr. English. I object, the contract speaks for itself.

Q You knew of the contract and its provisions at that
20 conference? A It was produced at the conference of the mayor and board of aldermen.

Q Now, as mayor, didn't you instruct several of these taxi men that the railroad company had no right to make such an order or to exclude them from the railroad company's property? A After I read the contract between the town and the railroad company, which reserved to the town the police powers to regulate vehicular traffic—after I read that contract, then I notified the hackmen that they
30 were to remain on that public hackstand.

Q Upon the railroad company's property? A Alleged to be the railroad company's property, yes.

Q And you don't know, do you, of any dedication by the railroad company of this property to the Town of Morristown?

Mr. English. The question is whether you know.

A A dedication by public use?

Q A dedication by the railroad company to the Town of Morristown of this so-called plaza property? A As I
40

Clyde Potts, cross.

remember I assumed it was dedicated to the public by usage, and I assumed that that was a dedication of it.

Q Did you know of any instrument dedicating it? A No, only the contract between the town and the company.

Q Do you mean the elevation contract of 1912, Exhibit D. 2, in this connection? A Yes, sir.

Q And after you had so advised the taxi men, then the railroad company obtained an injunction against you as mayor and the other members of the board of aldermen, restraining you from aiding these cabmen—that is a fact, is it not? A Well, the injunction was quite limited in its scope. 10

Mr. English. I object to his testifying to the contents of the injunction because that speaks for itself.

Q Then it was after the service of the injunction was it not that you, as mayor, designated another taxi stand in Lackawanna Place, off the railroad company's property? 20

Mr. English. Are you speaking of the preliminary injunction, or the restraining order?

Mr. Stallman. I will make it the restraining order.

A I can tell that better in my own language.

Q Whether it was after the railroad company had obtained a restraining order that you then designated another taxi stand in Lackawanna Place? A Yes, after the first restraining order, but before the receipt of the injunction. We then designated Lackawanna Place, south easterly from the Foundry House as a public hackstand which all the licensed hackmen of the town were to stand on. 30

Q That followed the issuance of the restraining order?

A Yes, they all obeyed it except Mr. Welsh.

Q And Mr. Welsh was not a defendant in the Chancery proceedings? A He had three licensed cabs under the town license. I don't mean the injunction. I mean that 40

Clyde Potts, cross.

all obeyed the orders of the mayor and board of aldermen in regard to the new hack stand on Lackawanna Place. All the licensed hackmen in the town obeyed the orders of the mayor and board of aldermen in regard to the new stand except the three licensed hacks of Mr. Welsh.

Q Lackawanna Place is a public street, is it not? A

10 Lackawanna Place is a public street? Yes, sir.

Q Up to the time that the railroad company raised this question of the use of its property for the public hack stand, no ordinance such as the ordinance under review had been introduced before the board of aldermen had it? A Before the injunction was issued?

Q Before the railroad company raised this issue of the right of the taximen to use its property. Up to that time this ordinance under review had not been introduced or considered in the board of aldermen? A No, this ques-
20 tion of the railroad was raised in December, last year, and I didn't become mayor until January first.

Q Now, with reference to an expenditure you say the Town of Morristown made in connection with a track elevation do you know for what purpose that money was expended? A Part of it was to acquire the York prop-
erty to open Lackawanna Place into this plaza. I think the balance was expended on reconstruction of the streets around the station grounds.

Q There was none of it expended on any railroad struc-
30 tural work, or for the acquirement of any land occupied by the railroad company? A Not unless you count that we bought up something which was used for railroad purposes in the way of a street.

Q Do you know that as a matter of fact that no land now included in Lackawanna Place was dedicated to the Town of Morristown by the Morris and Essex Railroad Company and Morristown and Erie Railroad Company?

A There was quite considerable contributed from the
40 Morristown and Erie Railroad Company. Some of it was

Clyde Potts, re-direct.

bought from York and a smaller part of it was contributed by the Morris and Essex Railroad Company.

Re-direct examination by Mr. English.

Q You spoke of some letters that Mayor Bartman, whom you succeeded as mayor, had shown you? Did he show you a letter received from the railroad company? 10

A Yes, sir.

Q I show you copy of letter of December 18th, 1922, and a letter from the railroad company by its passenger traffic manager, dated December 26th, 1922. A Yes, sir.

Mr. English. I offer the letters in evidence.

(Marked D. 4, D. 5.)

Mr. Stallman. We admit them.

Q You spoke of a Mr. Seager in your testimony—who is he? A Mr. Seager is an attorney of the Lackawanna Railroad Company, who attended a conference of the mayor and board of aldermen some time in January. 20

Mr. Stallman. It is admitted that Mr. Seager is the assistant general counsel of the Lackawanna Railroad.

Q Did you learn from him the interest the Lackawanna Railroad Company had in this contract with Welsh? A Yes, sir; and it was the first time that we found the railroad company had a financial interest in this contract. 30

Q How much was that financial interest? A Ten per cent. of the gross receipts.

Q And it was in consideration of that that they considered Welsh their preferred man on their grounds? A Yes, and contracted to exclude all other hackmen from this plaza.

David F. Bartman, direct.

DAVID F. BARTMAN, being duly sworn according to law, on his oath testifies as follows:

Direct examination by Mr. English.

Q Mr. Bartman, you live in Morristown? A Yes, sir.

Q How long have you lived in Morristown? A Since
10 1895.

Q You are a former mayor of Morristown? A I was.

Q Between what years were you mayor? A 1920,
1921 and 1922.

Q You are a member of the bar also? A Yes, sir.

Q Do you hold any public office? A I don't think so—
not any connected with salary.

Q You have been a member of the State Legislature?
A Yes, sir.

20 Q Now, you retired as mayor last December, 1922? A
I did.

Q About that time, I perceive from some correspond-
ence, now in evidence as Exhibits D. 4 and D. 5, the Lacka-
wanna Railroad raised some question about the hack-
men. Prior to their raising that question had there ever
been any question raised over the use of the station
grounds by hackmen? A Not to my knowledge.

Q Or the right of the town authorities to police the
30 place or regulate traffic? A Never heard of any.

Q As appears from this correspondence in December,
1922, some question was raised? A Yes, sir.

Q Which apparently you recited to the board of alder-
men? A Yes, sir.

Q Because I see this letter, "That the board of alder-
men shall thwart such a move, and desired me to inform
you of that fact." Desired you to inform the railroad
company? A Yes.

Q Then you got the letter in reply, D. 26? A Yes,
40 that is the letter I sent to Mayor Potts.

David F. Bartman, cross.

Cross examination by Mr. Stallman.

Q Mr. Bartman, in the letter which you sent to the railroad company, dated December 18th, 1922, you referred to the private hackmen who were using the station grounds of the railroad company as a parking place, did you not? A Not all of them. There are other hackmen who park along the east side of the track. 10

Q How many hackmen or how many hacks usually parked on the station grounds along the westbound tracks?

A I don't know whether they were on the station grounds as a matter of fact, but if you mean the space between the station and the express office, I have seen anywhere from one to twenty parked there.

Q You have seen as many as twenty taxis there at one time? A Yes, sir; one to twenty—maybe not so many as twenty, but there have been in the evening quite a number of hacks there. 20

Q At that time, towards the close of your administration as mayor in the end of 1922, how many licensed cabmen were there in Morristown?

Mr. English. I object to that as immaterial.

A I will have to refer you to the clerk.

Q To the best of your knowledge?

Mr. English. Same objection. 30

A I understood there were over forty taxis licensed.

Q Assuming that there were forty licensed cabmen, is it a fact that most of them went down to the station to meet the incoming trains, particularly in the evening and to solicit patronage there? A I presume they did. I presume that is the reason they had their license, to do business in the town and around the station.

Q Didn't you see them doing it? A All these hackmen doing it? 40

David F. Bartman, cross.

Q All at one time? A I have seen hackmen, some I knew and some I didn't know, driving hacks or taxis from the station, going to the station, delivering and taking away passengers.

Q Is it a fact that you have seen as high as twenty cabmen at the station there, awaiting trains, particularly in the evening? A Possibly there were twenty. I couldn't swear as a fact there were twenty.

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

I hereby certify that the foregoing testimony was taken before me as Supreme Court Commissioner at the times and places therein stated, in the presence of Mr. Nathaniel C. Toms and Mr. Conover English, for the defendants, and Mr. Maximilian M. Stallman, for the prosecutor; that it was stipulated and agreed by and between counsel for the respective parties that the testimony of the witnesses be taken stenographically, afterwards reduced to type-writing, and that signatures of the witnesses to their said testimony be waived.

I further certify that the foregoing is a true and correct transcript of the testimony taken before me, Supreme Court Commissioner, at the times and places above referred to.

NICHOLAS W. BINDSEIL,
Supreme Court Commissioner of New Jersey.

Stipulation.

STIPULATION.

NEW JERSEY SUPREME COURT.

LACLARE L. WELSH,

Prosecutor,

vs.

THE TOWN OF MORRISTOWN,

Defendant.

On Certiorari. 10

Stipulation.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto by their respective attorneys:

1. The parties waive any irregularity or defect in the record or proceedings herein, if any, in connection with the passage or publication of the ordinance in review. 20

2. That the return of the writ and the filing of reasons be and the same is hereby extended to February 17, 1923.

3. That the state of the case shall consist of:

(a) The writ of certiorari and return.

(c) Copy of Agreement dated December 28, 1922; between the Delaware, Lackawanna and Western Railroad Company and Laclare L. Welsh.

(d) The contract dated September 24, 1912, between the Town of Morristown and the Morris and Essex Railroad Company and the Delaware, Lackawanna and Western Railroad Company, providing for the elevation of the tracks of railroad company in Morristown. 30

(e) Depositions taken before N. W. Bindseil, Supreme Court Commissioner.

(f) This stipulation.

40

Stipulation.

10 IT IS FURTHER STIPULATED AND AGREED that the driveway mentioned in the ordinance in review is located entirely upon lands owned by the Morris and Essex Railroad Company and is under lease to its lessee the Delaware, Lackawanna and Western Railroad Company, and that said driveway is one of or part of the driveways mentioned in the contract between the Delaware, Lackawanna and Western Railroad Company, and the Town of Morristown, dated September 24, 1912.

M. M. STALLMAN,
Attorney of Prosecutor.

N. C. TOMS,
Attorney of Defendant.

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Exhibits D. 4—D. 5.

EXHIBIT D. 4.

(Letter from D. F. Barkman, Mayor of Morristown)

December 18th, 1922.

Delaware, Lackawanna & Western Railroad,
Hoboken,
N. J.

10

Gentlemen:—

In reference to the change from the private hackmen at Morristown to hackmen controled by the company, the Board of Aldermen went on record as against such a move and desired me to inform you of that fact.

Very truly yours,

DFB/RES.

D. F. BARKMAN.

20

EXHIBIT D. 5.

THE DELAWARE, LACKAWANNA & WESTERN R. R. Co.

New York, December 26, 1922.

Hon. David F. Barkman,
Mayor, Town of Morristown,
Morristown, N. J.

30

Dear Sir:—

Your letter of the 18th, addressed to this Company at Hoboken, has been referred to me with reference to our proposed arrangement for taxicab service at Morristown with Mr. Welsh, and I note that the Board of Aldermen have gone on record against such a move on our part.

It was our desire to improve the taxicab situation at Morristown as there has been in the past more or less complaint about the conditions existing at that station and the indifferent service rendered by the present inde-

40

Exhibit D. 5.

pendent taxicab drivers, I note in your letter you state that objection is made to the hackmen controlled by our Company. This is not entirely correct as it was simply our desire to make a contract with Mr. Welsh giving him the exclusive privilege to solicit business at our station in the same manner that we did at Newark sometime ago with the Yellow Taxicab Company, which resulted in greatly improved service at Newark and more satisfactory conditions in every way.

However, as there seems to be opposition to the proposed arrangement at Morristown we have no desire to press the matter or make any arrangement which would be unsatisfactory to the City officials, although it is our honest belief that the arrangement proposed with Mr. Welsh would have been a distinct improvement.

I trust, however, that there will be no further cause for complaint on the part of any of our patrons and I should also be glad to hear from you if you care to advise me what the particular objections were on the part of the Board of Aldermen toward our making the contract mentioned above with Mr. Welsh.

Yours truly,

W. F. GRIFFITHS,
Passenger Traffic Manager.

Opinion of Supreme Court.

OPINION OF SUPREME COURT.

Filed July 20, 1923.

NEW JERSEY SUPREME COURT.

No. 204, JUNE TERM, 1923.

LACLARE L. WELSH,

Prosecutor,

vs.

THE TOWN OF MORRISTOWN, *et al.*,

Defendants.

010

Argued June 6, 1923; decided July 20, 1923.

Syllabus.

020

1. An ordinance enacting that no automobile or other vehicle shall be parked or allowed to stand for a longer time than is necessary to take on and let off passengers or baggage, and in no case longer than two minutes, in a designated public place, is, under present-day conditions, a "regulation of traffic."

2. The Town of Morristown has authority by virtue of its municipal and contractual powers, by ordinance to enact that no automobile or other vehicle shall be parked or allowed to stand for a longer time than is necessary to take on and let off passengers or baggage, and in no case longer than two minutes, in a designated part of a public driveway girdling a railroad station where the railroad company owning the fee had expressly granted to the town the right to regulate traffic. The town has power to enact such ordinance even though the railroad company, before the passage thereof, had granted to the prosecutor, a taxicab man, the exclusive right to solicit business on its station grounds and the exclusive privi-

030

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Opinion of Supreme Court.

lege of parking vehicles at the place in question. Such ordinance, resting both on general municipal power and on the provisions of a track elevation contract (antedating that of the prosecutor) between the town and the railroad company (no question of lack of notice to the prosecutor being raised), does not deprive the prosecutor of his property without due process of law, nor take his property for public use without just compensation, nor deny him the equal protection of the laws.

On certiorari, etc.

Before Justices Trenchard, Parker and Bergen.

For the prosecutor, Maximilian M. Stallman.

For the defendants, N. C. Toms and Conover English.

The opinion of the court was delivered by TRENCHARD, J.
 This writ brings up an ordinance of the Town of Morristown entitled "An Ordinance to regulate traffic on the driveway lying on the east side of the shelter house of the Delaware, Lackawanna and Western Railroad Company in Morristown, extending from the American Railway Express office to Lackawanna Place." It ordains that:

"1. No automobile or other vehicle, either private or that which may be engaged in the transportation of passengers for hire, shall be parked or shall be allowed to stand for a longer time than is necessary to take on or let off passengers, expressage, or baggage, and in no case for longer than two minutes, along the curb on the westerly side of the driveway mentioned in the title of this ordinance from the southerly side of the entrance way to the shelter house or the tunnel leading under the depot, northerly to the turn of said driveway under the railroad."

"2. No automobile which may be engaged in the transportation of passengers for hire shall be so parked or so

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allowed to stand as prohibited in section 1 hereof on the remaining part of the westerly side of said driveway."

A penalty for violation is prescribed in the ordinance.

The status of the prosecutor is that he has a contract with the railroad company to furnish exclusive taxicab service at the station. That contract was entered into before the ordinance in question was passed. By it the company states its desire to regulate cab service and grants to the prosecutor "the exclusive right to solicit business as a cabman" on its station grounds and "the exclusive privilege of parking vehicles employed in said cab service when not in actual use in the spaces shown in green on the blue print map hereto attached." One of such spaces is that described in the ordinance. 10

No question is raised with respect to the passage of the ordinance, nor is it challenged as an unreasonable exercise of municipal powers. Of the four reasons assigned by the prosecutor the first is generally that it is beyond the power of the town to enact, and the other three rest on constitutional grounds, viz.: that it deprives the prosecutor of his property without due process of law, takes his property for public use without just compensation, and denies him the equal protection of the laws. 20

As we have seen, the ordinance in form and substance is on its face aimed at the regulation of vehicular traffic at the railroad station at a particular place in the driveway lying on the east side of the shelter house of the railroad company extending from the American Railway Express office to Lackawanna Place. 30

The town claims the right to enact this ordinance generally by virtue of its police power to regulate traffic in public places, and specifically by virtue of a contract with the railroad company made in 1912 and relating to the elevation of the station and tracks so as to avoid grade crossing. This contract was entered into by virtue of the various enabling statutes in that regard, particularly the Act of 1901, P. L., p. 116; C. S., p. 4266. It provides 40

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for a change in the station approaches partly by a new street to be laid out and made by the town, and partly by a roadway built by the company. The general scheme as carried out resulted in a driveway girdling the station consisting in part of a plaza (the driveway in question) connected at its north end with Morris street (a main highway) by a roadway built by the company, and at the south end through the new street called Lackawanna Place, a dedicated public street. The contract declared that "said driveway (which is the subject of the ordinance) shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds on the easterly side of said railroad and for the use of those now having rights of egress to Morris street in Saw Mill Lane, but this contract shall not be construed as a dedication of said driveway as a public highway." It thereby and otherwise appears that the driveway in question was and is devoted to public use, although the fee thereof remained in the railroad company.

This track elevation contract also contains this broad and significant language: "It is further agreed that the town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the railroad companies in respect thereto."

In our opinion that is a plain declaration that the foot and vehicular traffic at the station and in the station driveways is to be regulated by the town, and we have no doubt an ordinance enacting that no automobiles or other vehicles shall be parked or allowed to stand for a longer time than is necessary to take on and let off passengers or baggage, and in no case longer than two minutes, is, under present-day conditions, a regulation of traffic.

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By the contract with the prosecutor, as we have pointed out, the company undertook, in derogation of the control granted by the contract with the town, to establish a parking stand directly in one of the main driveways girdling the station, and where the town authorities might well say it is an obstruction and a nuisance.

For reasons presently to be stated we deem the ordinance within the municipal and contractual powers of the town. 10

We think that the prosecutor, in contracting with the company, did so subject to the town's rights generally, and specially under the contract of 1912, and cannot override them. No question of lack of notice on his part is raised.

There can be no doubt that the town has power by ordinance to regulate traffic when reasonably necessary for public safety and good order, and to enact that no automobile or other vehicle shall be parked or allowed to stand for a longer time than is necessary to take on and let off passengers or baggage, and in no case longer than two minutes, in a designated public place. See the charter powers, P. L. 1865, p. 819; P. L. 1866, p. 427; and Home Rule Act, P. L. 1917, p. 358. See also *Belmar v. Barkalow*, 67 N. J. L. 504; *Combs v. Lakewood*, 68 N. J. L. 582; *Atlantic City v. Brown*, 72 N. J. L. 207, and *Irwin v. Atlantic City*, 90 N. J. L. 99. 20

It is equally clear that the contract between the prosecutor and the railroad company did not deprive the town of the power which it had to enact the ordinance in question and to regulate traffic on the driveway. As we have pointed out the public generally had the right to use the driveway in question, and the town had authority, not only by virtue of its police power, but by express grant from the railroad company owning the fee, to regulate traffic thereon. The town had power to enact the ordinance, even though the company, before the passage thereof, had granted to the prosecutor, a taxicab man, the ex- 30

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- clusive right to solicit business on its station grounds, and the exclusive privilege of parking vehicles at the place in question. Such ordinance (no question of lack of notice to the prosecutor being raised) does not deprive the prosecutor of his property without due process of law, nor take his property for public use without just compensation, nor deny him the equal protection of the laws. Avowedly the ordinance was enacted in the exercise of the police power. Every citizen holds his property subject to the proper exercise of this power, either by the legislature directly, or by public or municipal corporations to which the legislature may delegate it. It is well settled that laws and regulations of this character, relating to the comfort, health, convenience, good order and general welfare of the inhabitants, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances.
- They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *dannum absque injuria*, or in theory of the law, he is compensated for it by his sharing the general benefits which the regulations are intended and calculated to secure. *Dillon's Mun. Corp.*, 5th Ed., p. 555, Sec. 301. *Munn v. Illinois*, 94 U. S. 113. The question here is not precisely the right of the railroad company to make the contract with the prosecutor for the exclusive parking privilege. The prosecutor relies mainly upon the case of *Thompson's Express Co. v. Mount*, 91 N. J. Eq. 497. But that case is not in point. There the only part of the railroad company's property which was involved was the platform of the Lakewood station, upon which no one had a right other than passengers or others having business with the railroad; whereas, here, the public generally have the right to use the driveway. Whatever right may have been conferred upon the prosecutor by his contract with the railroad company, such contract must be deemed to have been entered into

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in view of and in subordination to the right of the town authorities to exercise the power to regulate traffic. The law silently incorporates itself into the contract of the parties. They could not have contemplated that the municipal authorities would never exercise the power with which they were clothed to regulate traffic, nor is it to be presumed that they intended any embarrassment or diminution of the power when exercised. The more reasonable presumption is that it was intended that any unlimited parking privileges conferred should not endure if they came in conflict with the regulations ordained by the town authorities in the valid exercise of a power intended for the promotion of good order and deemed necessary for the public benefit. *Lindsey v. Anniston*, 104 Ala. 257, 16 South. Rep. 545; *Seattle v. Hurst*, 97 Pac. Rep. 454.

The writ will be dismissed, with costs.

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*Rule of Dismissal.***RULE OF DISMISSAL.**

Filed July 28, 1923.

NEW JERSEY SUPREME COURT.

10	LACLARE L. WELSH,	}	<i>On Certiorari.</i> <i>Rule of</i> <i>Dismissal.</i>
	<i>Prosecutor,</i>		
	<i>vs.</i>		
	THE TOWN OF MORRISTOWN, <i>et als.</i> ,		
	<i>Defendants.</i>		

20 This matter coming on to be heard at the June Term, 1923, of this court, in the presence of Maximilian M. Stallman, for the prosecutor, and N. C. Toms and Conover English, for the defendants, on the return of the writ of certiorari in this cause, with proofs taken thereof, and the Court having inspected the said return, reasons filed, and the proofs taken; and having heard the arguments of counsel thereon, and having considered said return, reasons, proofs and arguments, and being of opinion that the enactment by the Town of Morristown of the ordinance entitled "An Ordinance to regulate traffic on the driveway lying on the east side of the shelter house of the Delaware, Lackawanna and Western Railroad Company in Morristown, extending from the American Railway Express office to Lackawanna Place," which ordinance was

30 brought up for review by the writ of certiorari in this cause, is within the municipal and contractual powers of the said Town of Morristown, and does not deprive the prosecutor herein of his property without due process of law, nor take his property for public use without just compensation nor deny to him the equal protection of the laws;

Rule of Dismissal.

It is ORDERED that the said writ of certiorari be and the same hereby is dismissed with costs.

Rule entered this 28th day of July, 1923, on motion of

N. C. TOMS,
Attorney of Defendants.

A true copy.

EDWARD J. KELLEHER,
Clerk.

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Notice and Ground of Appeal.

NOTICE AND GROUND OF APPEAL.

Filed August 6, 1923.

NEW JERSEY SUPREME COURT.

10 LACLARE L. WELSH, <i>Prosecutor-Appellant,</i> <i>vs.</i> THE MAYOR and BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN, <i>et als.</i>, <i>Defendants-Respondents.</i>	}	<i>On Certiorari.</i> <i>Notice and</i> <i>Ground of</i> <i>Appeal.</i>
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To Nathaniel C. Toms and Conover English, Esqs.,
 Attorneys for Defendants:

20 TAKE NOTICE that the prosecutor appeals from the whole
 of the judgment entered in this cause to the New Jersey
 Court of Errors and Appeals on the following grounds:
 Because the said Supreme Court erred in giving judgment
 for the defendants-respondents whereas it should
 have given judgment in favor of the prosecutor-appellant.

MAXIMILIAN M. STALLMAN,
Attorney for Prosecutor.

30 Dated, Newark, N. J., August 6th, 1923.

New Jersey Court of Errors and Appeals

LACLAIRE L. WELSH,

Prosecutor-Appellant,

vs.

THE TOWN OF MORRISTOWN, *et al.*,

Defendants-Respondents.

*On Appeal
from Supreme
Court.*

On Certiorari.

BRIEF FOR PROSECUTOR-APPELLANT.

This case involves the validity of an ordinance which forbids the prosecutor from parking taxicabs on the lands of a railroad company, which he is required to do under a contract with the railroad company furnish cabs and cab service.

In December, 1922, The Delaware, Lackawanna and Western Railroad Company entered into a contract (p. 11), with the prosecutor (appellant) whereby the prosecutor agreed to furnish cab service for the railroad's patrons at its Morristown Station, and the railroad company granted to the prosecutor for that purpose an exclusive right to park his taxicabs on a designated part of the lands of the railroad company. At the time this contract was made, as high as twenty different taxicab men congregated with their cabs around the station (p. 59) on the railroad company's land, rendering unsatisfactory service (p. 63), and the result of this contract was to deprive all but the prosecutor of the privilege of parking their cabs on these premises, so that the congestion of vehicles and boisterous solicitation of patronage were eliminated, and a responsible cab service installed under the control of the railroad company. The other cabmen resented and resisted the new order of things and enlisted the aid of the town authorities to prevent the effectuation of the prosecutor's contract.

The Board of Aldermen formally objected to the arrangement (Exhibit D. 4), and the Mayor officially directed the cabmen to resist it (pp. 53, 54), until the acts of the cabmen and the town in that behalf were restrained by the Court of Chancery (p. 52).

The Town Council thereupon passed the ordinance under review, the purpose and effect of which is to prevent the prosecutor from parking his cabs on the railroad company's land in the performance of this contract (p. 53).

The ordinance is as follows (p. 5):

“An Ordinance to regulate traffic on the driveway lying on the east side of the shelter house of the Delaware, Lackawanna and Western Railroad Company in Morristown, extending from the American Railway Express office to Lackawanna place.

WHEREAS the Mayor and Board of Aldermen of the Town of Morristown, being the governing body of said town, determines that the proper exercise of its police power over the driveway mentioned in the title of this ordinance that vehicles be not allowed to park or stand along certain parts of said driveway:

THEREFORE, BE IT ORDAINED, by the said Mayor and Board of Aldermen as follows:

1. No automobile or other vehicle, either private or that which may be engaged in the transportation of passengers for hire, shall be parked or shall be allowed to stand for a longer time than is necessary to take on and let off passengers, expressage or baggage, and in no case for longer than two minutes, along the curb on the westerly side of the driveway mentioned in the title of this ordinance from the southerly side of the entrance way to the shelter house or the tunnel leading under the depot, northerly to the turn of said driveway under the railroad.

2. No automobile which may be engaged in the transportation of passengers for hire shall be so parked or so allowed to stand as prohibited in Section 1 hereof on the remaining part of the westerly side of said driveway.

3. Any person or corporation found guilty of violating this ordinance shall be liable to a fine of not exceeding Fifty Dollars or to confinement in the County Jail for not more than five days, in the discretion of the magistrate imposing the same."

Upon certiorari the validity of the ordinance was assailed on the grounds that the driveway was not a public highway and that the town had no power to regulate its use, and that by his contract with the railroad company the prosecutor had secured valuable rights and property, and an interest in the lands of the railroad company, which the town unlawfully has attempted to destroy in violation of his constitutional rights. The validity of the ordinance was asserted and upheld by the Supreme Court on the ground that the town had the power to pass the ordinance as a traffic regulation, applicable to and enforceable upon the lands of the railroad company on the theory that the station grounds constituted a "public place" and that the railroad company had previously granted to the town the right to "regulate traffic" on the station grounds. It is stipulated that the lands in question are owned in fee by the railroad company (p. 62).

In 1913 the railroad company and the town entered into a contract for the elimination of grade crossings, and the making of certain improvements, including a new station and driveways. The pertinent parts of this agreement are as follows:

"The railroad company shall also lay out, locate and construct a new driveway and * * * approach, extending northerly * * * from Morris Street * * * to the westerly side of their tracks * * * thence under and across the said tracks and easterly at right angles therefrom to the * * * southerly line of the lands of the railway company * * *. Said driveway shall be 48 feet in width * * *. The railroad company shall provide all lands necessary for the laying out and establishing said driveways. Said driveway shall be kept open at all times for pas-

sengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds * * * but this contract shall not be construed as a dedication of said driveway as a public highway" (p. 23).

"It is further agreed that the town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways for the purpose of regulating foot and vehicular traffic at said station and for the enforcement of the laws and regulations of the railroad companies in respect thereto" (p. 24).

While the contract specifies a driveway 48 feet wide—the driveway or open space adjoining the station, including the space assigned to the prosecutor, is about 70 feet in width, much wider than was required under the contract. The prosecutor was assigned a narrow strip of land next to the station for the parking of his cabs, as shown on the map in green shading (p. 75).

I.

The station driveway is not a public highway and subject as such to regulation by the town.

The ordinance does not recite or declare that the driveway is a street or highway. Admitting that the Town of Morristown has authority under its charter and the statutes to regulate traffic in public streets and highways, we deny that such power extends to the control of the use of private lands. "An act done upon private property, which does not amount to a nuisance, is neither within the words or spirit of the charter." *Bregugglia v. Vineland*, 53 N. J. L. 171.

In its opinion (Case, p. 68), the Supreme Court said, as a reason for sustaining the ordinance, that "it appears that the driveway in question was and is devoted to public use," and that "the public generally had the right to use the driveway in question." We submit there is no basis or justification for these statements. Such a

right or user could only exist by grant from the railroad company, and no such grant to the public, express or implied appears in the case. There is no claim that the public has acquired any rights by prescription, as the new station and driveways were not constructed until after 1913. The public generally have no rights in railroad property, and to adjudicate a grant to the public of rights in private real property, by which the owner is deprived of his dominion, must necessarily rest upon some substantial evidence.

The lands of the railroad company are private lands, and the use and employment of them by the owner and its assigns cannot be taken without due process of law. *Bill Posting Co. v. Atlantic City*, 71 N. J. L. 72.

The Act of 1839 (P. L., p. 170; Rev. Stat., p. 594) provided and the Railroad Act of 1903 (Sec. 22) retained the provision, that any railroad company may erect a fence or other enclosure around its stations so as to prevent any persons other than passengers from coming near its trains and may exclude from such enclosure all persons except travelers.

In *Spottiswoode v. M. & E. R. R. Co.*, 61 N. J. L. 322, Mr. Justice Depue said (p. 333):

“The possession by a railroad company of its roadbed is the possession by a corporation as its private property to enable it to perform a public duty.”

This view is supported by the great weight of authority.

In *Western U. Teleg. Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 49 L. Ed. 312, 25 Sup. Ct. Rep. 133, the Court considered the nature of the interest which a railroad company had in its right of way. It was there said:

“A railroad’s right of way has, therefore, the substantiality of the fee, and it is private property even to the public in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part except upon the payment of compensation. In other words, it is entitled to the pro-

tection of the Constitution, and in the precise manner in which protection is given."

In that case the Court referred with approval to the observation of the Supreme Court of Pennsylvania in *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457, to the effect "that a railroad company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it." So, in *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 370, 371, 83 Am. Rep. 751, the Supreme Court of Ohio said that "for all purposes not connected with the operation of its road, the right of the company to the exclusive use and enjoyment of the corporate property is as perfect and absolute as is that of an owner of real property not burdened with public or private easements or servitudes."

So, in *Fluker v. Georgia R. & Bkg. Co.* (1888) 81 Ga. 461, 2 L. R. A. 843, 12 Am. St. Rep. 328, 8 S. E. 529, in holding that a railroad company has the right to grant the exclusive privilege of selling lunches and soliciting the selling of lunches upon its grounds to one party, to the exclusion of all others, the Court said:

"We cannot believe that there is a sort of right of common lodged in the public at large, to enter upon lands on which railroads are located, and over which they have secured the right of way. Such lands the railroad companies may inclose by fences, if they choose to do so, and exclude any and all persons whomsoever. Their dominion over the same is no less complete or exclusive than that which every owner has over his property. If they do not choose to erect fences and make inclosures, they may, by mere orders, keep off intruders, and they may treat as intruders all who come to transact their own business with passengers or with persons other than the companies themselves."

And in *Skaggs v. Kansas City Terminal R. Co.* (1916) 233 Fed. 827, the Court discussed this question, saying:

"The property of the terminal company is to be deemed in every legal sense private property, as between it and those of the general public who have

no occasion to use it for purposes of transportation. The right of the company to the exclusive use and enjoyment thereof is as perfect and absolute as that of an owner of real property not burdened with public or private easements or servitudes."

It is claimed however that a grant of these premises to public use is found in the contract in the clause:

"Said driveway shall be kept open at all times for passengers * * * and general vehicular traffic to and from the station, but this contract shall not be construed as a dedication of said driveway as a public highway."

The railroad station grounds are not a thoroughfare, or any other institution to which the public generally are attracted or invited, and a railroad company cannot be presumed to hold its premises open to general public use. When the railroad company agreed to keep the driveway open for "traffic to and from the station," it must be presumed to have contracted with reference to the traffic of its patrons and their agents having business to transact with the railroad company and no others, particularly when the same contract expressly negatives the idea of a dedication to public use.

The station grounds at Morristown are concededly held and used by the Railroad Company for the exercise of its franchises and the performance of its duties as a common carrier, and it has no power to alienate or encumber its property without the consent of the state. The Public Utility Act (P. L. 1911, p. 374; III, 18, (h)) provides that no public utility shall without the approval of the Board

"sell, lease, mortgage, or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part thereof * * *. Every sale, lease, mortgage, disposition, encumbrance * * * made in violation of any of the provisions shall be void and of no effect."

We think it is clear that to make a grant to the public for general use, of a part of its station grounds, is a

disposition of or encumbrance upon the property within the meaning of the statute, for if these lands have for all practical purposes the status of a city street, the future use and control of them has passed from the railroad company to the town, and they could not be used for an addition to the station or any other structure which might be required for a particular station service. Such a grant being contrary to the statute, cannot be presumed.

There is no doubt that a railroad company has a common law duty to afford its patrons access to its facilities, and this contract does no more than express that duty—while at the same time any possible misapprehension of the intention of the railroad company to reserve all of its rights as the owner of the land was avoided by the plain declaration that the driveway was *not* dedicated as a public highway. The driveway was not thrown open to general public use—but for the particular purposes specified—and we submit that the opinion of the Supreme Court, that from this language “it thereby and otherwise appears that the driveway in question was and is devoted to public use” is directly contrary to the express language of the contract.

II.

The railroad company did not relinquish its own rights to make rules and enforce regulations as to the use of its station grounds.

The contract provision relied on by the respondent is as follows:

“It is further agreed that the town may and shall exercise all *necessary* police powers in and upon the station, station grounds, approaches and driveways for the purpose of regulating *foot and vehicular traffic at said station and for the enforcement of the rules and regulations of the railroad companies in respect thereto.*”

We submit that this provision also cannot be construed fairly by omitting any essential part of it. The purpose of the provision was to require the town to "exercise all necessary police powers * * * for the purpose of regulating * * * traffic at said station, and for *the enforcement of the rules and regulations of the railroad companies in respect thereto*. This means that the *railroad company* was expected to make rules and regulations in respect to foot and vehicular traffic, and that the town shall exercise its police power, so far as it may be *necessary* to that end, to aid the railroad company in the *enforcement* thereof. We do not see how this part of the contract can be expunged, ignored or otherwise nullified or omitted from consideration. The language of the Supreme Court ("In our opinion that is a plain declaration that the * * * traffic * * * in the station drive-ways is to be regulated by the town"), altogether ignores the material part of the paragraph that the powers of the town are invoked for the enforcement of the *rules and regulations of the railroad company in respect to foot and vehicular traffic*. There is certainly no suggestion in this clause that the railroad company relinquishes or surrenders its right to make or enforce such regulations, and to ignore or expunge the language which specifically retains such a right is palpably erroneous.

III.

A contract with the prosecutor for the exclusive cab service is a rule or regulation of the railroad company in respect to traffic at the station, which the town is obliged to enforce, not to destroy.

As Mr. Justice Harlan pointed out in *Donovan v. Penna. Co.*, 199 U. S. 279 at p. 296:

"They (the hackmen) only sought to use the property of the railroad company to make profit in the prosecution of their particular business. A hackman, in no wise connected with the railroad company, cannot, of right and against the objec-

tions of the company, *go upon its grounds* or into its stations or cars, for the purpose simply of soliciting the custom of passengers."

In the note on this subject in 15 Annotated Law Reports, at p. 356, it is said:

"The decided weight of authority is to the effect that a railroad company may, so long as it thereby affords reasonable accommodation to the public, grant to one company or person the exclusive privilege of entering its stations and depot grounds for the purpose of soliciting patronage from passengers."

Recognizing and applying the principle, Mr. Justice Swayze, writing for this Court in *Thompson's Express Co. v. Mount*, 91 N. J. Eq 497, said:

"The general question is not new. The great weight of authority sustains the complainants * * *. It would serve no useful purpose to repeat the reasons so well stated in those cases."

"As the railroad business developed and towns increased in size a demand arose for cab and omnibus service. This was a kind of public service which the railroads might well provide for the better accommodation of the traveling public. Even if they were without authority to do so under their charters, the case would come within the ruling of the United State Supreme Court in *Jacksonville Railway Co. v. Hooper*, 160 U. S. 514 * * *. It has not done so but has merely contracted that no one but the complainant shall have access to its station and platform for the purpose of conducting business which the railroad itself has not undertaken. The question we have to decide is * * * whether the railroad company can give the complainant an exclusive right in a case where neither the complainant nor any of the defendants have any right whatever, or, in other words, whether the railroad may select its own company in a case where it is under no public duty to serve all who come, and has express statutory authority to exclude all except travelers * * *. Reason clearly answers in favor of the exclusion * * * the authorities above cited justify the exclusion on the ground that even where a public

duty exists, *the right of the railroad company to make reasonable regulation involves the right to protect itself from the turmoil and danger involved in a competition between hackmen on the platform of a railroad station and the consequent liability of the railroad company to respond in damages to a passenger in case of injury * * ** A different case might arise if the railroad were under a legal duty to allow hackmen to do business and ply their calling on railroad property. Our view has not only reason on its side but also the authority of the highest tribunal, which can pass upon the question of the equal protection of the laws."

The Supreme Court held that the foregoing case was not in point because "the only part of the railroad company's property involved was the platform of the Lakewood station, upon which no one had a right other than passengers or others having business with the railroad, where as here the public generally have the right to use the driveway."

We submit that there is nothing in the opinion of this Court in the Lakewood case which limits the application of the principles therein stated to a station platform exclusively, and that the Supreme Court was in error in holding that the public generally have the right to use the driveway at the Morristown Station (See Point 1 of this brief).

It must, therefore, be taken as the settled law of this state, as elsewhere, that where a railroad owns a depot and the lands surrounding it, it may lawfully contract with one responsible party to furnish cab service, and grant to him a license to use its land in a specified way for the performance of such a contract.

If the railroad had the right "to make reasonable regulations * * * to protect itself from the turmoil and danger involved in a competition between hackmen," and such a right is exercised by licensing one operator to furnish cabs at its station, such a regulation or rule is clearly within the purview of the contract between the company and the town, by which the town is obligated

to exercise its powers "for the enforcement of the rules and regulations of the railroad company" in respect to vehicular traffic at the station.

If the town invokes rights under its contract it must observe its obligations. It has no right or power to destroy by ordinance what it has created by a lawful contract, which has been executed and performed by the other party, where no controlling public interest is at stake.

IV.

The ordinance deprives the prosecutor of his property without due process of law.

The ordinance is unquestionably in derogation of property rights. There is nothing in the town's charter or the statutes which grants specifically any power to regulate the use of railroad station property, and the ordinance cannot be sustained as an exercise of police power without some apparent necessity for the destruction of prosecutor's property.

The contract was made December 28, 1922 (p. 11). The ordinance was passed on February 7, 1923 (p. 6).

The contract gives the prosecutor "the exclusive privilege of parking vehicles employed in such cab service when not in actual use, in the spaces shown in green on the blue print map hereto attached" (p. 12).

The spaces mentioned are along the station, or westerly side of the driveway, which is 65 feet wide between curbs.

The ordinance provides that no taxicab may stand longer than two minutes along any part of the west side of the driveway, under a penalty of \$50, and thereby prevents the prosecutor from performing or enjoying the fruits of his contract. What was lawful and appropriate, and a valid exercise of property rights, at the time the contract was made, has now been declared unlawful and a punishable offense, and in order to carry on his busi-

ness, the prosecutor is compelled to resort to some public hack stand, where his contract with the railroad company has no effect or application, and where he cannot enjoy the same advantages of a stand on the station grounds.

There is no legal justification for this destruction of the prosecutor's rights under his contract.

A case practically on all fours with the case at bar is *Napman v. People*, 19 Mich. 352, wherein it appeared that an ordinance prohibited hackmen from approaching nearer to a train than a specified distance. The Court, recognizing the private character of railroad lands, as well as the right of a railroad to contract with one person for hacking privileges, said:

"The main question, however, calls for a decision upon the validity of a prohibition which would prevent railroad companies from making such arrangements as are found by the recorder to have been entered into here. We have no difficulty in deciding that the city cannot lawfully interfere to prohibit such arrangements. The acts done are done upon the private premises of the railroad companies, over which the city can have no general control; and we think there is no reason why these companies, in their character of carriers of passengers, may not properly make such arrangements as will facilitate their reaching their destination anywhere in the city, as well as at the end of the track in the depot. Passengers who are strangers in the city have no means of knowing the character of the runners they may encounter outside of the depot; and if they can deal without confusion, and at their leisure, with responsible agents, it will be much more convenient and safe than to compel them to select from among strangers, and in the noise and bustle attendant on the arrival of cars. Such contracts of employment, made in the cars and on the premises by the companies, cannot be lawfully restrained by the city authorities. No driver can without permission, go, of right, on the private property of the railroad company, unless employed by a passenger, and the city could

give him no authority to do so. And any arrangements for the delivery of passengers and their baggage, not unlawful in themselves, which are made by the railroads in their own cars, and on their own lands, are exempt from municipal interference; and the ordinances, so far as they may attempt such interference, are invalid."

While it was sought to sustain the ordinance solely on the ground that it was a proper municipal regulation of vehicular traffic in a place having all of the characteristics of a public highway, the Supreme Court also held that the ordinance was a lawful exercise of police power, subject to which every citizen holds his property, and that a regulation of this character, though it may disturb the enjoyment of individual rights, is not an invasion of constitutional rights.

The error, as we see it, in the application of this familiar doctrine, is that the welfare of the community is not served or improved by depriving travelers of the universal practice of furnishing convenient cab service at the railroad station, nor is there anything in the parking of the waiting cabs which is inimical or dangerous to the safety or health of the community. The record shows not the slightest reason, necessity, or justification for the town's purpose to exclude the railroad company's sole licensee from the use of its property.

The question of affording safe and adequate facilities to railroad passengers is of course not involved in the case. If it were, the jurisdiction of the Board of Public Utility Commissioners would be exclusive (P. L. 1911, Sec. I, 15).

Upon the allowance of the writ the respondent took depositions purporting to show facts to justify the passage of this ordinance. But the evidence only shows that since 1913 and before the railroad company entered into the contract with the prosecutor, all of the cab men in Morristown, about 40 in number, used the station grounds (p. 59; l. 32) and that town policemen included the station

grounds in their beats and attempted to keep order among the cabmen. (Officer Wildey, p. 39; Lieut. Holly, p. 42; Officer Meeker, p. 42; Cabman D. Murphy, p. 44; Cabman W. J. Murphy, p. 45). That the town authorities, particularly the mayor, objected to the railroad company's action in contracting with the prosecutor and excluding all others from the station premises, and counseled and advised such cabmen to disregard the orders of the railroad company to leave its premises (Mayor Potts, p. 53), because he assumed that the driveway was dedicated to the public "by usage" (p. 55, l. 1). When the railroad company with the aid of the Court of Chancery, excluded these cabmen from its lands, the mayor designated a public hack stand in a public street called Lackawanna Place (p. 55, l. 30) and all cabmen thereafter used the new stand except the prosecutor, who has three licensed cabs (p. 56, l. 1) and he is using the cab stand at the station, formerly the "public parking place" (p. 45, l. 36; p. 47, l. 27).

We think it is significant and important to note the fact that the prohibited parking place is the identical place which the town insisted should be maintained by the competing cabmen until the railroad company enjoined their use of it. It was originally designated as a cab stand by Mayor Todd (p. 35, l. 10); Welsh (the prosecutor) is now using for a taxicab stand these places formerly used by the cabmen in general (p. 47, l. 30). The present mayor, Potts, testified (p. 54):

"Q Now, as mayor, didn't you instruct these taxi men that the railroad company had no right to make such an order, or exclude them from the railroad property? A * * * after I read that contract I notified the hackmen that they were to remain on that public hackstand.

Q Upon the railroad company's property? A Alleged to be the railroad company's property, yes."

The single picture presented by all of this testimony is that while formerly 40 taxicab men used the railroad

company's property, competing for patronage, under the contract they were all excluded and a single operator selected by the railroad company now uses a part of this space. Can there be any presumption that one operator, bound by a contract to furnish modern, clean cabs with careful drivers, and to keep his cabs when not in use in a specified place, is a nuisance or menace to the health and safety of inhabitants of Morristown?

The rule is well stated, and supported by abundant authority, in 19 Ruling Case Law, p. 805, as follows:

"A municipal ordinance of a regulatory nature in contravention of the natural rights of individuals, enacted under general charter powers, is not only required to be constitutional, but it must be reasonable as well; that is, the court before which it is brought must be able to see that it will tend to promote the public health, morals, safety or welfare; that the means adopted are adapted to that end, and that it is impartial and not unduly oppressive upon individuals."

In *State v. Jersey City*, 29 N. J. L. 170, the Supreme Court reviewed an ordinance declaring it to be a nuisance to run trains faster than 10 miles per hour or to stop a train in a street. The Court said:

"It is an unwarrantable interference with franchises granted by the legislature to be exercised by the prosecutors for the public good. The doing of such acts cannot interfere with the public health, expose the inhabitants of the city to danger or inconvenience. I do not see why any railroad depot, or track, or freight house, any train of cars in motion or stationary at any point in the city, cannot, under the same power, with equal propriety be declared nuisances, if the city council should so determine."

In the foregoing case the Court said further:

"Whether an ordinance, confined by its terms to a particular part or street of the city, can be said to be a general law may admit of some doubt. If it may be limited to one street, why not to one house? It seems to me that when the legislature

used the term general law they intended to provide against restricted local legislation, by which the common council might, under the form of declaring a nuisance, single out the property of a single citizen or corporation, and confiscate it for the public good."

In *Bill Posting Co. v. Atlantic City*, 71 N. J. L. 72, it is said:

"While it may be conceded that in the exercise of the police power, the right may be granted to municipalities to control the erection of signs where the public safety requires it, a statute which purports to give unlimited power to regulate the erection of signs on private property would be an attempt to authorize the appropriation of private property to public use without compensation, and therefore inimical to our constitutional provision. (*People v. Green*, 85 App. Div. 400.) The recognition of a power so wide would bestow upon the lawmaker the right to invest cities with authority to control the size and style of buildings which should be erected upon private property where the public safety was in nowise involved. * * * The ordinance is too sweeping and must be set aside as unreasonable and void in so far as it authorizes interference with the prosecutor's property."

In *Dorison v. Saul*, 118 Atl. 691, the Court dealt with a case in which the City of Jersey City refused to permit a landowner to erect a two-story house on his property. The Court said:

"The prohibiting of the erecting on the relator's land of two-story buildings is not, we think, a power which is given by the statutes the defendants invoke. It is also not a reasonable and proper exercise of the police power, if that power can be invoked by a municipality in the absence of specified legislative authority."

In *Stell v. Jersey City*, (95 N. J. L., p. 39) the Supreme Court said:

"The curious notion, that the authority given by the Walsh Commission Government act to the city

to pass ordinances necessary for the protection of life, health and property, and to preserve and enforce the good government and general welfare, order and security of the city, authorizes an appropriation of this kind hardly requires notice. It is enough to say that any authority of the city government to protect property certainly cannot include authority to deprive owners of property of the beneficial use thereof. The general welfare and good government of the city requires that the city should see that so far as it is concerned all of the citizens are secured their rights, and it is a manifest perversion of the very object of the statute to use the power and money of the municipality for the protection of one class of citizens at the expense of another."

In *Vernon v. Westfield*, (27 N. J. Advance Reports, p. 1031) in discussing a zoning ordinance, the Chief Justice said:

"The ordinance appealed to is sought to be justified upon the ground that it is authorized by chapter 240 of the laws of 1920 (Pamph. L., p. 455), which confers upon municipalities power to regulate the location and use of buildings—including residences—for the purpose of promoting the public health, safety and general welfare. It will be observed that this statutory power is a limited one, and does not authorize municipalities to restrict the use of residential properties, unless such restriction is reasonably necessary for the carrying out of the declared legislative purpose. It follows therefore that where a municipality attempts to regulate the use of such properties by restrictions which have no tendency to produce the results indicated by the legislature, such municipal action is purely arbitrary; not authorized by the act of 1920, and, consequently, null and void * * *. In short, its only purpose, so far as can be discovered from the language used, is to place a restriction upon the use of residential properties within the designated area, without any pretence that such restriction is reasonably necessary for the public health and safety. This view is a mere reiteration of that exploited by this Court in the case of *Handy v. South Orange*, 118 Atl. Rep. 838, in which

the validity of a similar ordinance was under consideration; and, as in that case, we conclude that the provision of the ordinance upon which the action of the town building inspector is based is *ultra vires*, null and void."

In *Ignaciunas v. Risley*, (121 Atl. 783) the limitations of the police power and the guarantees of the enjoyment of private property under the common law and the State and Federal constitutions are clearly and forcibly stated by Justice Katzenbach as follows:

"The right to acquire property, to own it, to deal with it, and to use it, as the owner chooses, so long as the use harms nobody, is a natural right. This does not owe its origin to Constitutions. It existed before them. *Spann v. Dallas*, 111 Tex. 350, 235 S. W. 513, 19 A. L. R. 1387. It is however, a right guaranteed by our Constitutions. It is a right necessary to the existence of organized society. The protection of this natural right is one of the reasons which prompted men to form governments. The protection of private property is the aim of every well-considered form of government. The right of private property has been called the keystone of the arch of civilization. A government which fails to protect the right of private property cannot endure. Men will not undergo the labor and hardships necessary to the acquisition of property if they find that the ownership and the enjoyment thereof is not to be protected. With the right of ownership and possession goes the right to use, enjoy, and dispose of the property owned. The substantial value of property lies in its use. If the right of use be denied, the value of the property is lessened or destroyed. A law which forbids a certain use of property deprives it of an essential attribute. The result in effect is a proscription of its ownership. *Spann v. Dallas*, *supra*. The defendants, however, say that the right of private property is subject to police power of the state and must yield to such measures as are designed to promote public health, safety and general welfare of a community. This, as a general proposition, is true. But the police power is based upon public necessity, and only public necessity can justify its use. The abridgment of the rights of

the individual is the usual result of its exercise. It should never be exercised unless it is clear that the object to be attained is so essential to the public health, safety, and welfare as to fully justify its exercise. The use of the police power has grown in recent years, and courts have sustained laws and ordinances as valid, which formerly would have been declared invalid and invasions of private rights. Its use affords an easy route to the attainment of ends otherwise impossible. Each case must be considered separately and tested by these general principles. In the present case the question to be determined is whether or not the provisions of the ordinance which prevent the relator from using his property for a store are necessary for the health and safety of the public of Nutley, for, unless the use of said property for store purposes reasonably endangers or threatens the public safety, health, or welfare, the abridgment of its contemplated use is an invasion of the inherent and constitutional rights of the relator. *A provision of an ordinance which assumes to be a police regulation, but which in reality is designed to deprive one of the use of his property under the pretense that it is enacted to promote the public welfare, safety, and health, will be set aside as an invasion of the right of private property."*

Further authority is not necessary to demonstrate the proposition that the Town of Morristown has no legal right to prohibit, and punish the prosecutor for, the use of the railroad company's property under his contract with it, and there is no contention that the ordinance is of a remedial nature, as in the case of a public nuisance.

While the court will not ordinarily look into a motive where the power exists to pass an ordinance, here, where the ordinance attempts to regulate private property, and destroy rights secured by a lawful contract, the question of power is a question of occasion, and where the evidence of the respondent fails to show any reason for the ordinance except a resentment at the privileges obtained by the prosecutor, we submit that the court is entitled to examine the record and draw such conclusions as the undisputed facts will warrant.

V.

Conclusion.

Our contentions are therefore reduced to these propositions:

1. That a Railroad Company has the right to control its own lands, and exclude therefrom all persons not having business with the company.

2. That it has the right to contract with a single individual or company to provide cab service at a station, and exclude competing cabmen from its lands.

3. That the Railroad Company in this case has not dedicated its station grounds to general public use, and has not surrendered or relinquished or granted to the town of Morristown the right to regulate traffic at the station grounds, to the exclusion of its own powers and desires.

4. That the prosecutor has a valuable property right in his contract for cab service, and as the assignee or licensee of the railroad company in the use of a part of its lands.

5. That the ordinance which seeks to deprive the owner and its assignee of dominion over their property, and prohibit the prosecutor from standing his cabs at the station is beyond the power of town to enact, and deprives the prosecutor of his fundamental rights.

We respectfully submit that the ordinance should be set aside.

MAXIMILIAN M. STALLMAN,
Of Counsel with Prosecutor-Appellant.

10/8/23.

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New Jersey Court of Errors and Appeals

LECLARE L. WELCH,

Prosecutor-Appellant,

vs.

TOWN OF MORRISTOWN, *et al.*,

Defendants-Respondents.

*On Appeal
from Supreme
Court.*

On Certiorari.

BRIEF FOR DEFENDANTS-RESPONDENTS.

The attack on the certiorari narrows down to the fundamental question of the authority of the Town of Morristown by its ordinance to regulate traffic on the station grounds of the Lackawanna Railroad, and particularly as against the prosecutor.

The sole grounds of attack as set up in the reasons (p. 10) are:

1. Said ordinance is beyond the power of the Town of Morristown to enact.
2. Said ordinance deprives the prosecutor of his property without due process of law.
3. Said ordinance attempts to take the property of the prosecutor for public use without compensation.
4. Said ordinance denies to the prosecutor the equal protection of the laws.

Under these reasons the Supreme Court was not called upon to, and did not, consider any such questions as the legality of the adoption of the ordinance, its reasonableness or lack of notice. In its opinion the Court said (p. 67, l. 18):

“No question is raised with respect to the passage of the ordinance, nor is it challenged as an unreasonable exercise of municipal powers.”

And, again (p. 70, l. 5), the Court said:

“Such ordinance (no question of lack of notice to the prosecutor being raised) does not deprive the prosecutor of his property without due process of law.”

We thus refer to the narrowness of the issue before the Supreme Court for the reason that the prosecutor-appellant in his brief in this court, particularly pages 16 and 17, seems to argue the question of reasonableness and other questions not set up in his reasons.

It is elementary that questions not presented to the Court below cannot now be argued in this court.

Mitsch v. Township of Riverside, 86 N. J. Law 603, p. 610;

Rahway v. State Board of Health, 80 N. J. Law 166, p. 169;

Axel v. Kraemer, 75 N. J. Law 688, p. 692;

Suburban Land Co. v. Vailsburg, 68 N. J. Law 311, p. 312.

The purpose of the ordinance is to regulate traffic on the driveway lying on the east side of the shelter house of the Lackawanna Railroad in Morristown extending from the American Railway Express Office to Lackawanna Place, in order to avoid confusion at the depot (p. 52, l. 16).

The Map, which is a part of the record, shows that the railroad tracks run roughly north and south. The main station building is on the west side of the tracks. On the east side is a platform roofed over which constitutes the so-called shelter house. The tracks are elevated.

A driveway runs under the tracks north of the station and from there southerly alongside of the easterly retaining wall and shelter house. This driveway runs into and becomes part of Lackawanna Place which continues on southerly and alongside of the easterly retaining wall.

The fee to the land, which constitutes the station and station grounds, including the driveway, which is the sub-

ject of the ordinance, is in the Railroad Company (p. 62). Lackawanna Place is a dedicated public street.

On December 28, 1922, the Railroad entered into a contract with the Prosecutor by which the Railroad Company gave to him the exclusive right to solicit business as a Cabman on the station grounds, to the exclusion of all other Cabmen (p. 11, ll. 34 to 40) and gave him the exclusive privilege of parking vehicles on that part of the station grounds which is now subject to this ordinance (p. 12, l. 5), in consideration of a payment by him to the Railroad Company of ten per cent. of the gross receipts from his business (p. 14, l. 10).

On September 24, 1912, the Town of Morristown and the Railroad Company entered into an agreement for the elevation of the railroad tracks (pp. 16 to 29).

This contract was based upon mutual stipulations and agreements, and provided (p. 28, l. 12):

“It is further stipulated and agreed that each and every of the acts and things to be done and performed by each of the parties hereto is essential consideration for the acts and things to be done and performed by the other party, and that each of the terms of this contract is a necessary and proper part of the work of improvement herein provided for.”

The Town performed its part by opening streets, spending money, &c. (p. 52, l. 35).

By its terms, the Railroad Company agreed to lay out the driveway which is the subject of the ordinance (p. 23, ll. 13 to 30) as follows (p. 23, l. 37):

“The Railroad Companies shall provide all lands necessary for the laying out and establishing said driveway. Said driveway shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds on the easterly side of said Railroad and for the use of those now having rights of egress to Morris Street in Saw Mill Lane, but this contract shall not be construed as a dedication of said driveway as a public highway.”

While the contract provided that it should not operate as a dedication of the driveway as a public highway, in the legal sense of the term "dedication," it nevertheless did in fact dedicate the driveway for public uses during such times as the Railroad Company continued to use its property there for station purposes.

It is significant that by the contract the Railroad agrees not only to keep open the driveway for passenger and general vehicular traffic to and from the station grounds, but also to keep the driveway open "for the use of those now having rights of egress to Morris Street in Saw Mill Lane." This provision of the contract is omitted from the quotation in appellant's brief (p. 4 and p. 7).

A glance at the Map shows that Saw Mill Lane runs in a northeasterly direction out of the driveway. Before the elevation it connected with Morris street. There is no necessary connection between persons using Saw Mill Lane, and passengers and general vehicular traffic to and from the station grounds, because it is quite conceivable that persons coming from Saw Mill Lane may have no business with the Railroad whatever, but would pass over the driveway en route to Morris street, either by passing under the tracks where Saw Mill Lane enters the driveway or by continuing along the easterly side of the tracks and coming into Morris street below and to the south of the station.

Although the law gives the municipality full authority to pass the ordinance in question, where property is devoted to quasi-public use such as a railway station (as shown in Point I of this brief and as the Supreme Court held), further authority was granted by the Railroad to the Town of Morristown to regulate traffic on this driveway, as well as on the other station property, by the contract. It is provided as follows (p. 24, l. 23):

"It is further agreed that the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and

vehicular traffic at said station, and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto."

The Supreme Court in commenting on this part of the agreement said (p. 68, l. 32):

"In our opinion that is a plain declaration that the foot and vehicular traffic at the station and in the station driveways is to be regulated by the town, and we have no doubt an ordinance enacting that no automobiles or other vehicles shall be parked or allowed to stand for a longer time than is necessary to take on and let off passengers or baggage and in no case longer than two minutes, is, under present-day conditions, a regulation of traffic."

Practical recognition of the force of this contract provision, as well as the legal right of the Town in the premises, is shown from the conduct of the Town, with the knowledge and acquiescence of the Railroad Company and the Cabmen, ever since the completion of the elevation of the tracks about ten years ago.

The testimony shows that beginning with the year the improvement was completed until the present time, the Town has exercised full police and regulatory powers over the traffic on the station grounds, including the driveway in question.

Mayor Todd, who was in office from January 1, 1913, to January 1, 1915 (p. 31, l. 14), was the first mayor following the completion of the improvement. Section 14 of the then existing ordinances of the Town provided that the Mayor was authorized to designate such places in the Town as public stands for hacks, cabs, etc., as he might deem expedient and proper and make regulations and give directions respecting the same (p. 32, l. 33).

Pursuant to these ordinances Mayor Todd did designate hack stands on the plaza of the Lackawanna Railroad and issued instructions to the Police Department to enforce them. Subsequent Mayors continued to exercise the same authority and the Police Department of Morristown down

to the time of the present contest between the Prosecutor and the Town, has regulated traffic on the station plaza and grounds, the parking of taxi cabs and private vehicles, and otherwise has exercised full police power and jurisdiction over the station property. This appears clearly from the testimony of the witnesses.

Mayor Todd testified that pursuant to the authority of the ordinance (Section 14, p. 32, l. 33) instructions were issued to the Police and they in turn carried out those instructions with respect to the regulation of traffic on the station plaza (p. 36, l. 5 and l. 36; p. 37, l. 8).

Chief of Police Wildley, who had been on the Force for sixteen years (p. 39, l. 37) testified to having patrolled the Station plaza when a Motorcycle Policeman (p. 40) under orders of the Mayor, and then, as Chief, to having assigned Policeman to the Station grounds to enforce regulations (p. 41, ll. 10 to 20).

Police Officer Meeker, who had also been on the Force for sixteen years (p. 42, l. 38) testified that he had been detailed to the Railroad Station platform and grounds (p. 43, l. 3) and that he had "looked after everything in general, any violations of traffic rules and everything" (p. 43, l. 18), and had regulated the traffic, and parking of cars; also that there were traffic signs on the station grounds which were enforced (p. 43, l. 35).

Daniel E. Murphy, a taxi cab driver, testified to seeing Police Officers on the station grounds directing traffic (p. 45, l. 15).

Michael James Murphy, another taxi cab driver, testified to similar activities by the Police ever since the Station had been first built (p. 46, ll. 1 to 18).

Durling, another taxi cab driver, testified to the same effect (p. 50).

Former Mayor Bartman, who is also a member of the Bar (p. 58, l. 15), testified that until the present controversy arose he had never heard any question raised over the right of the Town Authorities to police the place

or regulate traffic (p. 58, l. 30). He was Mayor just preceding the present Mayor, Mr. Potts, having gone out of office on December 31, 1922. When the present controversy arose the Board of Aldermen took the position defending their right to enforce traffic and Mayor Bartman so notified the Railroad Authorities (p. 58, l. 35).

We, therefore, have a situation where the Railroad Company, by its contract of September 24, 1912, with the Town (p. 16) specifically agreed that the Town should exercise all necessary police powers in and upon the station grounds, approaches and driveways for the purpose of regulating foot and vehicular traffic at the station; and also a practical recognition of this contract in the conduct of the Town in regulating traffic there, with the knowledge and acquiescence of the Railroad and the Cabmen.

The cases cited in Point I of Appellant's Brief (pp. 4-8) relate, as the quotations show, to the *roadbed* or *right of way*.

The ordinary right of a railroad company to fence in its roadbed has no application here. The Delaware, Lackawanna & Western Railroad specifically agreed with the Town, not only not to fence off this driveway and hence exclude persons from using it, but to keep it open at all times as a driveway (p. 23, l. 40), not only for passengers and vehicles to and from the station grounds, but also for the use of those having rights of egress to Morris street in Saw Mill Lane (p. 24, ll. 1-10). This railroad also agreed that the Town should "exercise all necessary police powers" in and upon this driveway (p. 24, l. 25). The Railroad's own agreement precludes the contention now made that the Town should not exercise police powers upon this driveway.

Nor does the provision in the contract that the exercise of police powers by the Town shall also be "for the enforcement of the rules and regulations of the Railroad Company in respect thereto," aid the Prosecutor-Appellant any as argued in his Brief Point II (pp. 8-9). By

the contract the Railroad Company empowered the Town to exercise necessary police powers on the driveway "for the purpose of regulating foot and vehicular traffic at said station" and also for the enforcement of the rules of the Railroad Company "in respect thereto."

The "thereto" necessarily referred to foot and vehicular traffic at the station. The fact that the "rules and regulations" of the Railroad Company are to be enforced with respect to this foot and vehicular traffic indicates that the Town's duty was thus limited. There is nothing in the contract by which the Town is obligated to enforce a private agreement of the Railroad Company. The expression "rules and regulations" implies universality. A private agreement with one individual cabman could not be deemed a rule or regulation of the Railroad with respect to foot and vehicular traffic at the station. The contract very evidently was intended to apply to such general rules regulating foot and vehicular traffic as the Railroad might promulgate to supplement the regulations of the Town under its police power with respect to the foot and vehicular traffic at the station.

Observe also that the rules and regulations of the Railroad Company are to be with respect to foot and vehicular traffic at the station and have nothing to do with persons using the driveway who have rights of egress to Morris street in Saw Mill Lane.

The Supreme Court, after considering all these facts including the testimony and the language of the contract, held (p. 68, l. 20):

"It thereby (the contract) and otherwise (the testimony) appears that the driveway in question was and is devoted to public use, although the fee thereof remained in the Railroad Company."

This is a finding of fact by which this Court on certiorari is bound.

In *Suburban Land Co. v. Vailsburg*, 68 N. J. Law 311, this Court held that a decision of a question of fact de-

cided by the Supreme Court upon certiorari is binding upon this Court.

In *George v. Board of Excise*, 74 N. J. Law 816, this Court said:

“A decision of a question of fact decided by the Supreme Court upon certiorari is binding upon this court and not open to review on writ of error if there appears to have been competent evidence upon which its conclusion could have been based. *Moran v. Jersey City*, 29 Vroom 653; *Delaware Lackawanna and Western Railroad Co. v. Newark*, 34 *Id.* 310; *Morris & Cummings Dredging Co. v. Jersey City*, 35 *Id.* 587; *Suburban Land Co. v. Vailsburg*, 39 *Id.* 311; *Yellow Pine Co. v. Board of Assessors*, 43 *Id.* 182.”

In his brief (p. 3) the Prosecutor-Appellant commenting on his Reasons (p. 10) says that the Ordinance was assailed on certiorari on the ground that the driveway was not a public highway (a question of fact), and that the Town had no power to regulate its use (a question of law).

The question of fact is determined against the Prosecutor-Appellant by the decision of the Supreme Court.

The question of law is the question open to argument in this Court.

I.

The town has full authority to pass the ordinance in question.

The Town of Morristown was incorporated by an Act entitled: “An Act to Incorporate Morristown” passed April 6, 1865, and supplemented by an Act passed March 15, 1866 (P. L. 1865, p. 819; P. L. 1866, p. 427).

By the Supplement of 1866 the Charter provides that the Common Council of Morristown shall have power to

make, establish, publish, modify, amend or repeal ordinances, among other purposes (P. L. 1866, p. 430),

“to license and regulate Cartmen, Hackmen, * * * and to fix the rates of compensation to be allowed to them, and to prohibit unlicensed persons from acting in such capacities.”

The so-called Home Rule Act (being an act concerning municipalities, P. L. 1917, p. 319) provides by Article XV, under the caption “Licenses,” as follows (N. J. Municipalities Law, Merrey & Eckman, p. 113):

“1. The governing body of every municipality shall have power to make, enforce, amend or repeal ordinances to license and regulate;

2. Hacks, coupes, cars, omnibuses, stages, wheel chairs, and all other vehicles used for the transportation of passengers, baggage, merchandise and goods and chattels of any kind, and the owners and drivers of all such vehicles; and the place or places or premises in which or at which the different kinds of business or occupation mentioned herein are carried on and conducted.”

By the same statute, Article X, Section 7 under the caption “Ordinances” it is provided that the governing body of every municipality may prescribe penalty or penalties for the violation of any ordinance or ordinances it may have authority to pass (Merrey & Eckman, p. 59).

The authority of a municipality to enact ordinances to license and regulate cabmen, regulate traffic, specify parking places and the like has been frequently upheld by our courts.

See

Belmar v. Barkalow, 67 N. J. Law 504, page 505;

Combs v. Lakewood, 68 N. J. Law 582, page 583;

Atlantic City v. Brown, 72 N. J. Law 207;

Erwin v. Atlantic City, 90 N. J. Law 99, page 101.

And see the opinion of the Supreme Court (p. 69, ll. 17-30).

Bearing in mind that the driveway was devoted to public use (although the fee thereof remained in the railroad company), a preliminary question of law is as to the effect of the contract between the Prosecutor Welch, and the Railroad Company (pp. 11 to 15), upon the power which the Town otherwise would have to pass the ordinance in question and regulate traffic on the driveway which is located on the station grounds of the Railroad Company.

II.

The contract between the Prosecutor and the Railroad Company has no effect upon the Town's power to pass the Ordinance.

The right of the Railway Company to make the contract with the Prosecutor is not disputed. Such a right is upheld by this Court in *Thompson's Express & Storage Co. v. Mount*, 91 N. J. Equity 497.

Except as that case authorizes the execution of such contract, it has no application to the case at bar.

In the Mount case, the only part of the Railroad Company's property which was involved was the platform of the Lakewood Station. Here, we are involved with a driveway which, under the terms of the contract between the Town and the Railroad Company (p. 23, l. 40) "shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds, and also for the use of those having rights of egress to Morris street in the Saw Mill Lane." Remember that Saw Mill Lane was originally a public street intersecting with Morris street, which was vacated under the agreement (page 22, line 30).

In the Mount case the Station platform was part of the property of the Railroad Company upon which no one had a right other than passengers or others having business with the Railroad (91 N. J. Equity, p. 498); whereas here the public generally have the right to use the driveway.

And see the opinion of the Supreme Court (p. 70, ll. 30-40).

III.

The Ordinance in question does not deprive the Prosecutor of his property without due process of law or compensation, or deprive him of the equal protection of the laws.

Since the ordinance relates to a public driveway, even though it is located upon the private property of the Railroad Company, and the use of it for parking purposes has been made the subject of a special contract between the Railroad and the Prosecutor, the authority of the Town to pass the ordinance in question is fully upheld, on both reason and authority under the police power of the municipality.

In Dillon's Municipal Corporations, Vol. I, 5th Ed., Section 301, page 555, the author says, speaking of the police power:

“But it may here be observed that every citizen holds his property subject to the proper exercise of this power, either by the State legislature directly, or by public or municipal corporations to which the legislature may delegate it. Laws and ordinances relating to the comfort, health, convenience, good order and general welfare of the inhabitants are comprehensively styled: ‘Police Laws or Regulations.’ It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure.”

In Cooley's Constitutional Limitations, 7th Edition, Chapter 16, the author says, in discussing the police power (p. 833):

"It is obvious that its possession by the State, and its exercise for the regulation of the property and actions of its citizens, cannot well constitute an invasion of national jurisdiction, or afford a basis for an appeal to the protection of the national authorities."

And again he says, in discussing that clause of the Federal Constitution relating to the obligations of contracts (p. 833):

"it has been held without dissent that this clause does not so far remove from State control the rights and properties which depend for their existence or enforcement upon contracts, as to relieve them from the operation of such general regulations for the good government of the State and the protection of the rights of individuals as may be deemed important. All contracts and all rights, it is declared, are subject to this power: (a) and not only may regulations which affect them be established by the State, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity."

In *Munn v. Illinois*, 94 U. S. 113, the question was whether Illinois could, under the limitations upon the legislative powers of the States imposed by the Federal Constitution, fix by law the minimum charges for the storage of grain in warehouses, and it was contended, among other things, that the Statute deprived the warehousemen of their property without due process of law. The Supreme Court, in determining the case, went into a most elaborate discussion of the police power, and said, among other things (p. 125):

"Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only'.

This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since."

And again, on page 130:

"Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. *New Jersey Nav. Co. v. Merchants' Bank*, 6 How. 382. Their business is, therefore, 'affected with a public interest', within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs-in-error, and the business which is carried on there, come within the operation of this principle."

There can be no question in the case at bar but that the driveway, which is affected by the ordinance, is affected with a public interest and devoted to a public use.

A case quite in point is *Lindsey v. Mayor, etc., of Anniston*, 16 Southern Reporter (Sup. Ct. Alabama), 545.

In that case an ordinance provided that no Hackman, agent of any Transfer Company or Hotel Proprietor should go within the depot of the Railroad for the purpose of soliciting patronage for his hack, Transfer Company or Hotel (p. 546).

Lindsey was employed by a Transfer Company and went within the Union Depot at Anniston for the purpose of soliciting patronage for his company. There was a contract founded on a valuable consideration between the Transfer Company and the Railroad, which, as between those two companies, gave Lindsey the privilege of soliciting baggage within the Union Depot (p. 545). Lindsey was convicted under the ordinance and his conviction affirmed. The Court commented on the power of

the City under its Charter to regulate in a case of that character, citing *Munn v. Illinois*, 94 U. S. 113 and said (p. 546); that such ordinances are in their nature and essence police laws or regulations, and, when adopted in the exercise of an express legislative grant of power, there can be no inquiry into or discussion of their policy or reasonableness.

The court then went on to comment on the contention of the appellant, which was (p. 546):

“that, if he be subjected to the operation of the ordinance, his principal, the Anniston Transfer Company, in whose service he was engaged when doing the act complained of, will be divested of a right and privilege which the railroad companies owning and constructing the depot had granted on a valuable consideration, prior to the adoption of the ordinance.”

The court said (p. 546):

“The contract, whatever may be its objects, or whatever may be the rights it confers, or it was intended to confer, must be deemed to have been entered into in view of and in subordination to the powers of the municipal authorities to exercise the power to regulate the business and employment of hackmen. *Knoxville Corp. v. Bird*, 12 Lea. 121.”

The court then quoted from that part of Judge Cooley's Constitutional Limitations above set forth in this brief and went on to say (p. 547):

“It is not mere legal presumption, resting upon considerations of public policy, that the law silently incorporates itself into the contracts of parties. The incorporation, when the parties are dealing in good faith, most often comports with their actual intention, or they would have expressed all that the law may imply. The parties could not have contemplated that the municipal authorities would never exercise the power with which they were clothed to regulate the business of hackmen, nor is it to be presumed that they intended any embarrassment or diminution of the power when exercised. The juster presumption is that it was not intended the rights

and privileges the contract may confer should endure if they became in conflict with the regulations ordained by the municipal authorities. However, this may be, the ordinance is a valid exercise of the power with which the municipal authorities were clothed; a power intended for the protection of the public and the promotion of good order, and its exercise deemed necessary for the public benefit. If thereby pre-existing private rights are restrained or limited, the restraint or limitation is *damnum absque injuria*. 1 Dill. Mun. Corp. Sec. 141; *Vanderbilt v. Adams*, 7 Cow. 349. The individual shares in and public benefit which it is intended to promote, and this is the compensation deemed by the law adequate."

Another case equally in point is *City of Seattle v. Hurst*, 97 Pac. Rep. (Sup. Ct. of Washington), 454.

In that case the ordinance provided (p. 454):

"No hack or omnibus driver, hotel runner, steamboat runner, expressman or solicitor while engaged in such occupation and soliciting customers or passengers for hire, shall be allowed upon any wharf or railroad station or railway leading therein in the city of Seattle when such wharf, railroad station or railway leading therein is being used by passengers leaving or entering such wharf or railroad station."

A penalty was prescribed for the violation.

The appellant Hurst was convicted under the ordinance. He was an employee of the Seattle Transfer Company, which was a common carrier under the laws of Washington, and was engaged in the solicitation, as such employee, of customers within the station of the Great Northern Railway Company. There was a contract between the Transfer Company and the Railway Company, based on a valuable consideration, which contained recitals very similar to those in the contract between the Prosecutor and the Railroad Company in the case at bar (p. 11), and gave the Transfer Company the exclusive right and privilege to enter upon the trains of the Railroad Company approaching Seattle and into the said Depot and

train shed and to solicit and contract with passengers for the transfer of their baggage and for their passage in omnibus or otherwise to various parts of the City (p. 455), and it provided that the scale of prices should be reasonable and not greater than those provided for by ordinances of Seattle (p. 456), just as in the contract at bar (p. 13, l. 30).

The contention of the appellant and the Court's position thereon was stated by the court as follows (p. 456):

"It is argued by the appellant, at length, that the King Street Station or Union Depot is the property of the Great Northern Railway Company, and as such is to be deemed in every legal sense private property of the railway company as between itself and those of the general public who have no occasion to use the depot for purposes of transportation, and that it is lawful for the railway or depot company to make a contract granting special privileges to certain persons for supplying passengers with hacks or conveyances or baggage transfer. Many cases are cited to support that position. Among the cases are *Oregon Short Line R. Co. v. Davidson*, 33 Utah 370, 94 Pac. 10; *Union Depot & Railway Co. v. Meeking* (Colo.), 94 Pac. 16; *Hedding v. Gallagher*, 72 N. H. 377, 57 Atl. 225, 64 L. R. A. 811; *Godbout v. St. Paul Union Depot Co.*, 79 Minn. 188, 81 N. W. 835, 47 L. R. A. 532; *Donovan v. Pennsylvania Company*, 199 U. S. 279, 26 Sup. Ct. 91, 50 L. Ed. 192. There are many other cases which sustain the position above stated; but that position is not the controlling question in this case. It may be conceded that the depot is the private property of the railway company, and that the railway company may grant special privileges therein. But this case, in our opinion, depends upon the validity of the ordinance. If the ordinance is valid, making it a misdemeanor for hack solicitors to solicit customers for hire in railroad stations when such stations are being used by passengers leaving and entering the same, then it cannot be contended reasonably that a private owner may by a contract nullify the ordinance by permitting one or

more persons to violate the ordinance. City of Chillicothe v. Brown, 38 Mo. App. 609."

It was also contended that the ordinance affected the use of private property and restricted the right of private contract (p. 456), particularly because it had been passed after the making of the contract.

What the court said on that subject is, therefore, particularly in point, since the ordinance here was passed after the making of the contract between the Prosecutor and the Railroad Company. On this the court said (p. 457):

"The ordinance regulating hack solicitors, etc., in depots was passed after the contract above set out was entered into. Appellant argues that the ordinance, therefore, impairs the obligation of the contract, and is void for that reason. This does not follow, because 'the ordinance is a valid exercise of the power with which the municipal authorities were clothed, a power intended for the protection of the public and the promotion of good order, and its exercise deemed necessary for the public benefit. If thereby pre-existing private rights are restrained or limited, the restraint or limitation is *damnum absque injuria*.' All contracts are subject to this power, the exercise of which is neither abridged nor delayed by reason of existing contracts. Lindsay v. Anniston, 104 Ala. 257, 16 South. 545, 27 L. R. A. 436, 53 Am. St. Rep. 44."

To the same general effect are

Laddonia v. Poor, 73 Mo. Appeals 465;

City of Chillicothe v. Brown, 38 Mo. Appeals 609.

The Chillicothe case was followed by the Court in *City of Seattle v. Hurst*, 97 Pac. Rep. 454, at p. 457, in preference to a contrary decision in the case of *Napman v. People*, 19 Michigan 356.

In the Chillicothe case the court said (38 Mo. Appeals 609, p. 617):

"We are not aware of any principle which authorized the Railroad Company to suspend at its depot the operation of said municipal ordinance."

What the Court said in *Napman v. People*, 19 Michigan 356, quoted from at length in Appellant's brief, page 13, is contrary to the great weight of authority and to sound principle, besides being "*obiter dicta*." Napman was convicted in the Recorder's Court under an ordinance relating to Porters or Runners for Hotels (p. 353). He was neither a Porter nor a Runner for Hotels, but was working for an omnibus company. The Appellate Court said (p. 355):

"The case is, therefore, fatally defective in not bringing the defendant within the prohibition relating to runners for Hotels and Public Houses."

What, therefore, the court said, as quoted in Appellant's brief (p. 13), was *obiter*, as well as being contrary to the great weight of authority.

The almost unanimous holding of the courts is that the fact that Railroad station grounds, where ordinances of this kind are enforced are not the property of the City, or, strictly speaking, public property, is of no importance as affecting the right of the City under the police power to pass and enforce ordinances of this kind. The following, in addition to the case already cited, will illustrate the rule:

In *City of St. Paul v. Smith*, 7 N. W. (Minn.) 734, the ordinance provided that no hackman should park his hack on any street or public grounds adjacent to any railroad or railway depot except on designated places. The court said (p. 735):

"The fact that the ground about the depots or stations where these ordinances are to be enforced is not the property of the city, or public property of any kind, strictly speaking, is not important. The fact that it is commonly used by hackmen in their business, for the purposes mentioned in the ordinances, is sufficient."

In *Veneman v. Jones*, 20 N. E. (Sup. Ct. of Indiana), 644, an ordinance designated a place where hacks should

stand while waiting for passengers and prescribed penalties for disobedience. The Court said (p. 645):

“There can be no question but that the ordinance authorizing the depot marshal to prescribe the places where omnibuses, hacks and other vehicles should stand at the railroad depot, and requiring drivers to obey the directions of police officers in regard to the places which their respective vehicles should occupy, was a proper regulation, and one which the municipal authorities had the power to pass. *City of St. Paul v. Smith*, 27 Minn. 364, 7 N. W. Rep. 734, *Com. v. Robertson*, 5 Cush. 438; *Com. v. Stodder*, 2 Cush. 562; *Horr & B. Mun. Ord. Sec. 247*. Such regulations tend to the convenience of the general public by protecting persons from the annoying solicitations of hackmen and others, who, when acting without restraint, often confuse travelers, besides engendering strife and contention among themselves.”

Remember, that Mayor Potts testified that while the effect of the ordinance in question may have been to prevent the Prosecutor from using that part of the Railroad Company's property (p. 53, l. 8), the purpose of the ordinance was “in excluding that portion of the thoroughfare down there as a public hackstand in order to avoid confusion at the depot” (p. 52, l. 17).

In *Ex parte Vance*, 62 S. W. 568, the ordinance established hack stands at the Railroad depot in Fort Worth. The Court said (p. 569):

“The matter of the regulation of hacks, omnibuses and vehicles for the carriage and transportation of freight and passengers in cities has frequently been before the courts, and it is generally conceded this right is peculiarly within the power of the municipality, by ordinances passed for that purpose. *Com. v. Stodder*, 2 Cush. 562; *Com. v. Gage*, 114 Mass. 328; *City of St. Paul v. Smith*, 27 Minn. 364, 7 N. W. 734. It is presumed that the municipality which is intrusted with the public safety and convenience of travelers, is the best judge of the conditions and environments, and that it will not act in an unjust or oppressive manner, but for the good of the whole community.”

In *City of Emporia v. Shaw*, 51 Pac. (Kansas Appeals), 237, the ordinance prohibited Hotel Porters, Hackmen, etc., from soliciting custom in the passenger depot of the Santa Fe Railroad Company. The court overruled the contention that the municipality was without power to pass such an ordinance or that it was unreasonable or oppressive.

In *Emerson v. Town of McNeil*, 106 S. W. (Sup. Ct. of Ark.) 479, the ordinance prohibited the soliciting of custom or patronage for any Hotel or Hack line on the "gravel platform belonging to the Railroad Company" (p. 479). The court sustained the ordinance, saying (p. 480):

"The power conferred and as exercised is not obnoxious to, or an interference with any common right, but is a proper exercise of the police power, and is universally sustained. McQuillan on Municipal Ordinances, Sections 28, 184; *City of St. Paul v. Smith*, 27 Minn. 364, 7 N. W. 734, 38 Am. Rep. 296; *Veneman v. Jones*, 118 Ind. 41, 20 N. E. 644; 10 Am. St. Rep. 100. The fact that the platform upon which they were forbidden to solicit customers at this interval was the property of the railroad company does not affect the power. McQuillan says: 'Ordinances regulating hackmen, etc., while they are in and about landings, depots and stations, are valid, although the property of such places is not that of the city, or strictly speaking, public property of any kind.' McQuillan on Municipal Ordinances, Sec. 28."

This review of the authorities is a demonstration of the power of the municipality to enact the ordinance in question and that it does not deprive the Prosecutor of his property without due process of law, or take his property for public use without compensation, or deprive him of the equal protection of the laws.

It would be a very serious thing if a municipality were deprived of the power to regulate traffic at Railroad stations simply because the fee to the station grounds is in the Railroad Company. Such a rule, if announced by this

court, would result in a hopeless confusion of traffic, and be accompanied by danger and damage to life and property.

The right of a Railroad Company to contract with its favorite hackman or baggage transfer man in no manner militates against the higher power of the municipality under its police powers to regulate traffic in the interest of all the people on a public driveway, part of which may happen to be located on property to which the fee is in the Railroad Company.

Not only is this true as an abstract principle of law, but it is particularly true as applied to the case at bar because of the contract between the Town and the Railroad Company (pp. 16 to 29), in which the Railroad specifically agreed that the Town should exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station (p. 24, l. 25).

Cases cited by Prosecutor-Appellant in Point IV of his brief are not in point.

Napman v. People, cited on page 13, has already been referred to.

The cases cited on pages 16 and 17 deal with the question of the reasonableness of the ordinance, which question as already pointed out, is not in this case.

Cases cited on pages 18 to 20 deal with the legality of Zoning Ordinances in districting a City. While we have no quarrel with the observations made by the court in those cases on the rights of property, they have no application to the case at bar.

The Writ of Certiorari brought to the Supreme Court for determination, (1) a question of fact, whether the driveway in question was and is devoted to public use, although the fee thereof remained in the Railroad Company; and (2) a question of law, whether the Town of Morristown had power to regulate traffic on this driveway notwith-

standing the agreement between the Prosecutor and the Railroad Company.

(1) The Supreme Court has determined as a question of fact that the driveway was and is devoted to public use (p. 68, l. 21). This finding of fact is predicated on competent evidence, namely: the contract between the Town and the Railroad Company, which is admitted (Exhibit D. 2, pp. 16 to 29); and the testimony of witnesses, which stands unchallenged.

(2) The determination of law by the Supreme Court that the Town had power to make the ordinance is founded both on reason and authority.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed.

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