(2 3)

INDEX

Essex County Circuit Court

LAUREL GARDEN CORPORATION, *Plaintiff,* —*vs*— NEW JERSEY BELL TELEPHONE COMPANY, a corporation, *Defendant.*	Action at Law NOTICE OF APPEAL AND GROUNDS.

To New Jersey Bell Telephone Company
or
Smith & Slingerland, its attorneys.

SIRS:—

TAKE NOTICE that the plaintiff, Laurel Garden Corporation, hereby appeals from the whole of the judgment entered in this cause on February 17th, 1931, to the Court of Errors and Appeals of the State of New Jersey on the following grounds, to wit:

1. Because the Trial Court erred in ruling that the laying of telephone cables and conduits is an easement which comes within a street use.

2. Because the Trial Court erred in ruling that the defendant had a right to lay and maintain telephone wires and conduits underneath the sidewalk of the plaintiff's property.

3. Because the Trial Court erred in giving judgment in favor of the defendant whereas it should have given judgment in favor of the plaintiff and against the defendant.

Dated February 25th, 1931.

JOSEPH ZEMEL,
Attorney for Plaintiff-Appellant.

Service of a true copy of the foregoing Notice of Appeal is hereby acknowledged this second day of March, 1931.

SMITH & SLINGERLAND,
Attorneys for Defendant-Respondent.

THE STATE OF NEW JERSEY:

TO NEW JERSEY BELL TELEPHONE COMPANY, a corporation. YOU ARE SUMMONED to answer the annexed complaint of LAUREL GARDEN CORPORATION, a corporation, in an action at law in the Essex County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the said Essex County Circuit Court, at Newark, within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, Honorable Nelson Y. Dungan, Esq., Judge of the Essex County Circuit Court, at Newark, this 2nd day of May, Nineteen Hundred and Thirty.

JOSEPH ZEMEL,
Attorney.

JOHN H. SCOTT,
Clerk.

ESSEX COUNTY CIRCUIT COURT.

LAUREL GARDEN CORPORATION, a corporation, *Plaintiff,* —*vs*— NEW JERSEY BELL TELEPHONE COMPANY, a corporation, *Defendant.*	Action at Law COMPLAINT.

Plaintiff, a corporation having its principal place of business in the City of Newark, County of Essex and State of New Jersey, says:—

1. At the time hereinafter set forth and for a long time prior thereto, plaintiff was and is the owner of premises situate in the City of Newark, County of Essex and State of New Jersey, known as #457-463 Springfield Avenue and having a frontage of ninety-nine feet and seven and one-half inches on Springfield Avenue and forming an irregular plot running through to Eighteenth Avenue. Said Springfield Avenue is and for many years last past has been used as a public highway.

2. Plaintiff was and is also the owner of the sidewalk in front of and adjoining the said premises and so much of Springfield Avenue as adjoins the said premises to the center line thereof, as well as the owner of the land underneath the said street and sidewalk.

3. On or about April 23rd, 1930, the defendant, by its servants and agents, with force and arms, broke and entered the said premises of the plaintiff and there with shovels, pick axes and other iron instruments and various other kinds of equipment, dug up, turned and subverted the sidewalk

and the earth and soil under the said sidewalk and then and there dug and made a pit or shaft and hole of great breadth and width in the said sidewalk of the plaintiff and then and there raised, dug and got large quantities of earth, soil and stones which the defendants then and there took and carried away and converted to its own use and ever since the said time said defendant, by force and arms, unlawfully has held and retained possession of the said pit or hole and placed therein numerous articles and equipment of a description and kind known only to the defendant.

4. On or about April 23rd, 1930, the defendant forcibly and maliciously and with intent to harm the plaintiff, broke into the said sidewalk and dug therein and forcibly and unlawfully took possession and forcibly and unlawfully retained possession of the said shaft, pit or trench which the defendant dug in the said part of the plaintiff's premises, and the defendant forcibly and unlawfully withholds possession of the said shaft or trench down to the date hereof against the will of the plaintiff.

Plaintiff demands as damages the sum of ten thousand ($10,000.00) dollars, together with costs of suit.

JOSEPH ZEMEL,
Attorney for Plaintiff.

ESSEX COUNTY CIRCUIT COURT.

LAUREL GARDEN CORPORATION, *Plaintiff,* —*vs*— NEW JERSEY BELL TELEPHONE COMPANY, a corporation, *Defendant.*	Action at Law ANSWER.

Defendant, New Jersey Bell Telephone Company, a Corporation of the State of New Jersey, having its principal place of business at 540 Broad Street in the City of Newark, says that:

1. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 1, except that it admits that Springfield Avenue is, and for many years last past, has been used as a public highway.

2. It denies paragraphs 2, 3 and 4.

FOR SEPARATE AND DISTINCT DEFENSES TO THE COMPLAINT DEFENDANT SAYS:

1. Defendant, pursuant to written permission granted to it by the Department of Public Affairs, Bureau of Streets, of the City of Newark, opened Springfield Avenue in front of the premises of the plaintiff and laid beneath the surface of the sidewalk in said street conduits containing or intended to contain, wires for telephonic communication, which said conduits and wires are used and will be used for municipal and street purposes.

2. Defendant's said conduits and wires form part of its telephonic system and afford means of intercommunication among the inhabitants and municipal and governmental department of the

City of Newark, and of communicating with other parts of the State and Country for municipal and street purposes; and, by reason of such public function, constitute a part of the public use of said street, to which plaintiff's title, if any, is subservient.

3. Defendant's acts in laying said telephone conduits were performed in a careful, skillful and diligent manner and without injury or damage to the plaintiff.

4. Plaintiff has suffered no damage by reason of any act of the defendant.

SMITH & SLINGERLAND,
Attorneys of Defendants.

ESSEX COUNTY CIRCUIT COURT.

LAUREL GARDEN CORPORATION, a corporation, *Plaintiff*, —*vs*— NEW JERSEY BELL TELEPHONE COMPANY, a corporation, *Defendant.*	Action at Law NOTICE.

To Smith & Slingerland, Esqs.,
Attorneys for Defendants.

SIRS:—

TAKE NOTICE that on Friday, June 13th, 1930, at ten o'clock in the forenoon (daylight saving time) or as soon thereafter as this matter can be heard, I shall appear before the Essex County Circuit Court, at the Essex County Hall of Records, Newark, New Jersey, and shall move to strike out the answer filed herein by you on behalf of the defendant, on the ground that the said answer and each and every portion thereof, including the separate defenses, are sham, frivolous, impertinent, irrelevant, argumentative, obscure and uncertain. That they state conclusions of law. That they are not germane to the issue and are so framed as to embarrass and delay a fair trial of this cause.

And my application will also be based upon the affidavit hereunto annexed.

And take further notice that at the time and place aforesaid I shall move to enter an interlocutory judgment on behalf of the plaintiff.

JOSEPH ZEMEL,
Attorney for Plaintiff.

ESSEX COUNTY CIRCUIT COURT.

LAUREL GARDEN CORPORATION, a corporation, *Plaintiff,* —*vs*— NEW JERSEY BELL TELEPHONE COMPANY, a corporation, *Defendant.*	Action at Law AFFIDAVIT.

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

CHARLES ZEMEL, of full age, being duly sworn on his oath, deposes and says:—

I am the President of the Laurel Garden Corporation, a corporation of New Jersey, and the plaintiff in this action. As such President I am familiar with all its affairs.

The plaintiff is the owner of the premises known as 457-463 Springfield Avenue, Newark, New Jersey, which premises were conveyed to the plaintiff by deed from myself and others, dated November 16th, 1926, and recorded in the Register's Office of Essex County in Book S-75 of Deeds for said County, on page 92. Prior to the said conveyance to the plaintiff the grantors named in said deed were in actual physical possession of the said premises and since the said conveyance the plaintiff has been in actual possession of the said premises and the title to the said premises in the plaintiff has never been questioned to my knowledge. The said premises have a frontage of ninety-nine feet and seven and one-half inches on Springfield Avenue.

The said deed to the plaintiff, in addition to conveying the premises by metes and bounds, also conveys all the ways, privileges and advantages appertaining to the said premises.

I am informed and advised by counsel that the plaintiff corporation, by reason of its ownership of the said premises abutting upon Springfield Avenue and by reason of the fact that Springfield Avenue is a public street or highway, is the owner of the fee of the sidewalk in front of the said premises and of so much of Springfield Avenue as adjoins the said premises to the center line thereof, as well as the owner of the land or earth underneath said street and sidewalk, subject however, to the easement or uses thereof for public highway purposes only.

On or about April 23rd, 1930, the defendant, by its servants and agents, broke the sidewalk in front of the said premises and laid beneath the surface thereof at a depth of approximately twenty feet, as near as I can judge, certain hollow tiles or conduits which said tiles or conduits were and are intended to contain wires for telephone purposes. The defendant also removed a considerable part of the earth from the said premises and afterwards covered the said conduits or tiles with earth and caused a cement pavement to be laid on top thereof at a level with the former sidewalk which the defendant has broken.

Prior to the time the defendant did this work I repeatedly warned the persons in charge of doing similar work on adjoining premises that the plaintiff would not permit said work to be done in front of its premises. But the agents of the defendant nevertheless, in spite of my protests and warnings, continued to do the work.

The defendant has not removed any part of the tiling or conduits so placed in the sidewalk of the said premises but has covered the same with earth and cement pavement and retains possession of the said space.

Sworn and subscribed to
before me this 9th day
of June, 1930.

CHARLES ZEMEL

MAX H. SIRKIN,
A Notary Public of N. J.

ESSEX COUNTY CIRCUIT COURT.

LAUREL GARDEN CORPORATION, *Plaintiff,* —*vs*— NEW JERSEY BELL TELEPHONE COMPANY, a corporation, *Defendant.*	Action at Law AFFIDAVIT

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

SIFFREIN M. VASS, of full age, being duly sworn according to law upon his oath, deposes and says:

I am the Division Plant Superintendent of the Metropolitan Division of the New Jersey Bell Telephone Company and as such I have had charge of and am familiar with the construction of underground conduits in Springfield Avenue, in the City of Newark, passing the property of plaintiff in the above entitled suit.

The construction contemplated will consist of thirty-two ducts enclosed within vitrified clay conduits of the dimensions of three feet nine inches in height by nineteen inches in width. The purpose of this construction is to provide adequate telephonic service for the territory immediately contiguous to the property in question, as well as toll service between Newark and Philadelphia. The need for this construction is urgent and if it be interfered with, the demands for telephonic service, both local and long distance, cannot be met. This particular line forms an important link in the telephone system throughout all of Northern New Jersey, extending as well to Philadelphia and points West and South, and unless the relief sought

by the installation of this conduit line is afforded, great inconvenience to the public will result in the very near future. The present facilities in Springfield Avenue are insufficient to meet the ever increasing demand for telephone service. While it is true that at the present time as many as thirty-two ducts are not required, it is only a question of time when all of them will be required and it is essential that while the present construction is being made these future requirements be provided for so as to save further interference with the public convenience and interference with traffic etc. at some future date.

In addition to the general importance of this line as hereinabove stated, the New Jersey State police are inaugurating which is known as a Telephone Typewriter System in connection with various municipalities of the State, including the City of Newark, the purpose of which is to facilitate the apprehension of criminals and this system will be incorporated in part within the conduit line in question, and will be used exclusively for police, state and municipal purposes for the protection of the public.

It became necessary, in order to avoid subsurface structures in Springfield Avenue, such as water pipes, gas mains, electric light and power conduits, sewers etc. to run our conduit line beneath the surface of the sidewalk. The sidewalk was opened and the trench dug preparatory to the installation of our conduits, under the supervision of the Chief Engineer of the City of Newark and with his approval and acquiescense.

The conduit line in front of plaintiff's property will be a distance of three feet seven inches inside of the curb line and there will be a space of ten feet six inches between the conduit line and the building line. The top of the conduits will be

nine feet three inches below the surface of the sidewalk.

Formal permit for the construction of this conduit line through Springfield Avenue and passing the property of the plaintiff was dully issued by the municipal authorities of the City of Newark before we commenced our work.

Subscribed and Sworn to
before me this 19th day
of June, 1930.

SIFFREIN M. VASS

ELMER F. HOLTZ,
An Attorney at Law
of New Jersey.

LAUREL GARDEN CORPORATION *Plaintiff,* *vs.* NEW JERSEY BELL TELEPHONE COMPANY, *Defendant.*	*Action at Law* AFFIDAVIT.

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

Siffrein M. Vass, of full age, being duly sworn according to law upon his oath deposes and says:

I am the Division Plant Superintendent of the Metropolitan Division of the New Jersey Bell Telephone Company and as such I have had charge of and am familiar with the construction of underground conduits in Springfield Avenue, in the City of Newark, passing the property of plaintiff in the above entitled suit.

The defendant is a corporation duly organized

and existing under the laws of the State of New Jersey and is authorized to operate under the provisions of the Telegraph Act (Revision of 1877) as amended by P. L. 1900 p. 76 and P. L. 1909 p. 288 (4 C. S. p. 5314).

On or about April 23, 1930, the defendant opened the sidewalk in front of the plaintiff's said premises and dug a trench and placed therein vitrified clay conduits containing thirty-two ducts. Said conduits occupied a space 3′ 9″ in height by 19″ in width. Defendant then refilled said trench and relaid a new concrete sidewalk. The said conduits as laid are located 3′ 7″ inside of the curbing of the street. There is a space of 10′ 6″ between the conduits and the present buildings. The top of the conduits is 9′ 3″ below the surface of the sidewalk. Said conduits were laid inside of the curbing in order to overcome obstructions in the portion of the street outside of the curbing.

The purpose of these conduits is to provide adequate telephone service for telephone subscribers in the City of Newark, and especially to those occupying properties located along Springfield Avenue in said City; also to provide telephone toll service from and out of the City of Newark and other portions of Essex County and from the northern part of New Jersey generally, into the southern part of New Jersey and into Pennsylvania and other points throughout the United States.

The map of New Jersey attached hereto marked "Exhibit A", shows the territory in this State (cross-sectioned in green on the map) which will be furnished with telephone service by means of the conduits above referred to, from the major switching points at Morristown, Paterson and Newark and the areas surrounding the same as indicated by the red lines radiating from those

major switching points. Telephone service between the areas thus delineated upon said map will be routed through the conduits in question.

Based upon the present growth of the telephone system, defendant estimates that within a few years an average of 180,000 messages per day will pass through the conduit system referred to and of these messages approximately two-third will be between points within the State of New Jersey.

The telephone lines within the said conduits will be used for governmental, municipal and official business of the State of New Jersey and of its subdivisions, including the City of Newark. The extent of such public use is indicated by defendant's records which show that in a single month four telephones located in the City of Newark, and used for municipal or county purposes, had four hundred and thirty-five calls made upon them into the territory south of Newark (cross-sectioned in green on "Exhibit A"). This telephone service will pass through the conduits in question. The said four telephones here referred to are as follows:

Market 2-9220	Department of Public Affairs, City of Newark.
Mulberry 4-1865	Chief Clerk—Department of Public Affairs, City of Newark.
Market 2-5400	Police Headquarters, City of Newark.
Mitchell 2-7800	Board of Chosen Freeholders, Essex County.

The police and fire alarm communication systems of the City of Newark are operated by the conduit line in Springfield Avenue. The conduit line in question is an intergral part of this system. The defendant is obligated by ordinance to provide

without charge adequate space in its conduit system for the City of Newark to furnish to said City the means of properly operating its police and fire alarms. Without the use of the conduits in question, defendant will be unable to properly furnish this required service.

The conduits in question will be necessary to operate any electrically operated traffic control system hereafter installed in Springfield Avenue, space therefor having been provided therein.

The said conduits are and will be also used in connection with the police telephone typewriter system recently inaugurated in the State of New Jersey (commonly known as the Teletype System) which is designed and will be used to render an instantaneous and comprehensive communication system to aid the police of the State and its subdivisions in the apprehension of criminals.

A map is annexed hereto and marked "Exhibit B" which shows the State and Essex County police telephone typewriter network and indicates in particular those circuits which will occupy space in the telephone conduit system in Springfield Avenue involved in this suit.

Without the conduit system in question, the defendant will be unable to furnish necessary telephone service desired by residents and business establishments along Springfield Avenue, from the premises of each subscriber, not only throughout the City of Newark and the State of New Jersey, but throughout the United States.

Said conduit system will afford to them the only means of telephonic communication in connection with their business and affairs and also of communicating with the public offices of the State, the counties and municipalities and the various

police, fire, administrative and business offices thereof.

Prior to the laying of the said conduits by the defendant, it had received permission therefor by ordinance of the City of Newark in compliance with the requirements of the Telegraph Act above referred to (C. S. p. 5314, Section 8) and had obtained a permit from the Department of Public Affairs, Bureau of Streets of the City of Newark, to open Springfield Avenue at the location in question in order to lay the said telephone conduits; and which said conduits were laid in compliance with the requirements of said ordinance, and under the direct supervision and pursuant to the instructions of the Engineer of the Bureau of Streets of the City of Newark and his subordinates.

Subscribed and Sworn to
before me this 19th day
of December, 1930.

SIFFREIN M. VASS

ETHEL A. KANN,
A Notary Public
of New Jersey.

nine feet three inches below the surface of the sidewalk.

Formal permit for the construction of this conduit line through Springfield Avenue and passing the property of the plaintiff was duly issued by the municipal authorities of the City of Newark before we commenced our work.

Subscribed and Sworn to
before me this 19th day
of June, 1930.

SIFFREIN M. VASS

ELMER F. HOLTZ,
An Attorney at Law
of New Jersey.

ESSEX COUNTY CIRCUIT COURT.

LAUREL GARDEN CORPORATION, *Plaintiff*, —*vs*— NEW JERSEY BELL TELEPHONE COMPANY, a corporation, *Defendant*.	Action at Law.

Case submitted on agreed state of facts.
Joseph Zemel, attorney for plaintiff.

Smith & Slingerland, attorneys for defendant.

SMITH, J.

This is an action brought by the pliaintiff in trespass against the defendant to recover damages by reason of the defendant's having opened a part of Springfield Avenue, a public highway in the City of Newark, in front of the premises owned by the plaintiff, taking up the sidewalk in so doing, for the purpose of laying beneath the surface of the sidewalk certain conduits as part of its telephone system. The sidewalk taken up was replaced after the conduits were laid.

The case was originally submitted to the Court on the plaintiff's motion to strike out the defense as sham or frivolous, and after the argument additional affidavits were filed by consent. Since the disposition of this case does not require the determination of disputed questions of facts, the parties have stipulated that the case be tried before the Court without a jury on the affidavits filed, the stipulation being as follows:

"It is hereby stipulated and agreed between Joseph Zemel, attorney for the plaintiff, and Smith & Slingerland, attorneys for the defendant, that

the question of liability in this case be submitted for trial before the Hon. William A. Smith, Esq., Circuit Court Judge, without a jury, upon the pleadings and affidavits heretofore filed in this cause; and that the question of damages, if any, be reserved for submission to a jury to be drawn from the general panel."

From the affidavits it appears that the conduits in question are for the purpose of carrying telephonic wires which were theretofore strung along Springfield Avenue on poles erected at the curb; and also for additional telephone wires for extension of service. The laying of these conduits was done pursuant to the permission of the proper municipal authority, and the wires themselves form another communication for city, county, state and United States governmental use. It is not necessary for me to amplify the necessity of the telephone for governmental use; the affidavits clearly show that.

The surface over the conduits was replaced and put in as good condition as it had been before the laying of the conduits.

The defendant is a corporation organized under the laws of this state and authorized to operate under the provisions of the Telegraph Act as amended. P. L. 1909, p. 288 (4 Comp. Stat. 5314). This act gives the power to the defendant "to erect, construct, lay and maintain the necessary poles, wires, conduits and other fixtures for its lines in, upon, along, over or under any of the public roads, streets and highways upon first obtaining the consent in writing of the owner of the soil to the erection of any such pole or poles . . .

provided, however, that no pole shall be erected, nor shall any conduit, wire or other fixtures be constructed or erected in, upon, along, over or un-

der any of the public roads, streets or highways of any municipality in this state without first obtaining from the governing body of such municipality permission therefor."

It will be noted that while the provision requires the consent of the governing body to the erection of poles and for the laying of conduits and the stringing of wires, it only requires the consent of the owner of the soil in the street to the erection of "such pole or poles," and it does not, by its terms, require his consent to the laying of conduits or the stringing of wires.

This case is one of extreme importance, because in the development of municipalities the use of the subsurface of the highway for pipes and conduits is being changed from the sub-surface of the highway between curbs, to the sub-surface of the highway outside of the curbs; and in making this change, it is necessary to use the sub-surface of the sidewalk due to the fact that the roots of the trees are between the sidewalk and the curb. The reason for this change is due principally to three things: first, the construction of hard, permanent pavements, the disturbance of which is damaging; second, the interference with traffic that the opening of the street causes; and third, the municipal requirement of putting wires underground.

In considering this case I have had to review the authorities, but I do not think it the province or the duty of this Court in the trial of a case, in giving the reasons for its decision, to attempt to collect the auhorities and distinguish between them. Vice Chancellor Backes referred to the question here involved in the case of *Dalton v. Public Service,* 83 N. J. Eq. 560, but did not decide it, so I think the matter is an open question in this state.

The question we are faced with is: Is the laying of conduits under the sidewalk a taking of private property for public use for which just compensation must be made to the owner of the fee, or is it a construction within the public easement of a highway and therefore imposing no additional servitude upon the owner of the fee? If it is the former, then an action of trespass will lie. *Winters v. Peterson,* 24 N. J. L. (4 Zab.) 524.

As the law now stands, conduits may be laid below the surface underneath the roadway by a public utility company such as the defendant, without compensation to the owner of the fee; and the municipality may lay pipes for water, sewage or drainage underneath the sidewalk as well as under the roadway, without imposing any additional servitude. It remains, therefore, to consider: Does the telephone or other electric wire serving the public generally, fall within the class of water and sewer and drainage pipes when the municipal consent is obtained?

The case of *Nicoll v. The New York and New Jersey Telephone Company,* 62 N. J. L. 733, decided in the November Term, 1898, is urged by the plaintiff as dispositive of this question. In that case the court considered the question of the method of condemnation to be used by the defendant in acquiring as against the plaintiff's fee in the avenue, a right to place poles and wires for a telephone line. Undoubtedly, the proposed poles referred to in that case were to be placed within the curb line.

The court, in stating the question with which it had to deal, says as follows at p. 735: "We must, therefore, consider whether the acquisition by a telephone company of a right to erect poles and place wires and other fixtures for telephonic purposes along a public street wherein the fee of

the land belongs to private persons, without the consent of such persons, is the taking of private property." And further states the question was: Does such proposed improvement place an additional servitude upon the fee over that provided for by the public easement? The court held that the right there asserted by the telephone company was not within the public easement and could only be acquired against the consent of the private owner of the fee by condemnation under the power of eminent domain.

We must bear in mind that the statute under which the telephone company operates, provides that it must obtain the consent of the property holder to the erection of the poles, or otherwise condemn. It does not require such consent to the stringing of wires or laying of conduits, while it may be that the telephone company, when condemning its right of way for the purpose of erecting poles, also included the right to string wires. Still, this was but a natural demand when condemning the right to place the poles.

The court's opinion in the Nicoll case extends the principle applicable to poles, to the wires as well, saying that the public easement which is the servitude on the property holder's land, where a highway is placed across it, does not extend to telephone wires used in the general telephonic system. The court says: "The public easement, as interpreted in this state, is primarily a right of passage over the surface of the highway and of so using and occupying the land within it as to facilitate such passage. In this primary right are included the grading, paving, cleaning and lighting of the highway, the construction and maintenance of street railway with the apparatus proper for their use, and the maintenance of appliances conducive to the protection and con-

venience of travelers while using the way. Secondarily, the easement covers uses which, though their relation to the right of passage is remote, or even fanciful, are so generally advantageous to the owners of the fee, the owners of abutting property, that, rather by common consent and custom than by logical deduction from the primary design, they are now recognized as legitimate. Such are the construction and maintenance of sewers, water pipes and gas pipes for the convenience of persons occupying neighboring lands."

The court then says that while it is claimed for the telephone line that it is merely using the highway for the passage of electric current, it is not in reality this; but that the electric current does not use the highway for passage, but it uses the wire; and says that the highway is used only as a standing place for the structures, and that such use seems to be different from the primary right of passage as to be essentially distinct, and goes on to say: "Telephone lines in a street do not afford to the occupants of neighboring property such general convenience, nor have they been permitted with such common and continued acquiescence, as sanction the other uses mentioned."

It seems to me that the reasoning of the Justice who wrote the opinion in the Nicoll case is too narrow; at least for this advanced age. The law must keep pace with changing conditions due to the development in our method of living. Modern urban development calls for the use of the subsurface of the highway outside of the curb because of the permanence of modern pavement and the congestion of modern traffic and the necessity for the removal of overhead wires. The law is for the protection of the people, and not the people for the protection of the law, and it is the duty

of the courts to so modernize their rules as to meet changing conditions where the doing so will not run counter to constitutional or statutory prohibition.

As evidence of the court's recognition of changes in the use of a highway for purposes of transportation, we have, first, the approval of the street car drawn by horses, *Hickman v. Paterson Horse Railway Company,* 17 N. J. Eq. 75, and the subsequent adoption of electricity, *Halsey v. Rapid Transit Street Railway Company,* 47 N. J. Eq. 380.

Vice Chancellor Van Fleet in the latter case calls attention to the changes due to improvements in the following words at p. 384: "By the taking the public acquire a right of free passage over every part of the land, not only by the means in use when the lands were taken, but by such other means as the improvement of the age, and new wants, arising out of the increase in population or of an enlargement of business, may render necessary. It is perfectly consistent with the purposes for which streets are acquired that the public authorities should adopt them, in their use, and the improvement and conveniences of the age."

In 1898, when the opinion in the Nicoll case was handed down, the telephone system had not grown to its present size, nor was its use so essential; nor had the congestion upon the city streets reached any such state as now exists. The growth at the present time of congestion upon the highways of the cities requires the use of the telephone. If it were discontinued, the congestion resulting would no doubt be prohibitive. Where, in the old days, communication to the house or various buildings in the municipality, was by letter or by messenger, now this communication goes by wire, and the congestion

upon the highway which would result from the old method is relieved by the telephone.

The character of a private enterprise which the telephone company originally assumed, has been done away with by rate regulation, and now the cost to the property holder or the citizen is determined by the cost of the service and the profit from the operation to the telephone company is subject to limitation by the government, so long as it is not confiscatory.

It seems to me, therefore, that the laying of telephone cables in conduits is an easement which comes within a street use, and therefore, unless required by statute, the property holder's consent is not required where the conduits are laid beneath the surface of the sidewalk, provided, of course, that the proper municipal authority has passed upon the question and determined in favor of the utility company.

My feeling is that I am not bound by *Nicoll v. The New York and New Jersey Telephone Company, supra,* because the statute required the consent or the condemnation of the right to erect the poles. The statute does not require that in the case of the laying of conduits, and I know of no case in this state where the courts have held in a direct proceeding, where the question was directly involved, that it was necessary to condemn the right of stringing wires in front of the owner's property along a highway where no poles were erected in the highway in front of his property.

The case of *Zemel v. Public Service Production Company,* 150 Atl. 344, Supreme Court, 1930, is not in point, because the construction which was for electric service involved the placing of a vault, manhole and transformer under the sidewalk, and

was not the case of just the placing of conduits for the purpose of carrying wire.

That the owner of the fee has rights in the subsurface under the sidewalk, such as for maintenance of a vault, must be conceded. *Blum v. Orange*, 91 N. J. L. 376. He also has rights on the surface and over it, such as for hitching posts, awnings, and the like. But all these rights must be exercised subject to the right to use the land for highway purposes. Where these rights conflict, undoubtedly equity could so adjust them that both might be enjoyed.

I find the affidavits truly state the facts, and render judgment for the defendant.

(Signed) WM. A. SMITH,
Judge.

February 17, 1931.

ESSEX COUNTY CIRCUIT COURT.

53205

LAUREL GARDEN CORPORATION, *Plaintiff,* —*vs*— NEW JERSEY BELL TELEPHONE CO., *Defendant.*	Action at Law By Order of the Court. Judgment for Deft. February 17, 1931. Costs $71.60.

Smith & Slingerland, Attys. for Deft.

Judgment By Order of The Court in the above entitled Action was rendered on the Seventeenth day of February A. D. Nineteen Hundred and Thirty-one in favor of the Defendant New Jersey Bell Telephone Company and against the Plaintiff Laurel Garden Corp. for the sum of Seventy-one Dollars and Sixty Cents Costs of Suit.

Judgment Signed and Entered February 17, 1931.

WILLIAM S. GUMMERE,
C. J.

Book 113 Page 88 C C Judgments

ESSEX COUNTY CLERK'S OFFICE.

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

I, JOHN H. SCOTT, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey.

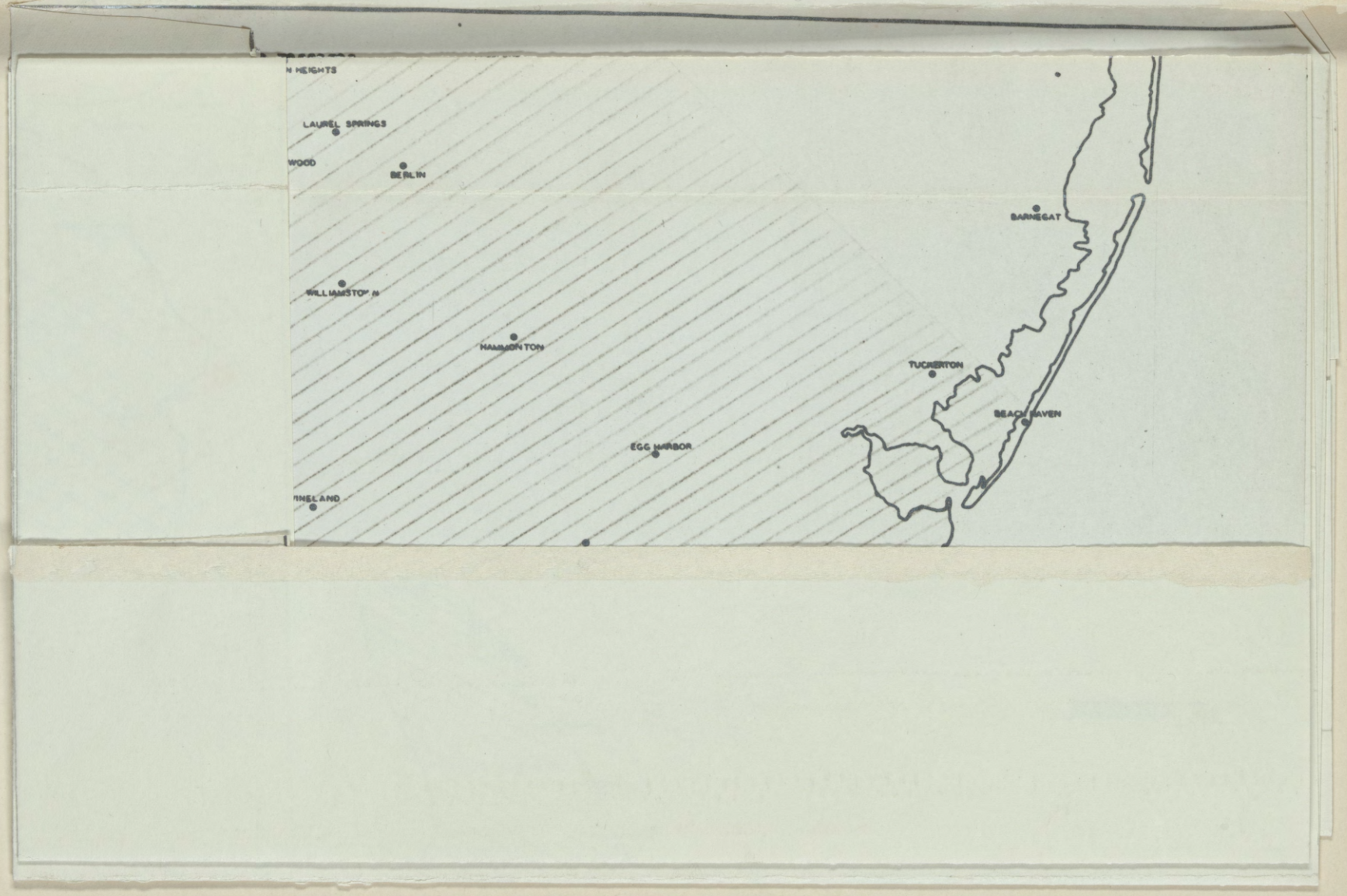
DO HEREBY CERTIFY That the foregoing is a true and correct copy of all the pleadings in the case of Laurel Garden Corporation, Plaintiff vs New Jersey Bell Telephone Co. Defendant, together with a copy of the Judgment record entered on February 17, 1931 in Book 113 Page 88 of Circuit Court Judgments

and the same is taken from and compared with the original copies of all records and as the same now remains on the files of said Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said Court and County at Newark, N. J. this Sixteenth day of March A. D., 1931.

(SEAL)

JOHN H. SCOTT,
Clerk.


N HEIGHTS
LAUREL SPRINGS
WOOD
BERLIN
BARNEGAT
WILLIAMSTOWN
HAMMONTON
TUCKERTON
BEACH HAVEN
EGG HARBOR
INELAND

- Indicating a switching point for telephone messages.

- Indicating a major switching point for telephone messages (Newark serves as both a switching point and a major switching point).

- Indicates that portion of New Jersey that will in general be connected to area around Newark as indicated by red lines, through the conduit in Springfield Ave.

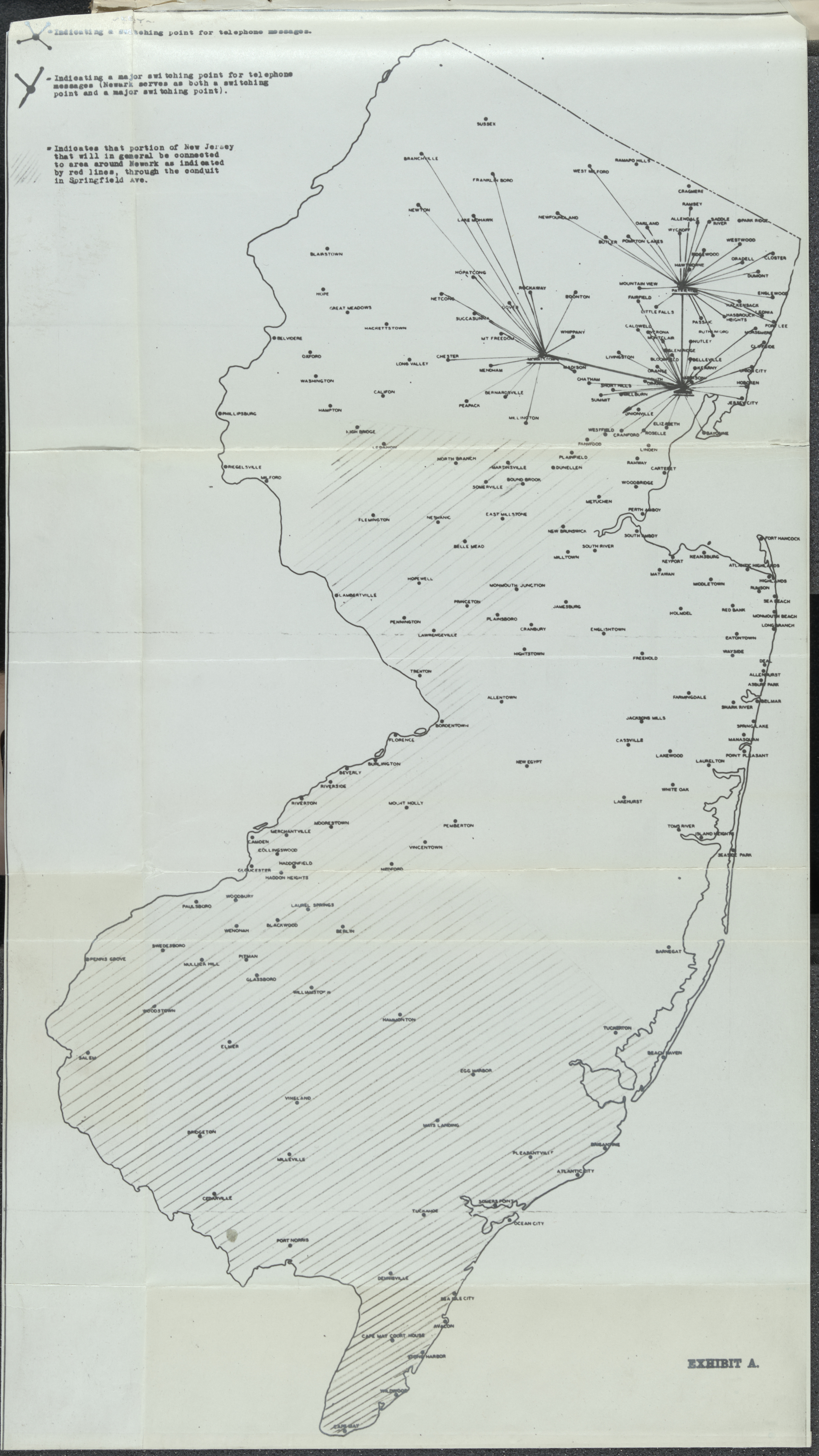


EXHIBIT A.

MAP SHOWING
STATE AND ESSEX COUNTY
POLICE TELEPHONE TYPEWRITER NETWORK
WHICH INDICATES IN PARTICULAR THOSE
CIRCUITS WHICH WILL OCCUPY SPACE IN
THE TELEPHONE CONDUIT SYSTEM NOW
UNDER CONSTRUCTION IN SPRINGFIELD AVE.

THE POLICE TELEPHONE TYPEWRITER
SYSTEM IS DESIGNED TO RENDER AN
INSTANTANEOUS AND COMPREHENSIVE
COMMUNICATION SYSTEM TO AID THE
POLICE OF THE STATE AND ITS SUBDIVISIONS
IN THE APPREHENSION OF CRIMINALS.

KEY TO SYMBOLS

- LOCAL POLICE STATIONS
- ZONE HEADQUARTERS
- STATE POLICE STATIONS
- STATE HEADQUARTERS

STATE SYSTEM
COUNTY SYSTEM

SECTION SHOWING TELEPHONE CONDUITS IN SPRINGFIELD AVE.

NEWTON
NETCONG
RAMSEY
POMPTON LAKES
ALPINE
CALDWELL TWP.
WEST CALDWELL
CEDAR GROVE
CALDWELL
VERONA
ESSEX FELLS
ROSELAND
MONTCLAIR
NUTLEY
GLEN RIDGE
BLOOMFIELD
BELLEVILLE
NEWARK
NEW YORK
SOUTH ORANGE
MAPLEWOOD
MILLBURN
TEN TELEPHONE TYPEWRITER CIRCUITS IN THIS SECTION
MORRISTOWN
MADISON
CHATHAM
SUMMIT
MILLINGTON
MORRISTOWN
WASHINGTON
SOMERVILLE
METUCHEN
FLEMINGTON
KEYPORT
LAMBERTVILLE
PENNINGTON
EATONTOWN
HIGHTSTOWN
FREEHOLD
TRENTON
POINT PLEASANT
COLUMBUS
NEW EGYPT
DELANCO
PHILADELPHIA
TOMS RIVER
BERLIN
SWEDESBORO
HAMMONTON
TUCKERTON
MALAGA
WOODRUFF
MAYS LANDING
ABSECON
PORT NORRIS
CAPE MAY COURT HOUSE

EXHIBIT B.

New Jersey Court of Errors and Appeals

LAUREL GARDEN CORPORATION,
Plaintiff-Appellant,

vs.

NEW JERSEY BELL TELEPHONE COMPANY,
Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE.

Facts.

The facts as stated in appellant's brief, while not controverted, are incomplete, and certain additional facts should be stated in order that the Court may fully understand the situation.

By stipulation (recited at length in Opinion, Case pp. 14-15) the case was submitted to the Court below on the question of liability, upon an agreed state of facts contained in three affidavits, one filed by the plaintiff below and two by the defendant. From this agreed state of facts it appears that the defendant below is duly authorized to operate under the provisions of the Telegraph Act (Case p. 12 etc.); that prior to the laying of the conduits in question it had received permission therefor by ordinance of the City of Newark in compliance with the requirements of that Act; that it had also obtained written permission from the Department of Public Affairs, Bureau of Streets, of the City of Newark; and that the work was done in compliance with the requirements of said ordinance, and under the direct supervision and pursuant to the instructions of the Engineer of the Bureau of Streets

of the City of Newark and his subordinates (Case pp. 12-13).

It further appears that the said conduits and the wires enclosed therein form part of appellee's telephonic system and will be used, in addition to the usual telephonic service to the public, for governmental, municipal and official business of the State of New Jersey and of its subdivisions, including the City of Newark (Case p. 12 etc.); and that they will afford to the residents and business establishments along Springfield avenue the only means of telephonic communication with the various police, fire, administrative and business offices of the State, counties and municipalities (Case pp. 12-d, 13.

These facts, together with the other facts contained in the agreed state of facts (Case pp. 11 to 13), raise the only question in this case, which is this:

Is the use by the appellee of the necessary space beneath the surface of the street for its telephone conduit line embraced within the public servitude in the street, to which appellant's title is subservient, so as to dispense with any consent by the appellant, or compensation to it for such use?

The Court below decided this question in the affirmative.

ARGUMENT.

The decision of the Court below was eminently proper and is in accord with the reasoning not only of the best considered decisions of other jurisdictions, but of those of our own State, although the precise question here presented has not been definitely passed upon by this Court.

It is a question of exceeding importance, not only to the parties to this suit, but to the public as well, because if it be decided that the consent of an abutting owner is required to lay conduits for the reception of telephone wires in a public street, or, in the alternative, to resort to condemnation, the resultant enormous additional expense which would be thus thrust upon the company would inevitably involve an increase in the rates for telephone service, both public and private. We mention this merely to stress the importance of the question and not as having any effect upon the principles involved. This importance was recognized by Vice-Chancellor Backes in the case of *Dolton* v. *Public Service Electric Co.*, 83 N. J. Eq. 560, where he said:

> "The question which seems to me to be one of great importance, both to property owners and public service corporations, remains undecided in this state, and it should not be finally passed upon until after a careful examination and full discussion by counsel, and, therefore, I decline to express an opinion at this time."

POINT I.

The acts of the appellee were performed under legislative sanction and in strict compliance with the requirements of the statute.

It is admitted that the appellee is a corporation properly organized and existing under the laws of this State, and authorized to operate under the provisions of the Telegraph Act (Revision of 1877) as amended by P. L. 1900, p. 76 and P. L. 1909, p. 288 (4 C. P. p. 5314). These Acts provide that a telegraph company "shall have full power to erect, construct, lay and maintain the necessary poles, wires, conduits and other fixtures for its lines, in, upon, along, over or

under any of the public roads, streets and highways upon first obtaining the consent in writing of the owner of the soil to the erection of any such pole or poles, * * * provided, however, that no poles shall be erected, nor shall any conduit, wire or other fixture be constructed or erected in, upon, along, over or under any of the public roads, streets or highways of any municipality in this State, without first obtaining from the governing body of such municipality, permission therefor."

It will be noted that while the Act requires the consent of the owner of the soil to the erection of poles, there is no such requirement for the laying of conduits; and the reason for this is apparent when we consider that the only special rights of the abutting owner in the street, of which he cannot be deprived without compensation, are those incident to adjacency, such as access, light and air, which rights are more fully discussed in Point II of this brief. The erection of poles does interfere to some extent with such special rights of the abutting owner, whereas an underground conduit line does not.

The fact that the Legislature saw fit to dispense with the requirement of obtaining the consent of the abutting owner to the laying of conduits indicates clearly that it considered that the laying of conduits came within the public easement in the street to which the rights of the owner of the soil were subject, and that they did not constitute any additional servitude upon the land of the abutting owner. Had the Legislature any doubt on this score, it obviously would have included the word "conduits" when it provided that consent should be obtained from the owner of the soil to the erection of "any such pole or poles."

It is admitted that the appellee obtained the permission from the City of Newark for the laying of the conduits in question. As the statute does not require that consent be obtained from the owner of the soil for the laying of a conduit, the appellee had complied with all of the requirements of the law and was justified in proceeding with the work.

As the appellant's sole contention is that the appellee should have obtained its consent to the laying of the conduits in question, if it be determined that such consent was not necessary, the appellant must fail in its case, because there is no contention on its part that the appellee had not complied with all of the other requirements of the law, or that the work was not done in a careful, skilful and diligent manner.

POINT II.

The special rights of the appellant as abutting owner upon a public highway are limited to access, light and air.

The only special rights of an abutting owner in the streets of which he cannot be deprived without compensation, are those incident to adjacency, such as access, light and air, and not those incident to proximity. This distinction is pointed out in the case of *Paterson Railway Co.* v. *Grundy,* 51 N. J. Eq. 213, where the complainant was changing its motive power from horse-drawn to electrical energy, and in changing its construction had put up a pole at the edge of the curb on the sidewalk of the property on either side of defendant's and strung a wire between the poles at a height of 22 feet above the sidewalk. The defendant having cut the wire over his sidewalk, and threatened to do so again, the

company applied for an injunction to restrain defendant from interfering therewith. The application was denied but only because the statute required the consent of the State Board of Commissioners, which had not been obtained.

Vice-Chancellor Green says (p. 222):

> "In considering the right of the defendant as an abutting owner to remove the wire, we assume, for the present, that the complainant has legislative sanction for the operation of its railway by the use of electrical force and appliances, for if it has not, the defendant's right to clear the air of obstruction is as unquestionable as his right to clear the surface of the street in front of his property. If the contemplated use of the street by the complainant is authorized by statute, the defendant's rights therein are subservient thereto, unless such use imposes an additional servitude upon the land taken by the street fronting defendant's property or on his land abutting thereon."
>
> "The special rights of the abutting owner in the streets are *quasi* easements of access and light and air over the land of the street fronting his property. Barnet *v.* Johnson, 2 McCart. 481; Dill *v.* Board of Education, 2 Dick. Ch. Rep. 441. These he cannot be deprived of without compensation being made to him. These are interests distinct from those possessed by the general public and are rights appurtenant to the lot and the improvements thereon. * * *
>
> *"It is equally well settled that when a public use, authorized by law, takes no property of the individual, but merely affects him by proximity, the necessary interference in his business or in the enjoyment of his property occasioned by such use, furnishes no basis for damages.* * * * The defendant's right to compensation, if any, springs, therefore, from his rights of adjacency, not from the fact of proximity; it must be an interference with some one of the rights of

> access or of light or air which, so far as the adjacent owner is concerned, hampers complete legislative control of the street for public use as a highway." (Italics ours.)

With this in mind, it can be plainly seen why the Legislature has made a distinction between poles erected in the street and conduits laid beneath the surface. The installing of poles, in addition to creating an obstruction to passage over the highway, may be an interference with the rights of the abutting owner of access to his property and of light and air, but the laying of conduits does not in any way interfere with such access or light or air. Merely because the conduit affects it by proximity furnishes no basis for damages for the necessary interference in his business or in the enjoyment of his property occasioned thereby.

While it is thoroughly settled law that the owner in fee of a lot abutting upon a highway owns the fee to the center of the street, it is just as thoroughly settled that this ownership of the fee in the street is subject and subservient to the rights of the public, and that when the public interest demands, the rights of the abutting owner must give way to the paramount right of the public.

This rule is clearly enunciated in the case of *Coburn* v. *New Telephone Co.*, 59 N. E. 324, in which the Court says on this head:

> "He (the abutting property owner) may, we think, excavate and improve under the surface from his lot line to the center line of the street, or any part of it, and use his fee properly as he pleases (Elliott, Roads and Streets (2d ed.) para. 690, and cases cited), so long as his use does not impede or interfere with the superior right of the public to use the ground for purposes con-

templated by the easement grant. Such fee owner, however, must know that the estate he holds within the limits of the street is servient, and his property right therein qualified, and that any expenditure of labor or money in improvements will neither oust nor impair the right of the municipality to take possession, for a proper purpose, at any time the public interest require; and in yielding possession under such circumstances to the superior right of the public, he parts with nothing he owns, and the losing in itself is no special injury, nor a taking of property without compensation."

The Court then goes on to state that the lot owner's right is no greater in a street in which he has the fee than in a street in which the fee is owned by the municipality, and says:

"In every case, to recognize such a right, except subject to municipal regulation, would be inconsistent with the public rights, which are paramount in the whole street to the extent of all legitimate street uses and servitudes required or which may be required, for the *public benefit and conveniences.* The lot owner's rights are subject to the paramount rights of the public; and the rights of the public are not limited to a mere right of way, but extend, as we have shown, to all beneficial legitimate street uses, *as the public good or convenience may from time to time require.*" (Italics ours.)

These same principles have been recognized and adopted by the Courts of our own State. In *Hoboken Land & Improvement Co.* v. *Hoboken,* 36 N. J. L. 540, at page 581, Mr. Justice Depue in pronouncing the judgment of this Court said:

"With respect to the lands over which streets have been laid, the ownership for all substantial purposes is in the public. Nothing remains in the original proprietor but the naked fee, which on the assertion

> of the public right is divested of all beneficial interest."

This rule was approved and followed in *Halsey* v. *Rapid Transit Street Railway Co.*, 47 N. J. Eq. 380, where the Court said:

> "But his (the abutting owner) right is subordinate to that of the public, and so insignificant, when contrasted with that of the public, that it has been declared to be practically without the least beneficial interest."

It is unnecessary to refer further to the numerous cases in our own State approving this rule. It has always been, and still is, the law of this State.

It is true that the abutting owner can use the land underneath the surface for areaways, chutes and other purposes, but always in subordination to the public right, and if and when the public needs that portion of the subsoil which is being used by him, for legitimate purposes, the adjacent owner can be compelled to remove his instrumentalities at his own expense in order that the public may avail itself of its paramount right of use.

This ever-widening application of the right of the public has found its way into our statutory system, and has been made part of the Home Rule Act of 1917 (P. L. 1917, p. 319) which gives the municipality the power to compel the owner of the abutting premises to remove anything from the highway, at his own expense, which interferes with the proper use of the highway. The language used in that Act (p. 404) is as follows:

> "To prevent or regulate the erection or construction of any stoop, step, platform, window, cellar door, area, descent into a cellar or basement, bridge, sign or any post

> or erection, or any projection or otherwise, in, over or upon any street or avenue, and for the removal of the same, *at the expense of the owner or occupant of the premises, where already erected.*''

The Legislature by this Act recognizes and asserts the paramount right of the public to use the street for the best advantage and convenience of the public regardless of any inconvenience of expense thereby caused to the abutting property owner.

It having once been determined that the use by the appellee in this case forms part of the public use or easement in the street, the rights of the appellant are immediately subordinated thereto, and he is entitled to no compensation, as the occupancy by the appellee does not constitute a taking of its private property.

As was stated in the case of *Sears* v. *Crocker*, 69 Northeastern Rep. 327 (Mass. 1904), in deciding that a subway was a proper use of the street:

> ''The mere fact that it deprives abutters of the use of vaults or other similar underground structures in the streets, which they have heretofore maintained, is of little consequence. Abutters are bound to withdraw from occupation of streets above or below the surface whenever the public needs the occupied space.''

POINT III.

The use by the appellee of the subsurface of the street for its telephone conduit line is embraced within the public servitude in the street, to which appellant's title is subservient.

We now come to a consideration of the crux of this case, for if the appellee's use forms a part of the public servitude in the street, then

the appellant's title is subject to such use and there was no taking of its private property for public use without compensation. For a proper determination of this question, it becomes necessary to consider the reasoning of analogous cases in this State and in other jurisdictions, and to apply that reasoning to the facts existing here. As these cases are examined, it is interesting to note how the law keeps pace with the changing conditions due to the development of science and invention. This appears, with reference to the methods of transportation, from the decisions in this State growing out of the change, first to street cars drawn by horses, and later to street cars propelled by electricity, exemplified by the cases hereinafter referred to. As stated by the learned Court below, it is the duty of the Courts to so modernize their rules as to meet changing conditions where the doing so will not run counter to constitutional or statutory prohibition.

Taking up first the cases in this State which may be helpful in determining the question here involved, one of the earlier cases was that of *Morris & Essex Railroad Co.* v. *City of Newark,* 10 N. J. Eq. 352, which involved the right of the railroad company to maintain its railroad along certain streets in the City of Newark. Chancellor Williamson decided that case in favor of the City, but solely upon the ground that the railroad had not obtained the necessary consent of the municipality as required by the statute. His opinion, however, is pertinent here. He says:

> "The legislature had the power to authorize the company to occupy the public highways, either longitudinally or otherwise, either with or without compensation. The use of the public highways belongs to the public, although technically the fee to the land remains in the original owner and his

assigns. They have not been dedicated to any particular mode of travel or use. They are intended, and are devoted to public convenience, and to the profit and pleasure of the public as thoroughfares. As the means of facilitating the intercourse, in matters of business or pleasure, between one city or town and another, or between one man's dwelling house and farm and another's; it is perfectly consistent with the purposes for which they were originally designated and intended, that the public authorities, who have the control of them as public highways, should adapt them, in their use, *to the conveniences and improvements of the age.* (Italics ours.)

For the legislature to authorize the use of a public highway for the purpose of a railroad, in such a manner as not entirely to destroy its use in the ordinary mode, is not inconsistent with the purposes for which the public highway was originally intended. It may render the ordinary mode of travel less convenient, or perhaps dangerous; and yet the benefit to the public, by the use of it as a highway upon an iron superstructure, may very greatly outweigh and overbalance such danger and inconvenience. The legislature must be the judges as to the benefit to the public, and to their authority individuals and the public must submit. If these views are correct, it follows that where a public highway is used by a railroad company in common with the public under the sanction of legislative authority, it may enjoy such use without making compensation to the owners in fee of the adjacent lands, and that the legislature may authorize such use without providing compensation, even under the existing constitution of the state, which provides that individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners. The authority to use a public highway for the purpose of a railroad, retaining the use of

such highway for all ordinary purposes, subject only to the inconvenience of the railroad, is not such *taking* of private property from the owner of the fee of the adjacent lands as is contemplated by the provisions of the constitution. The *easement* of the highway is in the public, although the *fee* is technically in the adjacent owner. It is the easement only which is appropriated, and no right or title of the owner interfered with.

"If the legislature authorizes the company to *take* the highway, and appropriate it to its own use, by destroying the ordinary and legal right of the public to use it as a highway, then compensation must be provided; because when the rights of the public in it cease, then the *use* of it reverts to the person who holds the fee in the land. Then the legislature authorizes to be *taken* something which belongs to the land owner, to wit, the use of the land. But while it is preserved as a common public highway, the use of it does not belong to the owner of the fee any more than it does to any other individual of the community. The legislature, therefore, does not, by permitting the company to use the public highway in common with the public, take away from the land owner anything that belongs to him. It is not a misappropriation of the way. It is used, in addition to the ordinary mode, in an improved mode for the people to pass and repass."

This case was followed in the case of *Hinchman* v. *Paterson Horse Railroad Co.*, 17 N. J. Eq. 75 which involved the right of the defendant to construct a horse railroad through certain streets in the City of Paterson. In that case Chancellor Green held that if by the construction of a railroad the ordinary use of the highway becomes superseded by reason of embankments, tunnels, etc. so that the former highway is applied exclusively, or nearly so, to the use of the rail-

road, then the principle that private property cannot be taken for public use without just compensation applies; but that where the track is permitted by the municipal authorities to be laid upon the surface of the streets, such use is the exercise of the public right of travel and not a taking of private property for public use, within the provision of the constitution. He points out that the railroad company acquires no estate or interest in the land itself, but the mere right to the use of the highway or public easement.

The decision in the case of *State* v. *Laverack*, 34 N. J. L. 201, is enlightening because Chief Justice Beasley there defines the right of the public in a highway. In that case the City of Paterson attempted by ordinance to authorize a market to be held in a public street of the City without compensation to the adjoining property owners. After declaring that the right to hold a market in the street was inconsistent with its ordinary use as a highway, and that land taken for street purposes could not be used for other purposes without compensation to the owner of the fee, Chief Justice Beasley says:

> "The right of the public in a highway consists in the privilege of passage *and such privileges as are annexed as incidents by usage or custom, as the right to make sewers and drains, and lay gas and water pipes. These subordinate privileges are entirely consistent with the primary use of the highway, and are no detriment to the landowner.*" (Italics ours.)

In *Stoudinger* v. *Newark*, 28 N. J. Eq. 187, the city by ordinance authorized the construction of a sewer in Clay street. Complainant, an abutting property owner, sought to enjoin such use

of the street on the ground that it was not within the rights or powers conferred upon the public by the dedication. The court in denying the injunction quotes with approval the case of *Boston* v. *Richardson*, 13 Allen 146 where it was said:

> "Whenever land is taken for public use as a highway, and due compensation made, the public have a right to make any use of the lands, directly or incidentally, conducive to the enjoyment of the public easement, and such uses clearly include the making of culverts, drains and sewers under the highway, for the cleansing of the streets *and the accommodation of the inhabitants on either side.*" (Italics ours.)

And also quotes with approval the case of *Chapman* v. *Albany and Schenectady R. R.*, 10 Barb. 360 where it was said:

> "A street may be used in any way which shall best promote the interests and business of the city. What will so promote those interests and business is to be determined by the municipal authorities, to whom the control of the streets is committed. Sewers and drains may be constructed and water and gas pipes laid in them. The only restriction upon the power of the municipal authorities is that they cannot appropriate them to a purpose incompatible with the ends for which they were established."

The next case is the leading case of *Halsey* v. *Rapid Transit Street Railway Co.*, 47 N. J. Eq. 380 which is important because of Vice-Chancellor Van Fleet's clear exposition of the extent of the public's rights in a highway. In that case the complainant sought to restrain the defendant from erecting poles and wires in the street in front of complainant's property upon the ground that the erection of the poles imposed a

new and additional servitude on his land in the street. Vice-Chancellor Van Fleet says (p. 383):

> "The question on which the decision of the case must turn is this: Has the complainant's land in the street been appropriated to a purpose for which the public have no right to use it? It is of the first importance in discussing this question to keep constantly before the mind the fact that the *locus in quo* is a public highway, where the public right of free passage, common to all people, is the primary and superior right. The complainant has a right in the same land. He holds the fee subject to the public easement. But his right is subordinate to that of the public, and so insignificant, when contrasted with that of the public, that it has been declared to be practically without the least beneficial interest. Mr. Justice Depue, in pronouncing the judgment of the court of errors and appeals in Hoboken Land and Improvement Co. *v.* Hoboken, 7 Vr. 540, 581, said: 'With respect to lands over which streets have been laid, the ownership for all substantial purposes is in the public. Nothing remains in the original proprietor but the naked fee, which on the assertion of the public right is divested of all beneficial interest.' This view was subsequently enforced by the same court in Sullivan *v.* North Hudson R. R. Co., 22 Vr. 518, 543. Both the nature and extent of the public right are well defined. Lands taken for streets are taken for all time, and if taken upon compensation, compensation is made to the owner once for all. His compensation is awarded on the basis that he is to be deprived perpetually of his land. The lands are acquired for the purpose of providing a means of free passage, common to all the people, and consequently may be rightfully used in any way that will subserve that purpose. By the taking the public acquire a right of free passage over every part of the land, *not only by the means in use when the lands were taken, but by*

> *such other means as the improvements of the age, and new wants, arising out of an increase in population or an enlargement of business, may render necessary. It is perfectly consistent with the purposes for which streets are acquired that the public authorities should adapt them, in their use, to the improvements and conveniences of the age.* Morris and Essex R. R. Co. *v.* Newark, 2 Stock, 352, 357. This is the principle on which it has been held that a street railway, operated by animal power, does not impose a new servitude on the lands in the street, but is, on the contrary, a legitimate exercise of the right of public passage. Such use, though it may be a new and improved use, still is just such a use as comes precisely within the purposes for which the public acquire the land."

Mr. Justice Depue, in the case of *Roebling* v. *Trenton Passenger Railway Co., et al.,* 58 N. J. L. 666, speaking for the Court of Errors and Appeals, said (p. 670):

> "The title to the soil over which highways and streets are laid remains in the owner of the fee, subject only to the public easement. 'The right of the public in a highway,' said Chief Justice Beasley, in State *v.* Laverack, 5 Vroom 206, 'consists in the privileges of passage, and such privileges as are annexed as incidents by usage or custom, as the right to make sewers and drains and lay gas and water pipes; these subordinate privileges are entirely consistent with the primary use of the highway and are no detriment to the landowner.' This principle has been extended to the use of streets in populous districts, to appliances for distributing water, light, heat, power *and matters of general necessity or convenience.* Lew. Em. Dom. para. 126. In Stoudinger *v.* Newark, 1 Stew. Eq. 187; S. C., *Id.* 446, it was held against the landowner's objection, that the use of the street for sewers was a legitimate use, con-

> sistent with the purpose for which the land was appropriated. The uses of the streets for *such and similar local and public benefits, have, from an early period in municipal governments, been so usual and customary, as that they may be regarded as having been in contemplation when the streets were laid out or dedicated as servitudes upon lands within and abutting upon streets, to be put in force as occasions arise for their use which confer a benefit immediately upon the adjacent lands.*" (Italics ours.)

We now come to the case of *Nicoll* v. *New York and New Jersey Telephone Company*, 62 N. J. L. 733, upon which the appellant places great reliance because it was there held that the right of a telephone company to erect a telephone *pole* line within the limits of a public highway, upon land the fee of which is owned by private persons, imposes an additional servitude upon the fee, and can be acquired against the consent of such persons only through the power of eminent domain. It will be noted, however, that this deals with the placing of *poles* and not with an underground conduit. Justice Dixon in the opinion in that case says:

> "If the land were not subject to the easement of a public street, the matter would not be debatable; but it is equally clear that, whenever the property of the owner of the fee in a highway is subjected by law to an additional servitude, it is taken, within the meaning of the constitution. The contention, therefore, must be over the question whether the right thus to be acquired would be an additional servitude upon the fee, or is embraced within the public easement, and hence grantable by the public for public use without regard to the owner of the fee.
>
> The public easement, as interpreted in this state, is *primarily* a right of passage over the surface of the highway and of so using

> and occupying the land within it as to facilitate such passage. In this primary right are included the grading, paving, cleaning and lighting of the highway, the construction and maintenance of street railways with the apparatus proper for their use, and the maintenance of appliances conducive to the protection and convenience of travellers while using the way. *Secondarily, the easement covers uses which, though their relation to the right of passage is remote, or even fanciful, are so generally advantageous to the owners of the fee, the owners of abutting property, that, rather by common consent and custom, than by logical deduction from the primary design, they are now recognized as legitimate. Such are the construction and maintenance of sewers, water pipes and gas pipes for the convenience of persons occupying neighboring lands.*'' (Italics ours.)

After stating that a telephone line did not come within the primary right above mentioned he says:

> ''Nor does it rest on the same footing as those secondary uses to which allusion has been made. Telephone lines in a street do not afford to the occupants of neighboring property such general convenience; nor have they been permitted with such common and continued acquiescence as sanction the other uses mentioned.''

This opinion was written in 1898, thirty-three years ago, and at a time when telephonic service was not so universal and at a time when it had not become the absolute necessity that it is today. The telephone was invented in 1876 at Boston by Alexander Graham Bell. In 1878 the first telephone switchboard for commercial service was placed in operation in New Haven, Connecticut, with twenty-one subscribers. In 1895 the total number of telephones in use in the United States was 339,500 or .48 for every 100 population. In

1900 the total number in use was 1,355,900, or 1.76 per 100 population. In 1910 the total number was 7,635,400 or 8.19 per 100. In 1920, 13,329,400 or 12.43 per 100, and in 1928 it was 19,341,000 or 16.32 per 100.

We give these figures as to the origin and growth of the telephone industry in the United States to show that in 1898 it was in its infancy, and that since that time it has had a phenomenal and unanticipated growth, not foreseen by Mr. Justice Dixon when he delivered his opinion in the Nicoll case.

If Mr. Justice Dixon had had this question before him in the light of present-day conditions, we feel certain that he would have declared that telephone lines *do* "afford the occupants of neighboring property such general convenience," and that they *have* "been permitted with such common and continued acquiescence," as to bring them within the secondary uses to which he alluded. Such is the trend of modern decisions in other states, as appears from the cases hereinafter cited.

Indeed, not only do telephone lines come within the secondary uses referred to by Mr. Justice Dixon, but, in the light of present-day conditions, they may reasonably be considered as within the primary uses mentioned by him, for the reason that any such instrumentality which tends to facilitate traffic upon the highway comes within his definition of the primary uses of the highway. As was pointed out by the learned Court below, when the opinion in the Nicoll case was handed down, the congestion upon the city streets had not reached any such state as now exists. To alleviate this congestion upon the highways of the cities the use of the telephone is absolutely

essential. If it were discontinued, the congestion resulting would, no doubt, be prohibitive. Where in the old days communication to the houses or various buildings in the municipality was by letter or messenger, now this communication goes by wire, and the congestion upon the highway which would result from the old method is relieved by the telephone. Viewed in this light, the telephone line comes squarely within the primary use of the street, namely, the facilitation of passage, as well as within the secondary uses recognized as legitimate by common consent and custom.

The Court below very properly took this view and states very convincingly reasons why he does not feel bound by the decision in the Nicoll case.

The only case in this State which tends to throw any obscurity upon the question here involved is that of *Zemel* v. *Public Service Production Co., et al.,* 150 Atl. Rep. 344, Supreme Court 1930 (not officially reported) cited by appellant in its brief as being on all fours with the case at bar. That case, however, can be readily distinguished from the present case, if need be, as was pointed out by the Court below. In the Zemel case, it appeared that the defendants had constructed a vault approximately 6′ x 10′ and had installed therein three transformers and conduits in connection with the *business* of the Electric Company, in furnishing electrical energy either for light or power. This is quite a different situation from that existing in the present case. In the Zemel case the defendant was, in effect, establishing something in the nature of a manufactory by installing machinery for the generation or control and distribution *and sale* of a commodity, namely, electric current, for light *or power,* ap-

parently to private consumers. These facts indicate a use of the street beyond that embraced within the public easement; whereas in the present case, the stipulated facts are that the conduits in question do no more than carry the telephone wires needed to properly serve the public, and which are essential in order to furnish adequate service for municipal and governmental purposes.

With the general principle stated in the Zemel case, that private property cannot be taken without just compensation, we are in entire accord. That principle cannot be questioned. But the court in the Zemel case seems to assume that the acts of the defendants constituted a taking of private property, without making it clear in its opinion upon what that assumption was based, and the question as to whether the defendants' use was or was not embraced within the public easement is not discussed. The question involved, because of its importance, merits a more adequate discussion than was accorded to it in the opinion in the Zemel case, and the principles applicable should be stated with the same degree of care and thoroughness as has been given to the analogous questions in the cases heretofore referred to and also in the cases in other jurisdictions hereinafter referred to.

If, as is contended by appellant, the Zemel case stands as authority for the proposition that wires cannot be laid beneath the surface of a public highway for lighting or telephone purposes, without first obtaining the consent of an abutting owner or without first resorting to condemnation, then we respectfully urge that the decision runs counter to the reasoning of all of the prior decisions in this State touching upon the subject, and ought to be overruled. If, however, as appears to be the fact, the defendants

in the Zemel case were endeavoring to utilize the public highway for a business private in its nature, then that case is not pertinent here, for we are here dealing only with such use as is not only public in its nature, and (as was stated in *Roebling* v. *Trenton Passenger Railway Co. supra*), "of general necessity or convenience," but which also tends to facilitate passage over the highway, thus bringing it within that class of uses which are properly included within the public servitude in the street.

Turning now to the decisions of other jurisdictions, we find that in many of them the general principles recognized by the courts of our own State in the decisions hereinabove referred to are applied to specific facts similar to those in the case at bar.

The case of *Coburn* v. *New Telephone Co.* (Supreme Court Indiana 1901), 59 Northeastern 324 was a case identical as to the facts with the case at bar, and the reasoning of the Appellate Court is particularly pertinent to and enlightening upon the issue in this case. In that case, which was an appeal from the Circuit Court from a judgment for the defendant, the appellant was the owner of a tract of land abutting on two streets, each of which was 90 feet wide, and 25 feet on each side of one street had been set aside and improved as sidewalks. The appellant also owned, subject to the public easement thereon for street purposes, so much of each of said public streets as lay opposite and adjacent to the front side of his lot to the middle of said streets. At the time of the trial his lot had no improvements thereon, but appellant contemplated and intended to erect a large business block on it with cellars, basement and vaults extending under the sidewalk in front and at the side of his said lot. The

defendant telephone company, organized and doing business under the laws of that State, without leave or license from the appellant, and without having taken any steps to condemn or appropriate any portion of the ground covered by said street in front and alongside of appellant's lot, or to assess appellant's damages therefor, and without notice to appellant, dug a trench three feet wide and five feet deep in the sidewalk, and about three feet from the street line, along the entire portion of New York street, and installed pipes, cement and wires in the trench, which it was claimed would permanently destroy plaintiff's rights and impair the value of his property. The Court states (p. 325):

> "Under many decisions of this court, the fee owner of an abutting lot, whose grantor dedicated the public easement in connection with the platting of the lot, owns also the fee in the land to the center of the street, subject to the easement of the public to make such use of the street as was reasonably contemplated in the dedication, grant or condemnation. Railroad Co. *v.* Scott, 74 Ind. 29, and cases cited; Chicago & C. T. Ry. Co. *v.* Whiting, H. & E. C. St. Ry. Co., 139 Ind. 297, 301, 38 N. E. 604. The appellant must therefore show that the alleged occupation of the sidewalk with trench and pipes as a conduit for telephone wires is a new servitude not within the contemplated uses of the street, and therefore an additional burden upon his fee, for which he is entitled to recompense. The fact that the entry complained of is upon and under the sidewalk, rather than under the roadway, makes no difference, since a street is a street from property line to property line, not only the entire surface, but also so much of the depth as is or can be fairly used for the ordinary purposes of a street, each part equally with every other. * * * Neither can it be said, in the absence of a grant or a general

usage equivalent to a municipal license, that the fee owner has any greater or different property right in that part of the street used as a sidewalk for foot travelers than in that part used as a roadway for vehicles. He may, we think, excavate and improve under the surface from his lot line to the center line of the street, or any part of it, and use his fee properly as he please (Elliott, Roads & S. (2nd Ed.) para. 690, and cases cited), so long as his use does not impede or interfere with the superior right of the public to use the ground for purposes contemplated by the easement grant. Such fee owner, however, must know that the estate he holds within the limits of the street is servient, and his property rights therein qualified, and that any expenditure of labor or money in improvements will neither oust nor impair the right of the municipality to take possession, for a proper purpose, at any time the public interests require; and in yielding possession under such circumstances to the superior right of the public, he parts with nothing he owns, and the losing in itself is no special injury, nor a taking of property without compensation. * * * 'If the fee of the street is in the municipality in trust for the public uses, as it frequently is, it extends to the whole street, including the sidewalk, and the adjoining lot owner has, it seems clear, no absolute right, as against the public or the municipality charged with the control of the streets, to appropriate them to this use. And, in our judgment, the lot owner's right is not substantially greater, even if he has the fee in the street. In either case, to recognize such a right except subject to municipal regulation, would be inconsistent with the public rights, which are paramount in the whole street to the extent of all legitimate street uses and servitudes required, or which may be required, for the public benefit and conveniences. *The lot owner's rights are subject to the paramount rights of the public; and the rights of the public are not*

limited to a mere right of way, but extend, as we have shown, to all beneficial legitimate street uses, as the public good or convenience may from time to time require. (Italics ours.) The use of the streets for sewers, tunneling, public cisterns, gas pipes, water pipes, and other improvements might be seriously affected by the recognition of a right in the abutter to make at pleasure openings in, or even under, the sidewalk or street, except subject to reasonable municipal regulations.' In Julia Bldg. Assn. *v.* Bell Tel. Co., 88 Mo. at page 273, it is said: 'I think it may be safely affirmed that all the authorities to which we have been cited by counsel on both sides of this case agree that when the public acquires a street, either by condemnation, grant, or dedication, it may be applied to all uses consistent with, and not subversive of, the proper uses of a street, and not inconsistent with the uses contemplated in the dedication, grant, or condemnation, and that it is only when the street is subject to a new servitude inconsistent with and subversive of its use as a street, that the abutting owner can complain.'

"The question then arises, is the construction of a subsurface trench in a sidewalk, 3 feet wide and 5 feet deep, and 3 feet from the abutter's lot line, for the purpose of permanently maintaining such trench as a conduit for telephone cables and wires to be used by the city public in inter-communication by electricity, such a use of the street as is consistent with the contemplated purpose of the dedication? In principle, the question has been recently answered in the affirmative by this court in Magee *v.* Overshiner, 49 N. E. 951. The question in that case was whether the setting of telephone poles in the curb line of a street was a proper public use of the street, or a new and additional servitude upon the fee, for which the owner was entitled to compensation; and the nature and extent of the public easement in municipal highways, and the expansive and growing

character of the easement in keeping pace with scientific discovery and the increase of population is there thoroughly reviewed, and many of the later cases collected. The general doctrine of these cases is that in locating, marking, and dedicating streets in plats of land for urban residences, the purpose of the dedication, in the absence of controlling language, is conclusively presumed to be for the accommodation of public travel, traffic, and communication. Anything which reasonably facilitates these ends is, therefore, consistent with the dedication. In sparsely-settled towns and cities public necessity requires but little of the servient owner, beyond the right of unobstructed passage over the street, but, as cities become populous and the street crowded with traveling footmen and vehicles, public necessity increases with the multitude; and, whenever the necessity exists, any use of the street by reasonable structures and devices, above or below the surface, which will enable the citizens to communicate without actual travel upon the streets, and which does not materially obstruct the ingress and egress and light and air to abutting property, is within the contemplated purpose of the dedication, and not a new burden upon the fee. A reason for this doctrine is given in Julia Bldg. Ass'n *v.* Bell Tel. Co., 88 Mo. at page 268, in these words: 'These streets are required by the public to promote trade and facilitate communications in the daily transactions of business between the citizens of one part of the city and those of another, as well as to accommodate the public at large in these respects. If a citizen living or doing business on one end of Sixth street wishes to communicate with a citizen living and doing business on the other end, or at any intermediate point, he is entitled to use the street, either on foot, on horseback, or in a carriage or other vehicles, in bearing his message. The defendants in this case proposed to use the street by making the telephone poles

and wires the messenger to bear such communications instantaneously and with more dispatch than in any of the above methods, or any other known method of bearing oral communications. Not only would such communications be borne with more dispatch, but, to the extent of the number of communications daily transmitted by it, the street would be relieved of that number of footmen, horsemen, and carriages. If a thousand messages were daily transmitted by means of telephone poles, wires, and other appliances used in telephoning, the streets through these means would serve the same purpose, which would otherwise require its use either by a thousand footmen, horsemen, or carriages to effectuate the same purpose. In this view of it, the erection of telephone poles and wires for transmission of oral messages, so far from imposing a new and additional servitude, would, to the extent of each message transmitted, relieve the street of a servitude or use by a footman, horseman, or carriage.' A distinguished author says: 'When land is taken or dedicated for a town street, it is unquestionably appropriative for all ordinary purposes of a town street—not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants.' Cooley, Const. Lim. 5556. If the setting of poles, and the stringing thereon of a body of telephone wires overhead, in a street, which at best is some obstruction to travel and to the manipulation of apparatus for the extinguishment of fires, is a legitimate exercise of the public easement, there is a stronger reason for asserting that the laying of cables and wires under the surface for a like purpose, with municipal authority, is a proper use of the street, and for which, if skillfully performed, the fee owner has no ground of complaint.''

In *Hardman* v. *Cabot,* 7 L. R. A. N. S. 506 (W. Va.), the Court held that a pipe line, laid in a

public rural highway under proper authority, and used for supplying the public with natural gas for heating and illuminating purposes, though imposing an additional public service upon the road, is not a use in excess of the right of the public in such road, and does not impose an additional burden upon the estate in fee in the land. The Court said at pages 510 and 511:

> "That railroads, whether operated by steam or other motive power, and telegraph and telephone lines, do not impose additional servitudes, when located in highways, be they city streets or country road, is abundantly settled by the decisions of this court."
>
> "In Bishop *v.* North Adams Fire District, 167 Mass. 364, 45 N. E. 925, the court held that the public authorities might lay water pipes in a public highway without the payment of any compensation to an abutting landowner, although the highway, of which he owned the fee, was thereby subjected to an additional public use. This decision was based upon the doctrine announced in Atty. Gen. *v.* Metropolitan R. Co., 125 Mass. 515, 28 Am. Rep. 264, and Pierce *v.* Drew, 136 Mass. 75, 49 Am. Rep. 7."
>
> "That the surface, the use of which is granted for highway purposes, includes more than the visible part of the land, has been often declared by the courts, and is affirmed by constant experience. Excavations, fills, and the laying of deep foundations for bridges are necessary. Danforth, *J.*, said, in Story *v.* New York Elev. R. Co., 90 N. Y. 122, 161, 43 Am. Rep. 136: 'The public purpose of a street requires of the soil the surface only. Very ancient usage permits the introduction under it of sewers and water pipes, and upon it posts for lamps.' In Coverdale *v.* Charlton, L. R. 4 Q. B. Div. 104, Lord Justice Bramwell said: 'Street' comprehends what we may call the surface; that is to say, not a surface bit of no reasonable thickness, but a surface of such thickness as

> the local board may require for the purpose of doing to the street that which is necessary for it, as a street, and also of doing those things which commonly are done in or under the streets.' What has just been said, it must be observed, assumes that the grantee of this permission will use the pipe line in the service of the public. Upon the evidence adduced, the circuit court has necessarily found that such is the intention, and the evidence seems to amply justify the finding. The defendant testifies that he has 30 miles or more of gas mains, of which this pipe will form a part, used in distributing natural gas, and that he is supplying a number of private customers. It seems not to be contested that he is supplying the people of the town of Brooksville and vicinity; and he says if he is unable to lay the large line in controversy he will be obliged to obtain gas from some other place other than his Leaf Bank field, in order to give his customers down the river an adequate supply; and further, that some of his customers in that section are complaining of the lack of an adequate supply."

One of the earlier cases was that of *Pierce* v. *Drew,* 136 Mass. 75, which was a bill in equity against the selectmen of Brookline and the American Rapid Telegraph Company of Massachusetts to restrain the selectmen from granting to the telegraph company a location for its posts and wires in Brookline. Mr. Justice Devens, speaking for the court says (p. 80):

> "When land has been taken or granted for highways, it is so taken or granted for the passing and repassing of travellers thereon, whether on foot or horseback, or with carriages and teams for the transportation and conveyance of passengers and property, and for the transmission of intelligence between the points connected thereby. As every such grant has for its object the procurement of an easement for

the public, the incidental powers granted must be so construed as most effectually to secure to the public the full enjoyment of such easement. Commonwealth *v.* Temple, 14 Gray, 69, 77.

"It has never been doubted that, by authority of the legislature, highways might be used for gas or water pipes, intended for the convenience of the citizens, although the gas or water was conducted thereunder by companies formed for the purpose; or for sewers, whose object was not merely the incidental one of cleansing the streets, but also the drainage of private estates, the rights of which to enter therein were subject to public regulations. Commonwealth *v.* Lowell Gas Light Co., 12 Allen, 75. Attorney General *v.* Metropolitan Railroad, 125 Mass. 515, 517; Boston *v.* Richardson, *ubi supra.*

"Nor can we perceive that these are to be treated as incidental uses, as suggested by the plaintiff, because the pipes are conducted under the surface of the travelled way, rather than above it. *The rights of the owner of the fee must be the same in either case, and the use of the land under the way for gas pipes or sewers would effectually prevent his own use of it for cellarage or similar purposes.*" (Italics ours.)

"When the land was taken for a highway, that which was taken was not merely the privilege of travelling over it in the then known vehicles, or of using it in the then known methods, for either the conveyance of property or transmission of intelligence. Although the horse railroad was deemed a new invention, it was held that a portion of the road might be set aside for it, and the rights of other travellers, to some extent, limited by those privileges necessary for its use. * * * The discovery of the telegraph developed a new and valuable mode of communicating intelligence. *Its use is certainly similar to, if not*

identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy of the mail-coach.'' (Italics ours.)

The Court held that the use of a portion of the highway for the public use of companies organized under the laws of the State for the transmission of intelligence by electricity and subject to the supervision of the local municipal authorities which has been permitted by the Legislature is a public use similar to that for which the highway was originally taken or to which it was originally devoted, and that the owner of the fee is entitled to no further compensation.

In *Sears* v. *Crocker, et al.,* 69 Northeastern Rep. 327 (Supreme Judical Court of Massachusetts 1904), which were bills in equity to prevent the defendants, as members of the Boston Transit Commission, from constructing a subway and tunnel through public streets in front of the premises of the plaintiffs they contending that the construction of the tunnel without a formal taking of the land in the streets is unauthorized and illegal, because it imposes an additional servitude upon lands previously taken for streets, and in that way would deprive the plaintiffs of property as owners of the fee in parts of these streets, and because the Statute of 1894, p. 771, c. 548 para. 31, provided for the taking of property ''held under or by title derived under eminent domain or otherwise.'' Mr. Chief Justice Knowlton, speaking for the court said, after citing numerous cases including *New England Telegraph and Telephone Company* v. *Boston Terminal Company,* 182 Mass. 397, 65 N. E. 835; and *Eustis* v. *Milton*

Street Railway Company, 183 Mass. 586, 67 N. E. 663:

> "In the last two cases the doctrine was stated broadly, in accordance with previous decisions, that this public easement includes 'every kind of travel and communication for the movement or transportation of persons or property, which is reasonable and proper in the use of a public street.' In the early settlement of the country and in the location of streets in later times these ways were appropriated to the use of the public for the movement of persons and property from place to place, just as the adjacent lands were appropriated to the use of private owners. The original proprietors of lands in Boston and the original proprietors of lands in New York did not foresee the growth of population and business which has induced landowners to erect buildings 15 or 20 stories high, and to excavate under them basements and cellars and subcellars to be ventilated by the use of engines, to be lighted by electricity, and filled with merchandise. They did not think that the surface of the streets would be insufficient for the use of the people with convenience and comfort in moving to and fro and passing in and out in the transaction of business or the pursuit of pleasure. It is now a fact of common knowledge that the streets of those parts of Boston which are most crowded are entirely inadequate to accommodate the public travel in a reasonably satisfactory way if the surface alone is used. Our system, which leaves to the landowner the use of a street above or below or on the surface, so far as he can use it without interference with the rights of the public, is just and right, but the public rights in these lands are plainly paramount, as they include, as they ought to include, the power to appropriate the streets above or below the surface as well as upon it in any way that is not unreasonable, in reference either to the acts of all who have occasion

to travel or to the effect upon the property of abutters. The increase of requirements for the public within the streets of our large cities has probably equaled, if it has not surpassed, the increase of requirements for business along the streets.

"The legislature, the guardian of public interest and of private rights, has determined that the space below the surface of certain streets in Boston is needed for travel. The question is whether action under the statutes involves an acquisition of a new right as against the landowner, or only an appropriation and regulation of existing rights. It hardly can be contended that this is an unreasonable mode of using the streets in reference either to travelers or abutters. It is not an unreasonable mode of using them. *The mere fact that it deprives abutters of the use of vaults and other similar underground structures in the streets, which they have heretofore maintained, is of little consequence. Abutters are bound to withdraw from occupation of streets above or below the surface whenever the public needs the occupied space for travel.* The necessary requirements of the public for travel were all paid for when the land was taken, whatever they may be, and whether the particulars of them were foreseen or not. The only limitation upon them is that they shall be of a kind which is not unreasonable. In the present case the travel which is being provided for is from place to place within the city. There are stopping places on the subway at convenient points. In that respect it is different from a tunnel designed only or chiefly for travel for long distances. The new method is a substitution in part of a subterranean use of the streets for a use of their surface for the same general purpose. It is impractical to have direct communication between the premises of abutters and the cars in the tunnel, but by going a short distance, access to them may be had from any place. We are of opinion that this use of the streets

is within the purposes for which the lands were taken, and that no additional servitude is created by it." (Italics ours.)

One of the most comprehensive definitions of "public purpose" for which streets may be used without payment as for additional servitudes is furnished in the case of *Fox* v. *City of Hinton, et al.,* 99 Southeastern Rep. 478. (Supreme Court Appeals of West Virginia 1919). Mr. Justice Ritz, speaking for that court, says (p. 479):

> "It may be said that in this state, upon the acquisition of a public street, the fee of the land remains in the landowners, and the public acquires an easement in the street for travel. What does this easement include? It embraces every kind of travel and communication for the movement or transportation of persons or property which is reasonable, and further it includes the use of all kinds of vehicles which can be introduced with reasonable regard for the safety and convenience of the public, as well as every reasonable means of transportation, transmission, and movement beneath the surface of the ground, as well as upon or above it. And when the easement is acquired by the city it carries with it the right to use the street for street cars, for wires of telephone, telegraph, and electric lighting companies, and for water pipes, gas pipes, sewers and such other similar arrangements for communication or transportation as future invention may make desirable. * * * And in 3 Dillon on Municipal Corporations, para. 1211, it is said that while the decisions of the courts are not uniform as to the extent of this easement, some of them making it include much more than others, there is practical unanimity that the easement in such a street in urban communities includes the use thereof for water mains and pipes, sewers, gas mains and electric light poles and wires."

In *Mordhurst* v. *Ft. Wayne & S. W. Traction Co.,* (Ind.) 71 Northeastern Rep. 646, the Court says:

> "The dedication of a street must be presumed to have been made, not for such purposes and usages only as were known to the landowner and platter at the time of such dedication, but for all public purposes, present and prospective, consistent with its character as a public highway, and not actually detrimental to the abutting real estate. * * * The convenience and advantage of all the inhabitants of the city and of the public at large must be regarded as the objects contemplated when the street was laid out or opened. A narrower construction would require a sacrifice of the greater interests of the community and the public to the inferior and subordinate claims of the local lot owner and abutter. Such a construction of the law governing the dedication of public streets and the reserved rights of the original land owner and his assigns in the street by unreasonably increasing the cost of rights of way or use would obstruct all progress, and deprive the local community of the benefit to be derived from the advancements of science, invention, and discovery."

In the case of *Frazier* v. *East Tennessee Telephone Co.,* (Tenn.) 90 Southwestern Rep. 621, the question whether telephone poles and wires erected in the streets constituted an additional burden upon the fee of abutting owners for which they would be entitled to compensation, was presented for the first time in 1906. The Court after reviewing the authorities, presented on behalf of both of the parties to the suit, decided that the poles and wires do not constitute an additional burden upon the fee of abutting owners for which they are entitled to compensation. The Court states (p. 621):

> "—it is held generally in the courts of the country that electric light poles and wires,

gas pipes, and lamp posts for highway purposes, sewer pipes, and water pipes, do not."

The Court sets forth in detail the theories and arguments propounded by the parties to the litigation, and in adopting the rule that the erection of the poles and wires do not constitute an additional burden for which the abutting owners can claim compensation, says:

"When land has been dedicated or condemned for street purposes, the city has the right not only to use the surface of the ground, but also may go beneath the surface, or above it, so far as may be necessary to adapt to its proper use the land so devoted to the service of the public. We approve the authorities which hold that the chief purpose of a street is that of intercommunication between the inhabitants or denizens of a city or town, and that the telephone is but a new and improved method of effecting this purpose, and hence not a new burden upon the fee of the abutting owner. If this instrument of a larger and more generous civilization were destroyed, not only would social intercourse be very greatly restricted, but the progress of all business would be retarded and its development confined within much narrower limits than now. Friends desiring to converse with each other, whether in near or remote parts of the city would find it necessary to leave their own houses, and proceed along one or more streets to the home of the person with whom they desired to talk, and thus consume an hour or hours in doing what may now be accomplished within a few minutes. So, of the housewife in sending orders, or directing orders, to merchants for the purchase of goods necessary for the daily conduct of the home; and so in a larger way of the countless affairs of busines, by men of business, in the daily life of the world. Houses are built upon streets, and people live in them, and work in them and the telephone must

> go along the street, and must enter these houses from the street in order to be of any use at all. It must follow the street with more regularity than even sewer pipes or water pipes, and like these, must go into houses from the street in order to serve the purpose for which it was designed. It is thus distinctly an apparatus for the street, and from the street enters the houses and places of business of the denizens of a city, and as truly unites its people as do the streets themselves; and, indeed, in a more real, or at least a more intimate way, since it renders possible an almost instant mental contact, so to speak, between all the people who make the aggregate of the city's population, its wires being, as it were, the city's nerves."

If we compare the reasoning of the foregoing cases in other jurisdictions with the reasoning of Mr. Justice Dixon in the case of *Nicoll* v. *New York and New Jersey Telephone Company, supra,* we find that they are in entire accord, as the principles enunciated are the same, namely, that the public easement in a street is broad enough to include any use which the governing body may consider advantageous or beneficial to the public and will add to its comfort and convenience.

Appellant, in its brief, overlooks the reason for the decision in the Nicoll case and erroneously concludes that what it is pleased to term in its brief "the New Jersey view" as expressed in that case, precludes the use contemplated by the appellee in this case, without the consent of the abutting owner. As a matter of fact, until the decision of the Court below in the case at bar, this question had not been definitely passed upon by the courts of this State, so that it cannot truthfully be said that there is any "New Jersey view." Unless, however, the reasoning of the

decisions hereinabove referred to touching upon this question is to be ignored, an entirely different conclusion will be reached by this Court than that stated by appellant in its brief. The decision in the Nicoll case that telephone lines as such (disregarding for the moment the fact that the Court was referring to a *pole* line) constituted an additional servitude, must be viewed in the light of the then existing conditions. Since the decision in that case, vast strides have been made in the science of telephony, and speedy and satisfactory telephonic communication has become vitally essential to the conduct of human affairs, public and private. To facilitate the installation of telephonic systems and to encourage their universal use is to add to the advantage, comfort and convenience of the public which furnishes sufficient reason for holding that the use of the streets for conduit lines should be considered as coming within the public easement. Such has been the theory upon which the cases in other jurisdictions hereinabove referred to have been decided and such theory is in entire accord with the Nicoll case. In the light of present-day conditions it cannot be denied that telephone lines now come squarely within the secondary uses referred to by Mr. Justice Dixon in his opinion in that case, as being "so generally advantageous to the owners of the fee, the owners of abutting property, that, rather by common consent and custom, than by logical deduction from the primary design, they are now recognized as legitimate." Any slight inconvenience which may be caused to abutting property owners as a result of the recognition of such a rule must be disregarded, as the benefit and convenience of the public at large must be given first consideration.

It must also be borne in mind that the Court in the Nicoll case was dealing with a *pole* line. The

erection of telephone poles in a street is still considered by the Legislature as imposing an additional servitude, because it has expressly required in such case the consent of the abutting owner. The laying of wires beneath the surface of the street, however, presents an entirely different situation, closely akin to the laying of water and gas pipes and sewers, none of which can be said to facilitate passage over the highway and yet all of which are considered as included within the public servitude.

As was said by Chancellor Runyon in the case of *Roake* v. *American T. & T. Co.*, 41 N. J. Eq. 35, at page 37, referring to the stringing of overhead wires:

> "The legislature of this state appears to have considered that the use of the street, so far as the wires are concerned, was not a violation of the rights of the owner of the soil in the street; for, while it recognizes such rights as to the erection of poles, it does not do so as to the wires."

And Vice-Chancellor Green in *Paterson* v. *Grundy, supra,* quotes Chancellor Runyon as above and then adds:

> "In my opinion, the act of the complainant in stringing its wires in front of the defendant's lots, if authorized by statute, was not such an invasion of defendant's rights of adjacency as to entitle him to compensation, and, consequently he was not justified in removing it by reason of the fact that he was such abutting owner."

The cases of *Taylor* v. *Public Service Corporation*, 75 N. J. Eq. 371; *Andreas* v. *Gas & Electric Co.*, 61 N. J. Eq. 69; and *French* v. *Robb*, 67 N. J. L. 260 cited in appellant's brief and relied upon as supporting its contention, were cases involving electric lighting poles and wires (not conduits) and they held that so long as such poles

and wires were not more than sufficient to provide lighting for highways and other public purposes they came within the public easement; but that beyond that, when they came to be used for private lighting, they did not. Telephone lines differ from electric lighting lines in that their value for public use depends upon the number of installations of telephones—the greater the number of telephone connections, the greater the value for public purposes. Each telephone connection increases to that extent the facilities for handling the public affairs, and aids in the protection of life and property in case of accident, sickness or fire. In the case at bar, it appears from the affidavits filed by the appellee, that a portion of this conduit line will be used for the new teletype system about to be installed to assist in the apprehension of criminals. Can there be any doubt about the public character of this use? It is the belief of authorities that this system will be of incalculable benefit in the endeavor to quickly apprehend and punish perpetrators of crimes, and to prevent their escape, and is expected to effect an appreciable reduction in criminal attempts.

While it may be said that the telephone lines will be used for private purposes, yet it can not be denied that every wire to be placed within this conduit will be available for use in a manner and on occasions when such use will be solely public in character; so that no portion of the system can be segregated from the other as being capable of use for private purposes only.

The cases hereinabove referred to clearly indicate that the use of a highway is not to be measured by the means contemplated by our ancestors, nor the conditions which existed when highways were first devised. The design of a

highway is broad and elastic—even to including the newest and best of facilities of travel and communication which the genius of man can invent and supply. If there is any one fact established in the history of society and the law itself, it is that the mode of exercising its easement is expansive, developing and growing as civilization advances. In the most primitive state of society, the conception of a highway was merely a footpath; in a slightly more advanced state, it included the idea of a way for pack animals; and the next, a way for vehicles drawn by animals. Thus the methods of using public highways expanded with the growth of civilization until today our urban highways are developed to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence, it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterward be discovered and developed in aid of the general purpose for which highways are designated; and it is not material that these new and improved methods of use were not contemplated by the owner of the land when the easement was acquired, and are more onerous to him than those then in use.

POINT IV.

There is no distinction between the respective rights of the appellant and appellee in that part of the street used for vehicular traffic and that part lying beneath the sidewalk.

Appellant's contention that it has some peculiar and special rights in the sidewalk or the land thereunder which are paramount to the public easement therein, is entirely without the support of any of the decided cases. In the cases cited by appellant in its brief, the distinction, if any, between street and sidewalk, was drawn in pursuance to the effort to *impose* upon the abutting owner a burden, not to establish in him a *private* property right in the street.

Vice-Chancellor Foster in *Morris* v. *Eisner,* 96 N. J. Eq. 538, stated the rule tersely:

> "It is well settled that the owner of the premises in question has no special rights in the use of the street and sidewalk in front of the property that are paramount to the rights of the public. Clausen *v. De*-Medina, 82 N. J. L. 491; Kennelly *v.* Jersey City, 57 N. J. L. 293."

In ordinary acceptation the term "street" includes sidewalks. Control of the streets conferred upon the city by charter extends to the sidewalk as well as the roadbed, although the abutting owner may own the fee of the street. Dillon Munc. Corp., Section 1147, footnote.

Dillon in his work on Municipal Corporations (3rd ed.) Section 1178 says:

> "In many cities lot proprietors upon streets are permitted or not forbidden to make openings in the sidewalks in order to obtain an entrance into the basement or cellar. It is also the usage that owners of buildings may make openings *under* the

sidewalk or street to obtain additional cellar room. If the fee of the street is in the municipality in trust for the public uses, as it frequently is, it extends to the whole street, including the sidewalk; and the adjoining lot-owner has, it seems clear, no absolute right as against the public or the municipality charged with the control of the streets, to appropriate them to this use. And in our judgment the lot-owner's right is not substantially greater even if he has the fee in the street. In either case, to recognize such a right, except subject to municipal regulation, would be inconsistent with the public rights, which are paramount in the whole street to the extent of all legitimate streets uses and servitudes required, or which may be required, for the public benefit and convenience. The lot-owner's rights are subject to the paramount rights of the public; and the rights of the public are not limited to a mere right of way, but extend, as we have shown, to all beneficial legitimate street uses, as the public good or convenience may from time to time require. The use of the streets for sewers, tunnelling, public cisterns, gas pipes, water pipes and other improvements might be seriously affected by the recognition of a right in the abutter to make at pleasure openings, in, or even under, the sidewalk or street, except subject to reasonable municipal regulation. It is clear that all rights of this character are subject to legislative and municipal regulation."

And he further says (Section 1180):

"Whenever the existence of the vault or opening interferes with the public use of the street, the right to maintain it terminates; the rights of individuals under such permits must be regarded as subordinate to the necessities or requirements of the public. The permit may be revoked when the space is required for municipal or other public purposes."

A sidewalk is a part of the street, and water pipes and mains may be laid thereunder without creating any liability in favor of the abutter and owner of the fee other than such as flows from negligence. *Provost* v. *New Chester Company,* 162 Pa. 275.

The law is thoroughly settled in *Opdycke* v. *Public Service Railway Co.,* 78 N. J. L. 576, that when a highway is laid out of a certain width the entire width becomes subject to the public easement of passage; if a less width is graded and worked for travel, or if a bridge or culvert does not extend to the entire width, the public rights of passage are not thereby limited in favor of one who placed an unauthorized or improper structure within the highway limits. Chancellor Pitney cites with great fullness the authorities for showing that "the right of the public to use a highway extends to the whole breadth thereof and not merely to the part which is worked or actually traveled."

In the case of *Central Life Assur. Soc., of the United States* v. *City of Des Moines,* 171 Northwestern Rep. 31, at p. 32, the Court says:

> "A sidewalk is a part of the street, exclusively reserved for pedestrians, and constructed somewhat differently than other portions of the street made use of by animals and vehicles, generally. It is paved differently, that the public may be better served by maintaining the two portions of the way separately. Whatever may be the difference, it constitutes a part of the street. Warren *v.* Henly, 31 Iowa, 31."

As tersely stated in *Wabash R. Co.* v. *DeHart,* 32 Ind. App. 62, 65 N. E. 192:

> "The word 'sidewalk' has a well-understood meaning. We understand *ex vi termini* that a part of the street is meant. It

> is the public way, generally somewhat raised, especially intended for pedestrians, and adapted to their use, usually constructed in this country as a part of the street at or along the side of the part thereof especially designed and constructed for the passage of vehicles and animals; there being often, if not generally, a gutter, also constituting a portion of the street, between such parts; and when the sidewalk is spoken of as being on a specific side of a designated street, it is to be understood to be a part so reserved of that street at or along the specific side of the roadway. 1 Elliott on Roads and Streets, par. 23."

And in *Coburn* v. *New Telephone Company, supra,* the Court says:

> "The fact that the entry complained of is upon and under the sidewalk, rather than under the roadway, makes no difference, since a street is a street from property line to property line, not only the entire surface, but also so much of the depth as is or could be fairly used for the ordinary purposes of a street, each part equally with every other."

While it has been held in this State that the abutting owner may be assessed for sidewalk improvements, this does not establish in him a private property right in the street. As was said in *Weller* v. *McCormick,* 47 N. J. L. 397:

> "A distinction, however, has been drawn between the road in general and the sidewalk. Probably in consideration of the peculiar privilege usually accorded to the owner of land to use the adjacent sidewalk for stoops, areas, chutes, and other domestic and trade conveniences, he has been held chargeable with the whole expense of maintaining this portion of the road. Paxson *v.* Sweet, 1 Green 196; State, Agens, pros., *v.* Newark, 8 Vroom 415; Kirkpatrick *v.* Commissioners, 13 Vroom 510; Robins *v.* New Brunswick, 15 Vroom 116. Still even this liability has not

> been extended beyond the limits fixed by express legislation. No case has intimated that if the owner or occupant of the abutting premises had not in any way interfered with the side of the road, and had had no duty enjoined upon him in regard to it by statute or lawful municipal regulation, he was under an obligation to render it fit or safe for passage. Since the private duty is enforced mainly for public benefit, and seems to form an exception to the rule that public advantage should be secured at public cost, it ought not to be enlarged beyond the bounds already indicated."

And in the same case, when it was again before the Supreme Court (52 N. J. L. 470, at p. 472):

> "The public right is paramount, and includes the right to have the street safe for travel. That of the abutting owner is subordinate to this public right. He may use the highway in front of his premises, when not restricted by positive enactment, for loading and unloading goods, for vaults and chutes, for awnings, for shade trees, etc., but only on condition that he does not unreasonably interfere with the safety of the highway for public travel. Any such interference, arising from a want of due care on his part, is unreasonable, and therefore to occasion such interference, by negligence in the exercise of his subordinate private rights, is a breach of public duty."

Vice-Chancellor Van Fleet, in *Halsey* v. *Rapid Transit Rlwy. Co., supra,* expressly refrained from declaring that the owner had any rights in the sidewalk that were in any way paramount to the public easement or which could prevent the laying thereunder of sewers, water pipes, gas pipes, conduits, etc. His discussion of the matter in that case was purely *obiter,* and was stated by him so to be.

From an examination of these authorities, it will be seen that the appellee's rights are no greater in the subsoil beneath the sidewalk than they are beneath the surface of the vehicular-travelled portion of the street. Had the appellant damaged the surface of the sidewalk and had it failed to restore the same to its original condition, another question would be involved; but there is no claim of that kind made in this suit.

In the face of the authority of the foregoing cases no distinction can be drawn between the sidewalk and the street proper, because there can be no doubt whatever that under the law there is no such distinction insofar as the respective rights of the abutting property owner and the public are concerned. The rights of the owner in the land beneath the sidewalk are just as subordinate and subservient to the paramount rights of the public as they are in land beneath the vehicular-travelled portion of the highway; and if the appellant had the right to lay its conduits beneath the street proper, then it had the same right to lay them beneath the sidewalk.

As was stated by the Court below, it must be conceded that the owner of the fee has rights in the subsurface under the sidewalk such as for the maintenance of a vault, and he also has rights on the surface and over it such as for hitching posts, awnings and the like. But all these rights must be exercised subject to the right to use the land for highway purposes.

CONCLUSION.

From an examination of the foregoing cases, it is apparent that what the courts have attempted to protect for the abutting owner is his right of *adjacency,* the right of light and air, and access to and from his premises. It has been recognized by all of the courts that the construction and maintenance of sewers and water and gas pipes for the convenience of persons occupying neighboring lands is within the public easement. If the courts recognize the right to install gas and water pipes under the surface of the highway, the commodity being carried therein being beneficial not only to the public, but also to the abutting owners and the owners of neighboring lands, we can see no distinction between the laying and maintaining of gas and water pipes and the burying underground of wires for telephonic communication. It is argued by appellant that the laying of the telephone conduits constitutes a permanent appropriation of that portion of the street. So also does the laying of gas and water pipes. All, however, are subject to removal upon demand of the public authorities, if and when public necessity requires. By laying the pipes or conduits, the utilities acquire only the right to the *use* of the highway and do not acquire any *title* to the fee.

We also call the Court's attention to the regulations adopted by cities and towns throughout the country, requiring the removal of overhead wires and the placing of the same underground. Travel on the highway, by reason of the elimination of poles and overhead construction, is made safer; fire hazards, with the elimination of poles and wires, are reduced; and the appearance of the streets is likewise improved by the adoption of the more improved method of construction of

burying the wires underground, using conduits for that purpose; and so the highway, due to the adoption of modern appliances, bears a burden, the extent of which was possibly never thought of by our forefathers, but which our courts, as public necessity increases, have recognized as being within the public easement.

We submit that the telephone conduit line laid by the appellee in this case comes within the primary purposes of a highway as defined in *Nicoll* v. *New York and New Jersey Telephone Company, supra,* inasmuch as its use will in a large measure facilitate passage over the highway by relieving the congestion of traffic which would inevitably follow upon a discontinuance of this means of communication. If there be any doubt on this score, however, the use in question certainly comes squarely within the secondary uses defined by Mr. Justice Dixon in the Nicoll case, because the use, beyond doubt, is one of those "uses which, though their relation to the right of passage is remote, or even fanciful, are so generally advantageous to the owners of the fee, the owners of abutting property, that, rather by common consent and custom, than by logical deduction from the primary design, they are now recognized as legitimate."

On the grounds above stated, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

SMITH & SLINGERLAND,
Attorneys for and of Counsel with
Defendant-Appellee.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

LAUREL GARDEN CORPORATION,
Plaintiff-Appellant,

vs.

NEW JERSEY BELL TELEPHONE COMPANY, a corporation,
Defendant-Respondent.

BRIEF OF JOSEPH ZEMEL,
Attorney for Plaintiff-Appellant.

This is an appeal from the judgment of the Essex County Circuit Court tried before the Honorable William A. Smith, Esq., Circuit Court Judge, on pleadings and affidavits without a jury, by consent of counsel.

Facts.

Plaintiff is the owner of premises Nos. 457-63 Springfield avenue, Newark, New Jersey. Defendant opened the sidewalk in front of the premises, dug a trench underneath the same and placed therein certain hollow tiles and conduits, which conduits and tiles are used for telephone wires for general telephone service, both local and long distant and to furnish telephone service to various persons in the City of Newark for pay. Plaintiff sued the defendant in trespass and the court gave judgment in favor of the defendant. Plaintiff appeals.

THE LAW.

There is but one question involved: Did the acts of the defendant constitute a trespass?

POINT ONE.

At common law, the acts of the defendant are clearly wrongful and constitute a trespass.

Part One.

The New Jersey Cases.

1. Plaintiff, as abutting owner, owns the fee to the sidewalk and street subject to the easement of the public.

(a) In the case of *Rogers* v. *Warrington,* 90 N. J. Law 653, at page 654, Justice Black, speaking for the Court of Errors and Appeals, says:

> "It is the accepted law of this state that lands on which streets and highways have been laid, the fee is in the abutting owners. Hoboken Land & Improvement Co. *v.* Mayor of Hoboken, 36 N. J. Law 540; Starr *v.* Camden Railroad Co., 24 N. J. Law 592."

2. The easement possessed by the state or the city or the public does not include the right to go upon the sidewalk for any purpose other than for use as a public highway for traveling and the authority to lay conduits for electric wires is not included within the easement of a public highway.

(a) In the case of *Starr* v. *Camden, etc., Railway Co.,* 24 N. J. Law 592, the Supreme Court, speaking through Justice Hains, at page 597, says:

> "*This easement* (of a public highway) *does not comprehend any interest in the soil* nor give the public the legal possession of it; the right of freehold is not touched by establishing a highway, but continues in the owner of the land, in the same manner that it was before the highway was established, subject to the easement." Swift, *J.,* in *Peck* v. *Smith,* 1 Conn't R. 103, 132.

(b) In the case of *Paterson* v. *Grundy,* 51 N. J. Equity 213, at page 225, Vice-Chancellor Green says:

> "The distinction between the use of a street by **telephone and telegraph companies** and **street railways,** in this that the latter is, and the **former is not,** consistent with the character of a highway, is clear and is recognized in * * *"

(c) In the case of *Taylor* v. *Public Service Corporation of New Jersey,* 75 N. J. Equity 371, at page 375, Vice-Chancellor Garrison says:

> "If, therefore, the defendants, by virtue of their contract and the proceedings of the municipality, had a right, as against the municipality to erect these poles for the purpose of public lighting, the complainant, or any landowner similarly situated, could not prevent the placing of the poles, or their being used, for the purposes of **public** lighting. But if the company was in this position and used the poles for stringing wires for **private** lighting, the landowner, with respect to whose land no consent in writing had been given, had the right, by ejectment, or by resort to equity, to restrain such misuse. French *v.* Robb (Court of Errors and Appeals, 1901), 67 N. J. L. (38 Vr.) 260; Andreas *v.* The Gas and Electric Company of Bergen County (Vice-Chancellor Pitney, 1900), 61 N. J. Equity (16 Dick.) 69."

(d) In the case of *Andreas* v. *Gas and Electric Co.,* 61 N. J. Equity 69, Vice-Chancellor Pitney says, at page 76:

> "and I can find nothing in the reported decisions or judicial utterances in this state which warrants the idea that because a municipality may undertake to supply either water or gas or electricity for lighting purposes to private consumers, it is thereby relieved of the *constitutional* duty of making

compensation to persons whose property shall be taken for that purpose."

And on page 77:

"* * * As pointed out by Vice-Chancellor Van Fleet in the Halsey Case, the lighting of streets may be considered as necessary in order to make them safe for use at night. But this consideration does not reach the lighting of the interior of the houses built along their route."

(e) In the case of *Nicoll* v. *Telephone Company,* 62 N. J. Law 733, the Court of Errors and Appeals held that telegraph and telephone lines for public use are not within the highway easement.

Justice Dixon says, at page 736:

"The argument to support the proposition, that the right to construct and maintain a telephone line for common public use is within this easement, is that the structures required for the exercise of the right are mere adaptations of the road to the passage of the electric current, which thus travels along the highway.

"But the resemblance between this use and that ordinarily enjoyed under the easement scarcely goes beneath the words by which it may be described. In reality, the electric current does not use the highway for passage—it uses the wire—*and would be as well accommodated if the wire were placed in the fields or over the houses;* the highway is used only as a standing place for the structures. **Such a use seems to us to be so different from the primary right of passage as to be essentially distinct.** Nor does it rest on the same footing as those secondary uses to which allusion has been made. Telephone lines in a street do not afford to the occupants of neighboring property such general convenience, nor have they been permitted with such common and continued acquiescence, as sanction the other uses mentioned.

> "We therefore think that the right now under consideration is *not* within the public easement, and can be acquired against the consent of the private owner of the fee only by condemnation under the power of eminent domain."

The learned Circuit Court Judge tells us "that the reasoning of the Justice who wrote the opinion in the Nicoll case is too narrow; at least in this advanced age." We urge and we argue as a matter of law that advanced age is no sound reason for depriving persons of their constitutional rights.

(f) In the case of *French* v. *Robb,* 67 N. J. Law 260, the defendant was lawfully authorized to erect poles for public lighting. Thereafter, one of the poles being in poor condition, the defendant permitted the telegraph company to erect a new pole in its stead and to string thereon a telephone wire. Other wires on the pole were used by the defendant for private lighting and the telegraph company was using its wire for telephone purposes. On this state of facts the Trial Court directed a verdict for the plaintiff against the telegraph company, of which action no complaint was made, and the Trial Court directed a verdict in favor of the defendant Robb for so much of the land as was occupied by the pole. As to this latter direction, the plaintiff appealed. Justice Dixon says, at page 264:

> "So far, therefore, as Robb occupied the streets with poles and other appliances for *public* lighting, and thereby excluded the plaintiff, the ouster was not tortious, and a verdict of not guilty was properly directed.
>
> "* * * *No color of right* is shown for maintaining apparatus for *private lighting,* and as to the wire strung for that purpose the defendant was clearly guilty."

(g) In the case of *Morris and Essex Railroad Co.* v. *Hudson Tunnel Railroad Co.,* 25 N. J. Equity 384, Chancellor Runyon says, at page 388:

> "It would seem to follow," says Chancellor Green, treating of this subject in Hinchman *v.* Paterson Horse Railroad Co., 2 C. E. Green, 75, 78, "that the **owner** of the soil under a highway **cannot be deprived of his property,** or be prejudiced in any right therein, **without compensation, even by express authority of the legislature,** without a violation of the provision of the Constitution which declares that private property shall not be taken for a public use, without just compensation." He adds, that **this is especially true** where the land taken is applied **exclusively** to the use of the railroad, **as by tunneling under the highway** for the railroad track. The case is not altered by the fact that the highway is a street in a city.

(h) In the case of *Roebling* v. *Trenton Passenger Railway,* 58 N. J. Law 666, on page 669, Justice Depue says:

> "In considering this question, it must be admitted at the outset that the transmission of passengers with increased speed and greater comfort is a great public benefit. This is equally true of the lines of railroads that traverse our state and penetrate into every section, and of the diversion of waters to create waterways for carrying freight, or to supply water for use in the large cities and towns. It is also conceded that the erection of poles, with wires strung thereon, in the present state of the sciences, is necessary to accomplish the purposes contemplated by this legislative provision. **But no considerations of public advantage should be permitted to predominate over the rights of private property which, by a constitutional inhibition, cannot be taken for a public use without compensation.**

> "As was said by Chancellor Green, in Hinchman *v.* Paterson Horse Railroad Co., 2 C. E. Gr. 75, 80: **'Nothing can be claimed on the ground that city railroads are a great public convenience and benefit; if they are so, the public can afford to pay for it; that is certainly no reason why individual property should be taken for public use.' This constitutional provision has uniformly been liberally construed for the protection of private property.** Not only an actual taking, but also the destruction of private property, either total or partial, or the diminution of its value by the act of the government, directly and not merely incidentally affecting it, which deprives the owner of the ordinary use of it, is a taking within the constitutional provision which can only be exercised under the right of eminent domain, on just compensation made. Trenton Water Power Co. *v.* Raff, 7 Vroom 335; Pennsylvania Railroad Co. *v.* Angel, 14 Stew. Eq. 316, 329."

(i) Appellant submits that the case of *Zemel* v. *Public Service Production Company and Public Service Electric and Gas Company,* 150 Atlantic 344; 8 N. J. Miscellaneous 439, is on all fours with the case at bar. In that case the defendant opened up the sidewalk adjoining the plaintiff's property and constructed a vault or manhole in which was placed three transformers and conduits used in connection with the business of the electric company. In that case the Supreme Court held that the statutes and ordinances in question, which were very much similar to those in the case at bar, did not authorize the defendants to take private property without just compensation and affirmed a District Court judgment for the plaintiff.

True, that case involved a vault or manhole 6′ x 10′ while in the case at bar the portion of the soil occupied by the defendant is approximately

3′ 9″ x 19″ and runs across the entire front of the property and the conduit is 9′ 3″ below the surface, but we submit that these differences, if they are such, are differences in degree and not in kind.

Part Two.

Cases from other States.

The appellant is reluctant to cite cases from other jurisdictions, particularly since our courts have shown an inclination not to be bound by decisions of other states. In the court below the defendant cited a great many decisions from other jurisdictions and the same cases may be cited by the defendant in this court. *In limine* it may be well to quote the words of Justice Dixon in the case of *Nicoll* v. *Telephone Company,* 62 N. J. Law 733, at page 736:

> "We deem it unnecessary to discuss the views of courts in other jurisdictions. They are irreconcilable and those on each side may be found cited in Magee *v.* Overshiner, 49 N. E. 951, where the Supreme Court of Indiana arrived at a conclusion opposed to that above expressed."

as well as the words of Vice-Chancellor Backes in the case of *Dolton* v. *Public Service Electric Co.,* 83 N. J. Equity 560, at page 563:

> "The opinions of the courts of other states are irreconcilable on the proposition as to whether grants, such as conferred by the act of 1896, are consistent with the use of highways, but in this state **our highest tribunal has held that such grants to telegraph and telephone lines,** a fortiori electric lighting lines, **are not within the public easement.**"

Among the states which take the view opposite to that held by the courts in this case

are Pennsylvania, Massachusetts, Tennessee, Indiana and West Virginia, and several of the cases cited in the defendant's brief are from those states. On the other hand, the New Jersey view has been adopted in New York, Ohio, California and Illinois and several other states and each of these states has consistently refused to depart from the New Jersey view, namely that use by electric lighting companies of the streets for wires for private electric lighting is not a highway purpose.

The defendant cited the case of *Castle* v. *Bell Telephone Company,* 63 N. Y. Supplement 482, as authority for its position. That case was decided by the Appellate Division of the Supreme Court of New York in 1900 and one of the Judges sitting wrote a very strong dissenting opinion.

Because the views expressed in that opinion are substantially those adopted by the highest court of New York, the appellant begs leave to quote therefrom. Judge Laughlin says:

> "Telephone companies are **private corporations** organized and conducted for the **individual profit of the stockholders.** The telephone is so extensively used that it seems indispensable to professional men and those engaged in various lines of trade and business, and it is a great convenience to all others who have occasion and financial ability to use it. Strictly speaking, however, the telephone is not a public necessity or convenience. It accommodates and serves the public to no greater extent than street, steam, surface and elevated railroads; and as to these, regardless of whether they obstruct light, air and access, it is well settled that their construction is an additional burden upon the owner of the fee. (Citing cases.) Telephones are not essential to the

> **health** of the community or to the safety of the lives or property of the inhabitants of a city. This line is not being constructed for the city, or in fulfillment of any duty to the public enjoined upon the municipality by the legislature. **Placing conduits for telephone wires in this avenue is not a proper municipal or street use,** if against the owner of the fee. **Telephone poles and wires, or conduits for such wires, may not be lawfully erected, strung, or placed in a public street** or highway by a private corporation for the **purpose of private contract service,** without obtaining the consent of the owner of the fee of the street or highway, or acquiring the right so to do by condemnation proceedings.'' (Citing cases.)

And the New York Court of Appeals has adopted the view urged by the plaintiff, in a great number of cases, one example of which is the case of *Osborne* v. *Auburn Telephone Company,* 82 Northeastern 428, decided in 1907. In that case the Court of Appeals quotes the case of *Palmer* v. *Larchmont Electrical Company,* wherein the same court distinguished between wires for public lighting and telephone electric wires and, after discussing the question of highway purposes, says:

> ''Not so with telegraph and telephone wires. They in no way preserve or improve the streets or aid the public in traveling over them.''

The New York Court of Appeals, as late as October, 1930, did not adopt the fallacious theory so ably urged by the defendant in this case, that by reason of modern conditions the old decisions are too narrow; and pointed out, in the case of *Thompson* v. *Orange & Rockland Electric Co.,* 173 N. E. 224, 254 N. Y. 356, that:

> ''*Distribution* of electricity *to private consumers* is 'public and municipal use' but *not*

'street use' as regards question of landowner's right to additional compensation for such use of street."

Judge Pound, speaking for the Court of Appeals says, at page 225:

"* * * If it acquired an easement merely, the highway is subject to street uses only, and no new burden may be imposed on plaintiff's land without further compensation.

"*Only such uses as appertain* directly or indirectly to the *right of passage,* and tend in some way to preserve or make more easy the exercise of such right, may be imposed upon the easement. *For other uses, public and municipal* in their character, *the landowner is entitled to additional compensation.* Thus the lighting of a highway has been held to be one of the burdens upon the fee which must be borne as an incident to the public right of traveling over the way. Palmer *v.* Larchmont Electric Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672. *So as to sewers and water mains when connected with the use of the street. But telegraph and telephone wires in no way improve the streets or aid the public in passing over them, and are held to be an additional burden upon the fee.* Osborne *v.* Auburn Telephone Co., 189 N. Y. 393, 82 N. E. 428."

A similar theory was urged before the Supreme Court of Ohio and was repudiated by the Court in the case of *Ohio Bell Telephone Co.* v. *Watson,* 147 N. E. 907, (1924) in which case Judge Day says, at page 909:

"It is urged that the erection and maintenance of telephone poles is not an inconsistent use of the highway and that modern conditions require new and modern means unknown at the time of the original dedication of the highway. Our views upon this point are so clearly expressed by Mr. Justice Peckham in Eels *v.* American Telephone & Telegraph Co., 143 N. Y. 133, 38 N. E. 202,

25 L. R. A. 640, that we quote at some length therefrom beginning at page 138 (38 N. E. 203): * * *

'We think neither the state nor its corporation can appropriate any portion of the public highways permanently to its own special, continuous and exclusive use by setting up poles therein, although the purpose to which they are to be applied is to string wires thereon, and thus to transmit messages for all the public at a reasonable compensation. It may be at once admitted that the purpose is a public one, although for the private gain of a corporation; but the constitution provides that private property shall not be taken for public use without compensation to the owner. Where land is dedicated or taken for a public highway, the question is, What are the uses implied in such dedication or taking? Primarily, there can be no doubt that the use is for *passage* over the highway. The title to the fee of the highway generally remains in the adjoining owner and he retains the ownership of the land, subject only to the public easement. If this easement do not include the right of a telegraph company to permanently appropriate any portion of the highway, however small it may be, to its own special, continuous and exclusive use, then the defendant herein has no defense, to the plaintiffs' claim. Although the purpose of a public highway is for the passage of the public, it may be conceded that the land forming such highway was not taken for the purpose of enabling the public to pass over it only in the then known vehicle, or for using it in the then known methods for the conveyance of property or the transmission of intelligence. Still the *primary law* of the highway *is motion,* and whatever vehicles are used, or whatever methods of transmission of intelligence is adopted, *the vehicle must move* and the intelligence be transmitted by some moving body, which must pass along the highway, either on or over or perhaps under it; **but it cannot**

permanently appropriate any part of it * * *.'

"We cannot agree that this permanent appropriation and exclusive possession of a small portion of the highway can properly be regarded as any newly discovered method of exercising the old public easements, for the very reason that this so-called 'new method' is *a permanent, continuous and exclusive use and possession of some part of the public highway itself,* and therefore cannot be simply a new method of exercising such old public easement. It is a totally distinct and different kind of use from any heretofore known. It is not a mere difference in the kind of vehicle, or in their number or capacity, or in the manner, method, or means of locomotion. All these might be varied, increased as to number, capacity or form, altered as to means or rapidity of locomotion, or transformed in their nature or character, and still the use of the highway might be substantially the same, a highway for passage and motion of some sort. Here, however, in the use of the highway by the defendant is the fact of permanent and exclusive appropriation and possession, a fact which is, as it seems to us, wholly at war with that of the legitimate public easement in a highway." (Citing cases.)

Judge Day then continues:

"There is a diversity of opinion in other states upon this proposition, but **we are content to adhere** to the former decisions of this court in their trend for the **recognition of the inviolability of private property and its protection from use for public or private purposes,** unless compensation be first made in money."

Part Three.

Texts.

The better considered texts on the subject hold that an abutting owner is entitled to compensation for wires used by telephone companies.

Jones on Telegraph and Telephone Companies, Second Edition, page 118, says:

> "For the reason that the public has acquired an easement over private property for the purposes of travel, is *no reason* why a quasi-public corporation, created for the convenience and welfare of the government, *but more specially for private gain,* should appropriate part of this easement for the use of such companies without compensating the owner of the fee when the consent has not already been obtained.
>
> "It is true that the use of a telegraph company is a public use. The company is a public corporation as to which the public has rights which the law will enforce, but these public rights can only be obtained by paying for them. The use, while in one sense public, is not for the public generally. **It is for the private profit of the corporation * * * There is no reason in law or common justice why it should not pay for what it needs in the prosecution of its business.**"

The streets and highways were dedicated to the public for the exclusive and unobstructed passage of its travelers, and any use or hindrance to which it might otherwise be subjected would be in violation of the grant. To use it for telephonic purposes would have this effect.

> "The erection of poles in the streets by telegraph or telephone companies is a permanent and *exclusive occupation* of the streets by such companies to the *continued exclusion* of the remainder of the public, and to that extent is a continued obstruction of the street."

As has been very ably said:

"That the *erection of a telegraph line* upon a highway *is an additional servitude,* is clear from the authorities * * * If the right acquired by the commonwealth in the condemnation of a highway is only the right to pass along over the highway for the public, then, if the untaken parts of the land are his private property, to dig up the soil is to dig up his soil; to cut down the trees is to cut down his trees; to destroy the fences is to destroy his fences; to erect any structure, to affix any pole or post, in and upon his land, is to take possession of his land; and all these interfere with his free and unrestricted use of property. *If the commonwealth took this without just compensation it would be a violation of the constitution. The commonwealth cannot constitutionally grant it to another.* It is true that the use of the telegraph company is a public use; that the company is a public corporation, as to which the public has rights which the law will enforce. But the *public rights can only be obtained by paying for them.* The use, while in one sense public, is not for the public generally; it is for the private profit of the corporation. It is its business enterprise, engaged in for gain. The services can only be obtained upon there being paid for. *There is no reason, either in law or common justice, why it should not pay for what it needs in the prosecution of its business.* Upon this burden being placed upon it, it can complain of no hardship; it is the common lot of all. If the said company has use for the private property of a citizen of this commonwealth, and it is of advantage to it to have the same, it is illogical to argue that the property is of small value to the plaintiff, and in the aggregate a great matter to the plaintiff in error. This argument is not worth considering; it cuts at the very root of the rights of property. It would apply with equal

force to all the transactions of life. It is sufficient to say, the aegis of the constitution is over this as over all other private property rights, and there is no power which can divest it without just compensation."

POINT TWO.

Neither the charter of the defendant corporation nor the statute referred to is a valid authorization for the doing of the work done without compensating the abutting owner.

1. The statute does not purport to authorize the use of the sidewalk.

(a) The statute provides that the company may use the public roads, highways, streets, avenues and alleys. There is no authorization, however, for the use of the sidewalk and none can be implied.

(b) While there are cases in other states holding that the sidewalk is part of the highway, the rule in this state is that the abuting owner has a greater interest in the sidewalk than in the street.

(c) In the case of *Halsey* v. *Rapid, etc., Railway Co.,* 47 N. J. Eq. 380, Vice-Chancellor Van Fleet says, at page 387:

"* * * Had they been placed on the sidewalk in front of his premises, rights growing out of a duty incumbent upon the abutting owner in respect to that part of the street, might have made it the duty of the court to consider questions not at all involved in this case."

Chief Justice Beasley said that a sidewalk has always, in the laws and usages of this state, been regarded as an appendage to, and a part of, the premises to which it is attached, and is essential to the beneficial use of the premises, *Agens* v.

Mayor, etc., Newark, 37 N. J. Law 473. A walk through a city or its suburbs discloses some of these uses. We find oil tanks buried beneath the sidewalks for the storage of oil pipes to oil burners which heat the adjoining houses or apartments, shade trees, drains to the street to carry off the surface water from the roofs, lateral pipes for supplying the householder with water, gas and electricity; service sewerage, outlets, gratings protecting sunken windows, vaults, coal holes, cellar-ways, elevators leading from basement landings to the sidewalk, sunken areaways, etc. These have been paid for by landowners.

From this we see that there is a distinction between the general easement in the public to a roadway and the rights of abutting owners. The general easement in the public extends to the limits of the roadway and consist of the right of free passage, and so using and occupying the roadway as to facilitate and effectuate such passage. To this end a municipality grades, paves, cleans and lights the roadway. Sewers, water pipes, gas mains are maintained therein.

A municipality may pass ordinances requiring owners of sidewalks to keep them in repair and free from snow, subject to a penalty, but the care of the roadway as to snow and general repairs rests upon the municipality.

When a roadway is improved the assessment made cannot exceed the peculiar benefit of the improvement to the adjoining property. The entire cost of a sidewalk assessment is levied upon the abutting owner.

Except for the public easement and its attendant uses to give free passage, the rights of the owner of the soil cannot be impaired.

These rights cannot be disturbed by legislation. They are guarded by the Constitution, *State* v. *Laverack,* 34 N. J. Law 201; see page 203.

How have our courts protected the abutting owners in the present and past?

In *Moore* v. *Camden and Trenton Railway,* 74 N. J. Law 599, a trolley company was ejected from the land occupied by its pole in front of plaintiff's premises.

In *Bloom* v. *City of Orange,* 91 N. J. Law 376, Justice Swayze held that an abutting owner has such special rights in the sidewalk as to permit of his maintaining a vault or cellar under the sidewalk.

2. Legislative authority to build telephone lines does not impliedly preclude the right of the abutting owner to compensation for the use of the fee. The defendant seems to contend that because it has statutory and municipal sanction for doing certain acts it does not have to pay for property taken in so doing.

Plaintiff urges that the mere fact that a statute or constitution authorizes the doing of a certain thing, does not further authorize the taking of private property without compensation. For example, the Constitution of the United States authorizes Congress to establish post offices and post roads, but Congress has never attempted to construe this provision as meaning that anyone's land can be taken for a post office without paying for it. The Walsh Act provides that cities may establish markets; but so far as plaintiff has been able to learn, no city has ever attempted to take private land for market purposes without paying therefor, under the color of this Act.

Plaintiff urges that the defendant could no more take the plaintiff's land for the laying of conduits without compensation, than they could demand from the manufacturer of wire or conduits that it furnish these articles to the defendant without compensation, merely because they are given statutory power to lay conduits.

II. Section 8 of the Telegraph & Telephone Companies Act, Compiled Statutes of 1910, page 5314, provides:

> "Any telegraph company organized under the laws of this or any other state or of the United States or of any company organized by virtue of this act shall have full power to erect, construct, lay and maintain the necessary poles, wires, conduits and other fixtures for its lines, in, upon, along, over or under any of the public roads, streets and highways upon first obtaining the consent in writing of the owner of the soil to the erection of any such pole or poles; and through, across or under any of the waters within the limits of this state, and upon, through or over any other land **subject to the right of the owners thereof to full compensation for the same.**"

(a) The Federal Statute permitting the erection of telephone lines along post roads is substantially similar to the statute in question and it has been repeatedly construed not to preclude the owner's right to compensation.

(b) The Supreme Court of North Dakota in *Cosgriff* v. *Tri-State Telephone & Telegraph Co.*, 107 Northwestern 525, discusses this question and says:

> "It has been repeatedly held, and without a dissenting voice, both by state and Federal courts, that sections 5263-5268, supra, which authorizes the construction of telegraph lines along post roads, do not affect the right of a

landowner to the damage to which he is entitled for the additional burden upon the fee caused by the erection of telegraph poles upon a public highway, which is a post road."

(c) In the case of *Western Union Telegraph Company* v. *Richmond,* 224 U. S. 160, the United States Supreme Court held that the act of Congress permitting telegraph companies to occupy post roads is permissive only, and not in a source of positive rights; it conveys no title in streets or roads, and does not found one by delegating the power to take by eminent domain.

Justice Holmes says (on p. 169):

"The act of Congress of course conveyed no title and did not attempt to found one by delegating the power to take by eminent domain * * * The inability of the state to prohibit the appellant from getting a foothold within its territory both because of the statute and of its carrying on of commerce among the states gives the appellant no right to use the soil of the streets, even though post roads, as against private owners or as against the city or state where it owns the lands. * * *"

(d) In the case of *St. Louis* v. *Western Union Telegraph Company,* 148 U. S. 92, the United States Supreme Court points out the distinction between the use of streets by telegraph and telephone companies and use thereof by the general public.

Justice Brewer says (on p. 98):

"The use which the defendant makes of the streets is an *exclusive and permanent* one and not one temporary, shifting, and in common with the general public. The ordinary traveler, whether on foot or in vehicle, passes to and fro along the streets and his use and occupation thereof are temporary

> and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveler. This use is common to all members of the public and it is a use open equally to citizens of other states with those of the state in which the street is situated. But the use made by the telegraph company is in regard to so much of the space as it occupies with its poles permanent and exclusive. It effectually and permanently dispossesses the general public as if it had destroyed that amount of ground."

POINT THREE.

I. If the statute should be construed as authorizing the defendant to lay conduits and do the other work in question without compensation to the landowner, it is unconstitutional.

1. There is no question that the landowner owns the fee in the sidewalk. *Rogers* v. *Warrington, supra.* To take from him an easement in this fee and give it to a corporation is a direct violation of the Fourteenth Amendment to the United States Constitution, which provides that no state shall deprive any person of life, liberty or property without due process of law.

2. It also violates the Fifth Amendment to the United States Constitution which provides that private property shall not be taken for public use without just compensation.

(a) In the case of *Andreas* v. *Gas and Electric Co.,* 61 N. J. Equity 69, Vice-Chancellor Pitney says, at page 77:

> "The result is that I find that the legislature has not only not given authority to municipalities or its licensee to erect poles on the sidewalk to support wires to conduct electricity for use in private lighting or for

the transmission of power, but has, by the act of 1896, above referred to, by implication, forbidden such erection without the consent of the landowner; **and my impression is that such authority, if given, would probably be held to be unconstitutional, unless given upon terms of making compensation,** and that the authority given by implication by the sixty-seventh section of the Township act of 1899 must be confined to the purpose of lighting the streets within the limits of the municipality."

3. Even if it should be held that the right to use the space beneath the sidewalk is within the public easement, the act would nevertheless be invalid.

(a) Section 19 of Article One of the New Jersey State Constitution provides as follows:

> "No county, city, borough, town, township or village shall hereafter give any money or property or loan its money or credit to or in aid of any individual, association or corporation or become security for or be direct or indirect the owner of any stock or bonds of any association or corporation."

(b) Section 20 provides:

> "No donation of land or appropriation of money shall be made by the state or any municipal corporation to or for the use of any society, association or corporation whatever."

(c) The effect of these Articles is to prevent cities from making gifts of lands to corporations. The easement of passage beneath the sidewalks is unquestionably an interest in land and a statute granting exclusive right to this easement or permitting a municipality to grant such a right, is clearly a violation of the constitution.

Strock v. *East Orange,* 77 N. J. Law 382.

POINT FOUR.

This point is given over to an analysis of the Circuit Court's opinion in this case.

With all due respect to the learned Circuit Court Judge, plaintiff urges that the decision is based upon several erroneous principles of law insofar as it affects the question at issue.

(a) The court says that Vice-Chancellor Backes referred to the question here involved.

The learned court first states that the question is an open one and on the fourth page of its opinion says:

> "As the law now stands, conduits may be laid beneath the surface underneath the roadway by a public utility company, such as the defendant, without compensation to the owner of the fee."

Plaintiff's counsel submits that he has been unable to find any case so stating the law.

The court then, on page 7, says that the reasoning of Justice Dixon in the Nicoll case "is too narrow for this advanced age" and that the law must keep pace with changing conditions. It seems to me the court has overlooked the question of the constitutional rights of the plaintiff and if, in 1898, when the Nicoll case was decided, abutting owners owned the sidewalk free of the telephone easement, to add a further burden upon their ownership of their fee because times have changed is, it seems to me, taking their property without compensation. It has been repeatedly held that constitutional provisions and constitutional rights cannot be abrogated by means of changed economic conditions. *United States* v. *Sprague,* decided February 24, 1931, by the United States Supreme Court.

The learned Circuit Court Judge also seems to base his opinion upon the public convenience. That public convenience is no valid reason for taking private property without compensation, plaintiff quotes the late Chief Justice Beasley in the case of *State* v. *Lavernack,* 34 N. J. Law 201.

> "* * * It is one of the most important privileges of the citizens of this state that **their property cannot be taken, even when required by the public convenience, without just compensation. This is a constitutional provision, and,** like all such, **is to be sedulously guarded and carefully preserved.** It is the admitted duty of the courts of the state to see that this invaluable prerogative is secure against all invasion. The provision is a restriction on the legislative power, **and a statute in contravention of it is void.**"

CONCLUSION.

From a careful study of the law of the case, the plaintiff submits: First, that it is the owner of the soil underneath the sidewalk subject only to highway use. Second, that the use made of the said space by the defendant is not a highway use. Third, that the statutes of this state do not authorize said use without compensation to the abutting owners. Fourth, that if the statutes be construed as authorizing said use without compensation, said statutes are in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Fifth, plaintiff further submit that if the city or state is the owner of the easement underneath the sidewalk, that such easement cannot be granted to a private corporation and to that extent the said statutes are in violation of Sections 19 and 20 of Article One of the New Jersey State Constitution.

Plaintiff therefore submits that the acts of the defendant clearly constitute a trespass and that the judgment should be reversed.

Respectfully submitted,

JOSEPH ZEMEL,
Attorney for Appellant.

JOSEPH ZEMEL,
Of Counsel.

(Note: All italics and heavy print are mine.)