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SUMMONS.

THE STATE OF NEW JERSEY, *ss.*:

To

PUBLIC SERVICE RAILWAY COMPANY, a corporation of New Jersey.

YOU ARE SUMMONED to answer the annexed complaint of the CITY OF BAYONNE, in an action at law in the New Jersey Supreme Court. AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the New Jersey Supreme Court, at Trenton, New Jersey, 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.

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WITNESS, WILLIAM S. GUMMERE, ESQ., Chief Justice of our Supreme Court, at Trenton, N. J., this 24th day of October, Nineteen Hundred and Twenty-One.

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ENOCH L. JOHNSON,
Clerk.

AARON A. MELNIKER,
Attorney for Plaintiff,
Bergoff Building,
Bayonne, N. J.

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COMPLAINT.

Filed Oct. 25, 1921.

NEW JERSEY SUPREME COURT.

City of Bayonne, Plaintiff, *vs.* Public Service Railway Company, a corporation of New Jersey, Defendant.	Action at Law. COMPLAINT.

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The City of Bayonne, the plaintiff herein, says:

FIRST COUNT.

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1. The City of Bayonne is and was at and during all the times hereinafter mentioned a municipal corporation of the State of New Jersey.

2. The defendant, the Public Service Railway Company, is a corporation organized and existing under the laws of the State of New Jersey, and operates a street railway in and along Avenue C and other public streets and highways in the City of Bayonne, aforesaid.

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3. On September 18th, 1885, by an ordinance duly adopted, the City of Bayonne granted to the Jersey City and Bergen Railroad Company a franchise to lay tracks along said Avenue C from First Street to the Morris Canal, and other public streets and highways in the City of Bayonne, and to operate street railway cars thereon.

4. Section two of said ordinance provides as follows:

"That said tracks and turnouts shall be

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laid in substantial manner, under the super-

vision of the City Surveyor, and it shall be the duty of said Company to pave the part of any street or streets through which its railroad may be laid that lies inside of the rails of any of its tracks, and two feet outside thereof, with Belgian block pavement as soon as and whenever the balance of said street or part thereof is paved, and to keep the said parts of said streets to be paved by them, as aforesaid, inside of their tracks at all times in good repair at their own expense." 10

5. Thereafter, the said Jersey City and Bergen Railroad Company accepted the said franchise and laid said tracks along said streets and operated its cars thereon, and paved that part of the streets through which its said railway was laid that lies inside of the rails of its said tracks and two feet outside thereof, as provided in said ordinance. 20

6. That thereafter and some time prior to July 1st, 1918, by mesne conveyances and assignments, the defendant, Public Service Railway Company, became the owner of said tracks and said railway, and has been since and is now operating the same under said franchise or ordinance, the supplements thereto and the amendments thereof.

7. Prior to July 1st, 1918, the pavement along and outside of the rails of said railway on Avenue C two feet in width, fell into a state of disrepair and became dangerous to pedestrians and others using said highway. 30

8. On July 12th, 1918, the Board of Commissioners of the City of Bayonne adopted a resolution directing the defendant to make the necessary repairs in the pavement along and outside of said rails, a copy of which resolution is hereto attached and made a part hereof, and notice of which was duly given to the defendant. 40

9. On July 17th, 1918, the Secretary of the defendant Company wrote to the City Clerk of the City of Bayonne, a letter of which the following is a true copy:

Newark, N. J.,
July 17, 1918.

Mr. William P. Lee, City Clerk,
Bayonne, N. J.

10

Dear Sir:—This will acknowledge receipt of your favor of yesterday enclosing copy of a resolution relating to the improvement of the pavement on Avenue C.

Yours very truly,
PERCY INGALLS,
Secretary.

10. On March 21st, 1921, the City Engineer of the City of Bayonne wrote to the defendant a letter, of which the following is a true copy:

20

Public Service Railway Co.,
Newark, N. J.
Gentlemen:

The following is a list of repairs made by this City to asphalt pavement 18 inches outside of rail:

5th St. to 4th St.,	outside	W.R.	201.00 sq. ft.
5th " " " "	"	E.R.	72.15 " "
3rd St. to 4th St.,	"	W.R.	90.60 " "
" " " " "	"	E.R.	85.50 " "
	Total Sq.	Ft.	449.25
	Sq.	Yds.	49.91

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asphalt pavement 49.91 Sq. yds. at $3.00—$149.75.

Very truly yours,
CHAS. E. BOUTON,
City Engineer.

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11. On April 16th, 1921, the defendant wrote to the Engineer of the City of Bayonne a letter, of which the following is a true copy:

Mr. Charles E. Bouton,
City Engineer,
Bayonne, N. J.

Dear Sir:

Referring to your letter of March 21st. giving a list of repairs made by the City to the asphalt pavement 18″ outside of the rails, between Third and Fifth Streets on Avenue "C". 10

This matter has been referred to the writer who understands that this covers repairs to the 18″ strip which has been the subject of numerous conferences between the Company and the City, during the past several years, the Company taking the position that it is not obligated to make these repairs. If we are wrong in assuming that this bill relates to the paving which has been the subject of controversy, we will be glad to be informed. 20

Very truly yours,
PERCY INGALLS,
Secretary.

12. On April 26th, 1921, the City Attorney of the City of Bayonne wrote defendant a letter, of which the following is a true copy: 30

Percy Ingalls, Esq.,
Secy. of Public Service Railway Co.,
80 Park Place,
Newark, N. J.
Dear Sir:—

Your letter to Mr. Bouton, City Engineer of Bayonne, under date of the 16th instant has been referred to me.

I have advised the City Commission that under the terms of your franchise, it is the 40

duty of your Company to maintain the pavement for a space of two feet outside of your rails and that your Company having failed to do so after notice given, pursuant to a resolution adopted on July 12th, 1918, that the City should proceed forthwith to do this work at your expense.

10 In order that you may have a further opportunity to make the necessary repairs, I am instructing the Director of Streets and Public Improvements to delay the commencement of this work for one week and thereafter to proceed with this work without further notice to you.

Very truly yours,
AARON A. MELNIKER,
City Attorney.

20 13. On May 23rd, 1921, the defendant wrote to the City Attorney of the City of Bayonne a letter, of which the following is a true copy:

Mr. Aaron Melniker,
Bergoff Building,
Bayonne, N. J.
Dear Sir:

Referring to the writer's conference with you, Street Commissioner Smith and City Engineer Bouton, on May 19th, regarding the
30 proposed repaving of the strips outside of the Company's rails on Avenue C.

As then stated, the company believes that it is not required, under its franchise, to maintain any paving outside of its tracks and it must therefore decline to agree either to repave the strips in question or pay the cost of repaving, if the work is done by the City.

The Company is strongly opposed to the laying of asphalt pavement up to the rail, as
40 experience has shown that it is impossible to

properly maintain street pavement where it immediately adjoins a rail. We therefore urge that if these strips are repaved by the City, that at least two rows of stone block be used adjoining the rail and between it and the asphalt pavement.

With regard to that section of Avenue C, between 18th and 25th Streets, where the street is now paved with Belgian block and your inquiry as to whether the company will agree to accept asphalt on the strips outside of the outer rails, if laid at the City's expense, in substitution for the stone block now there, provided it is later determined by a Court of competent jurisdiction that the company has an obligation under its franchise to maintain the paving on these strips, the writer is instructed to say that we cannot agree to accept asphalt pavement for the present stone block, for the reasons given above.

The writer has requested our Mr. White to confer with the City Engineer and Street Commission, believing that they will agree that the substitution of asphalt for stone block is unwise, without regard to who must thereafter maintain it.

Believing that you will appreciate our position in these matters, I am

Very truly yours,
PERCY INGALLS,
Secretary.

14. The defendant Company has at all times refused to make such repairs.

15. The plaintiff thereupon caused said repairs to be made and placed the said pavement on Avenue C, between 1st and 18th Streets and between 25th and 54th Streets in good repair.

16. The reasonable cost of said work was fif-

teen thousand three hundred and thirteen dollars and eighty cents ($15,313.80).

Plaintiff demands damages from the defendant on this count in the said sum of fifteen thousand three hundred and thirteen dollars and eighty cents ($15,313.80), with interest and costs.

SECOND COUNT.

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1. Plaintiff repeats all the allegations of paragraphs 1 to 13 inclusive, of the first count and makes them apart hereof.

2. On May 31st, 1921, the Board of Commissioners of the City of Bayonne adopted a resolution, a true copy of which is hereto attached and made a part hereof, directing the defendant Company to repair the pavement for two feet on each side of the rails on Avenue C, between 18th Street and 25th Street.

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3. On June 2nd, 1921, a notice was served upon the defendant Company, of which the following is a true copy:

Public Service Railway Company,
Terminal Building,
Newark, N. J.

Take notice that the pavement on Avenue C, City of Bayonne, between 18th Street and 25th Street, for two feet along and outside of the rails of your company, which you are obliged under the provisions of the ordinance under which you are operating to keep in good repair at your own expense, is out of repair and in a dangerous condition. You are therefore directed, pursuant to resolution of the Board of Commissioners adopted May 31, 1921, to repair the same and upon your failure so to do the work will be done by the City at your expense.

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You are further notified that unless this work is commenced by your company within

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thirty days after service of this notice upon you the City will proceed with the work.

Respectfully yours,
C. J. O'NEILL,
City Clerk.

4. On June 22nd, 1921, the City Attorney of the City of Bayonne wrote to the defendant Company a letter, of which the following is a true copy: 10

Percy Ingalls, Esq.,
Secy. of Public Service Railway Co.,
Public Service Terminal,
Newark, N. J.

Dear Mr. Ingalls:—

On June 2nd there was served upon your Company a notice relating to the condition of the pavement on Avenue C in Bayonne between 18th Street and 25th Street for two feet alongside of and outside of the rails of your Company and making a demand upon you to take some action relative thereto. 20

The City is about to proceed with the work of repaving the other portions of this street and would like to have your co-operation in this work. The City plans to pave with asphalt from the curb to a point two feet from your rails and should you fail to comply with the notice served upon you to repair the two feet alongside of your rails the City proposes to do this work and seek to recover the cost thereof from your Company. 30

Under the terms of the notice served upon you, the time to commence this work will expire on July 1st.

Will you please advise me what the disposition of your Company is in this matter so that the City may be guided accordingly in giving out this work. I think it will to the 40

mutual advantage of the City and your Company that we have this information before the work is commenced.

Very truly yours,
AARON A. MELNIKER,
City Attorney.

5. On June 24th, 1921, the defendant Company wrote to the City Attorney of the City of Bayonne a letter, of which the following is a true copy:

Mr. A. A. Melniker,
City Attorney,
Bayonne, N. J.

Dear Mr. Melniker:—

This will acknowledge your letter of June 22nd, referring to notice dated June first, signed by the City Clerk, calling upon the Company to repair pavement on Avenue C between 18th Street and 25th Street for two feet outside of the outer rails of our tracks.

This is the matter which the writer discussed with you, City Commissioner Smith and City Engineer Bouton on May 19th, which conference was covered by our letter of May 23rd, 1921. As therein stated, the Company does not believe that it has any obligation to maintain any paving outside of its tracks and we must therefore decline to either repave the strips in question or pay the cost of repaving if the work is done by the City.

Believing that this will give you the information which you desire, we are

Yours very truly,
PERCY INGALLS,
Secretary.

6. The defendant Company has at all times refused to make such repairs.

7. The plaintiff thereupon caused said repairs to be made and placed the said pavement on Avenue C, between 18th Street and 25th Street for two feet outside of the rails on said street in good repair.

8. The reasonable cost of said work was two thousand two hundred and twenty dollars ($2,-220.00).

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Plaintiff demands damages from the defendant on this count in the said sum of two thousand two hundred and twenty dollars ($2,220.00), with interest and costs.

AARON A. MELNIKER,
Attorney of Plaintiff.

Schedule A.

July 12th, 1918.

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By Commissioner Mara:

Whereas, by an ordinance approved September 18th, 1885, the Jersey City and Bergen Railroad Company was authorized to lay tracks, turnouts, and to run horse cars through certain streets of this City, which ordinance has been amended from time to time, and supplements have been made thereto, and the rights of said Company have been assigned to the Companies now operating the trolley cars in and through certain streets of this City; and

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Whereas, Section 2 of the ordinance provides as follows:

> "Sec. 2. That said tracks and turnouts shall be laid in substantial manner, under the supervision of the City Surveyor, and it shall be the duty of said Company to pave the part of any street or streets through which its railroad may be laid that lies inside of the rails of any of their tracks, and two feet outside thereof, with Belgian block pavement, as soon

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as and whenever the balance of said street or part thereof is paved, and to keep the said parts of said streets so to be paved by them as aforesaid inside of their tracks at all times in good repair at their own expense."

And whereas, this Board has been advised that the said Railway Company is obliged by the terms of the said ordinance, not only to pave so much of
10 the street as lies inside of the rails of their tracks, but for the space of two feet outside thereof, and also to keep the same at all times in good repair at the expense of said Company; and

Whereas, The pavement of Avenue C, for a considerable distance along the line of the said Railway Company is very much out of repair, and is inconvenient and dangerous to pedestrians and those having occasion to use said Avenue in vehicles, and is in urgent need of attention; therefore,
20 be it

Resolved, That the said Railway Company be notified that unless it takes immediate action to repair the said pavement of Avenue C, that this Board do make such repairs at the expense of the said Railway Company; and be it further

Resolved, That the City Clerk be and he is hereby directed to forthwith cause a copy of this resolution to be served upon the officials of the said
30 Railway Company.

Schedule B.

May 31st, 1921.

By Commissioner Smith:

Whereas, The City Engineer has made an examination of the pavement on Avenue C, between 18th and 25th Streets and has reported that the pavement for two feet on each side of the rails on said street is out of repair and in a dangerous
40 condition; therefore

Complaint.

Resolved, That the City Clerk serve notice on the Public Service Railway Company to repair the pavement on Avenue C, between 18th and 25th Streets and upon the failure of the said Company to make such repairs that the City proceed to do such work and collect the costs thereof from the said company.

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ANSWER.

Filed Oct. 28, 1921.

NEW JERSEY SUPREME COURT.

Hudson County.

CITY OF BAYONNE, Plaintiff, *vs.* PUBLIC SERVICE RAILWAY COMPANY, a corporation of New Jersey, Defendant.	Action at Law. ANSWER.

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The answer of Public Service Railway Company, a corporation of the State of New Jersey, having its principal office at No. 80 Park Place, in the City of Newark, County of Essex and State of New Jersey, to the complaint of the City of Bayonne:

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DEFENSE TO FIRST COUNT:

1. It admits paragraph 1 of first count.

2. It admits paragraph 2 of first count.

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3. It admits that an ordinance was passed by the City of Bayonne on September 18th, 1885, but prays leave to refer to the said ordinance for the terms and contents thereof, if it be material to the case or necessary so to do.

4. It admits that the words quoted in paragraph 4 of first count are contained in section 2 of the said ordinance.

5. It admits that said ordinance was accepted and tracks laid, and that the company did all the

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paving required by the said ordinance in the manner therein required.

6. It admits paragraph 6 of the first count.

7. It denies paragraph 7 of the first count.

8. It has no knowledge of the matters contained in paragraph 8 of the first count, except that it admits that a copy of the resolution as annexed to the complaint was served on the defendant. 10

9. It admits paragraph 9 of first count.

10. It admits receipt of the letter stated in paragraph 10 of first count.

11. It admits writing the letter stated in paragraph 11 of first count.

12. It admits receiving the letter stated in paragraph 12 of first count.

13. It admits sending the letter stated in paragraph 13 of first count. 20

14. It admits that defendant has refused to make improvements and do paving as directed and required by City of Bayonne in said notice and letters; but denies that it has refused to make any repairs to pavement which it was lawfully obliged to make.

15. It denies paragraph 15 of first count.

16. It denies paragraph 16 of first count. 30

DEFENSE TO SECOND COUNT:

1. Defendant repeats the answers made to paragraphs 1 to 13 inclusive of the first count as its answer to paragraph 1 of second count.

2. It denies knowledge of the matters contained in paragraph 2 of second count, and leaves the plaintiff to make proof thereof if the same be material or thought to be necessary. 40

3. It admits service of the notice set out in paragraph 3 of second count.

4. It admits receipt of the letter set out in paragraph 4 of second count.

5. It admits sending the letter set out in paragraph 5 of second count.

6. It admits that defendant has refused to make improvements and do paving as directed and required by City of Bayonne in said notice and letters; but denies that it has refused to make any repairs to pavement which it was lawfully obliged to make.

7. It denies paragraph 7 of second count.

8. It denies paragraph 8 of second count.

THIRD DEFENSE:

Defendant avers that it has fully met and discharged all obligation resting on it as to repairs to pavement on the highway referred to in the complaint in this cause, by law, ordinance or contract whatsoever.

FOURTH DEFENSE:

Defendant avers that there is no obligation resting on it to make any repairs outside of the rails of its railway track, its obligation being limited to the parts of the street inside of their tracks, and the plaintiff's claim is for spaces wholly without said tracks.

FIFTH DEFENSE:

Defendant avers that the work mentioned and set out in said complaint was not repairs to any pavement on the said avenue, laid by the defendant or its predecessors, but new pavements of a different and other kind of material, laid down by the City against the protest and in spite of the objections of the defendant.

FRANK BERGEN,
Attorney of Defendant.

REPLY.

Filed Nov. 9, 1921.

NEW JERSEY SUPREME COURT.

Hudson County.

City of Bayonne, Plaintiff, *vs.* Public Service Railway Company, a corporation of New Jersey, Defendant.	Action at Law. REPLY.

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The plaintiff, replying to the defendant's answer, says:

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1. Plaintiff denies each and every allegation of the answer, except such as admit the allegations of the complaint.

2. Plaintiff denies the allegations of the third defense.

3. Plaintiff denies the allegations of the fourth defense.

4. Plaintiff denies the allegations of the fifth defense and says that the defendant refused to make any repairs of any kind or description to the pavement and allowed the same to fall into a condition of disrepair. The City thereupon made such repair as was most practicable under the circumstances. The plaintiff will move to strike out the fifth defense on the ground that it does not constitute any defense to this action.

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AARON A. MELNIKER,
Attorney of Plaintiff.

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RULE FOR JUDGMENT

Filed April 17, 1922.

NEW JERSEY SUPREME COURT.

PUBLIC SERVICE RAILWAY COMPANY, Defendant. *ads.* CITY OF BAYONNE, Plaintiff,	Action at Law. ON POSTEA.

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It is ordered that judgment of non-suit be and hereby is entered in favor of defendant and against the plaintiff with costs to be taxed nisi.

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Entered April 17, 1922.

On motion of

FRANK BERGEN,
Attorney.

A true copy.

ENOCH L. JOHNSON,
Clerk.

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Notice of Appeal and Grounds of Appeal

Filed May 3, 1922.

NEW JERSEY SUPREME COURT.
Hudson County.

City of Bayonne,
Plaintiff-Appellant,
vs.
Public Service Railway Company, a corporation,
Defendant-Appellee.

Action at Law.
NOTICE OF APPEAL.

10

To Frank Bergen, Esq.,
Attorney of Defendant.

20

Please Take Notice that the plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment of non-suit entered in this cause on April 17th, 1922, in favor of the defendant and against the plaintiff, on the following grounds:—

That the Trial Court directed a judgment of non-suit against the plaintiff and in favor of the defendant, whereas said court should have denied said motion and should have submitted to the jury or should have tried the questions involved in the issues, and should have permitted the introduction of testimony bearing thereon.

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AARON A. MELNIKER,
Attorney of Plaintiff-Appellant.

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MOTION FOR NON-SUIT.

NEW JERSEY SUPREME COURT.

City of Bayonne,

vs.

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Public Service Railway Company.

Case moved April 10, 1922, before Speer, J.

A. A. Melniker for the plaintiff.

E. A. Armstrong for the defendant.

20 Mr. Armstrong: In this case it seems to me, on the plaintiff's own showing in the case, without anything that may be disputed in the matter, a non-suit would have to go; and therefore before you impanel the jury I would like to call your attention to the points of the case as we understand it.

The Court: Do these points all appear in the pleadings?

30 Mr. Armstrong: Yes. The plaintiff's allegation is that the defendant Public Service Railway Company succeeded to and is in the operation of a street railway on Avenue C in the City of Bayonne under an ordinance of September 18, 1885, to the Jersey City and Bergen Railroad Company. Section 2 of that ordinance is set out in paragraph 4 of the complaint: "Its said tracks and turnouts shall be laid in substantial manner under the supervision of the City Surveyor and it shall be the duty of said company to pave the part of any

40 street or streets through which its railroad shall

be laid that lies within the rails of any such tracks and two feet outside thereof with Belgian block pavement as soon as and whenever the balance of such street is paved, and to keep the said part of said streets so to be paved by them as aforesaid inside of their tracks at all times in good repair at their own expense.'' The suit here by the complaint brought is for the paving of two feet outside of the outer rail, the two feet that was to be primarily paved by the company with Belgian block having been paved by the city with asphalt pavement. After correspondence set out in the complaint herein this point was urged upon the city authorities and contrary obligation urged by them. That I think is the case. It is purely, it seems to me, a question of construction of this section of the ordinance. 10

The Court: (After argument) The only point that gives me any doubt at all is as to the coincidence of the definition of the word ''tracks'' with the expression used in the ordinance, ''the rails of the tracks and two feet outside.'' I do not think that the intention of the parties was to have a synonymity between the use of the word ''tracks'' and ''the outer rails of the tracks and two feet outside thereof.'' It does not seem to me as though that can be what the parties had in their minds when they passed that ordinance. It seems to me when they used the words ''inside the tracks'' they were speaking about the specific duty of repair and they meant to indicate that the railroad company was to keep the portion inside the rails in repair, and that only in case of repavement was the railroad company to pave outside of the rails. That is the way the thing would strike me the more I think about it, and that I think gives a complete meaning to every word; and it is our duty in construing an ordinance to give a meaning to every word if we can in the or- 20 30 40

dinance. That gives a meaning to the word "whenever," using it in the sense "as fast as repaving shall be done then the railroad company shall be required to bear the expense of that repaving." So I think, Mr. Melniker, that that is what I will hold, and put it plainly and firmly upon the ground that when they said, as they did say in this ordinance, that they are to keep the "part 10 of the street so to be paved by them as aforesaid inside of their tracks at all times in good repair at their own expense," they meant inside of the rails of the tracks.

Mr. Melniker: If your honor disposes of that matter in that way at this time I am wondering how I will get this matter of the subsequent conduct of the parties before the court, which I did not think was properly a part of the pleadings but would be evidence to put before the court in 20 aid of the construction of the contract. As it stands now it is not in the pleading. I merely make the statement of what we expected to prove. Of course that will not be in any record that will now go up. I thought perhaps I ought to amend the pleadings so as to bring that in, unless your honor's ruling is confined solely and entirely to the meaning of that language regardless of the subsequent conduct of the parties under the ordinance.

The Court: As I understand it, the answer to 30 that proposition is this: What you are urging upon me is what is known in the law as the doctrine of practical construction. That doctrine finds a good construction in the case of Jackson vs. Perrine, 6 Vroom, as to the elements that enter into practical construction, and I think it is one of the essential elements of the rule with respect to practical construction that it is never resorted to unless in case of ambiguity; and this language to my mind—the more I look at it the plainer it 40 seems to me that this is not a matter of ambiguity

at all. There is not any ambiguity to be deciphered by practical construction. You only resort to that when the contract to be construed is ambiguous, and it does not seem to me that this is.

Mr. Melniker: May I ask your honor to do this —I may be asking too much—

The Court: I want you to have a full opportunity for review. You are not asking for too much at all, if you ask to have anything put on the record which will give you a full and adequate chance for review. I will write anything on the record which will facilitate that review. I want you to have it. 10

Mr. Melniker: It is an important question not only to Bayonne but to every municipality in this State and to this defendant. It means not only the amount we are suing for here but the perpetual maintenance of the road. 20

The Court: Yes; and I think perhaps the best way for me to rule is as I am ruling, writing it down for you so that you may have a complete record and can take the precise question right up with the court in a case that will not perhaps amount to more than eight or ten pages—do it at very slight expense. And suppose we write it down on the record this way: that you contend that this contract is in its phraseology ambiguous and that you desire to have submitted to the jury evidence bearing upon the question of practical construction as tending to show how the parties themselves have dealt with the contract in the matter involved in the contract itself, so that that evidence might be used by the jury in determining the ambiguity existing in the contract and in determining precisely what the contract itself means. When I say "used by the jury" I mean under the instruction of the court. 30 40

Mr. Melniker: Yes; court or jury.

The Court: Yes, whichever would have the duty of passing upon it, whether the court or the jury. Of course if there is no doubt about it it is the court's job. If there is doubt about it it is the jury's job under the instruction of the court. But whatever it is, you offer the testimony of the dealings
10 of the parties pointing, in your contention, to a practical construction which would tend to show that the parties themselves both meant that the term "tracks" was to comprehend and include the rails and the space two feet on the outside of the outside rail of each track; and I decide then, in the light of your offer, that I think the contract is not ambiguous and that where the contract is not ambiguous there is no room for the application of the doctrine of practical construction, and I give
20 you an objection to that ruling on the record so that you may review it; and if there is any amendment to the pleading required in order to present that phase of the case I will say that I will permit such amendment.

Mr. Melniker: I understand then that your honor would so rule regardless of what evidence I offered of the conduct of the parties subsequent to this ordinance being passed?

The Court: Yes. I thought I had written it
30 down there. I am ruling that way because I contend the contract is not ambiguous, and if it is not ambiguous if the evidence was mountain high with respect to what the parties did it would not make the slightest bit of difference, because the acquiescence for a long while in an unfounded claim does not, excepting in the view of the doctrine of estoppel, create a right. In the absence of estoppel there would be no right created at all. I think one of our cases deals with that precise
40 phase of the case, Mr. Melniker.

Mr. Melniker: I just wanted to make myself clear on that point. This case would have to go to the court of appeals no matter how your honor ruled on it, because it is something that ought to be passed upon by the highest court. It is a question which is being raised all over the State.

The Court: This is what I had in mind: The case of Board of Freeholders of Hudson County vs. Jersey City, Hoboken and Paterson R. R. Company. Justice Gummere said: "An unfounded claim can never be given vitality by the mere failure of the person against whom it is made to repudiate it." That is the very case in which Judge White writes the dissenting opinion, concurred in by Justice Minturn. Now, if there is anything else you want to write down so that you may have it reviewed properly I want you to do it. 10

Mr. Melniker: I just wanted to make it clear that your honor would so rule even in spite of any evidence I might put in as to the conduct of the defendant in changing this pavement and in keeping it up, up to the time complained of in the complaint. 20

The Court: Yes; that evidence of course being offered to show how the parties themselves had practically construed the contract.

Mr. Melniker: Yes; the construction put on the contract by the parties themselves. 30

The Court: Yes. In that light I overrule that evidence because I do not think there is anything to be construed, the contract not being ambiguous in those particulars. You were not offering it on the ground of estoppel?

Mr. Melniker: No.

The Court: But just on the ground of the construction of the contract itself? 40

Mr. Melniker: Yes.

The Court: I want to say, Mr. Melniker, that this is an interesting point and I can readily conceive that many other cases are depending upon its correct decision, and it is my firm judgment that the case should be taken up and this point reviewed. I have therefore endeavored to write into the record, so that a review of it might be had, the offer on your part of evidence tending to show the practical construction which the parties themselves placed upon the contract after it had been executed and while it remained in force, as evincive of the intention of the parties in making the contract itself. If anything more is required to place this matter clearly on the record for review I shall be glad to assist you in any way in getting the record into such shape that a review of that question, which I think should be had, may be had; but I have no doubt that the court of errors and appeals in considering the question in the light in which it has been presented here and of the desire of both parties that this question shall be properly mooted and definitively settled by the highest court, will fully consider it and decide it.

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JUN 1 1922

New Jersey Court of Errors & Appeals

City of Bayonne, Plaintiff-Appellant, *vs.* Public Service Railway Company, Defendant-Respondent.	ACTION AT LAW. On Appeal from Supreme Court.

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BRIEF FOR APPELLANT.

Statement of the Case.

The City of Bayonne brought this suit against the Public Service Railway Company to recover the amount expended for repairing a two-foot strip of pavement alongside and outside of the rails of the respondent Company on Avenue C in the City of Bayonne, through which avenue the respondent operates a street railway.

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The pavement alongside and outside of the rails had fallen into a condition of disrepair and after repeated demands by the City upon the Railway Company to make the necessary repairs, and the refusal of the Company to make the same and its denial of any obligation so to do, the City did the work and now sues to recover the cost.

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The City bases its claim for reimbursement and its contention that the respondent is under a legal duty to make the necessary repairs upon the provision of the franchise granted by the municipality in 1885, under which the respondent is operating its railway.

Section 2 of this ordinance provides as follows:

> "That said tracks and turnouts shall be laid in substantial manner, under the su-

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> pervision of the City Surveyor, and it shall be the duty of said Company to pave the part of any street or streets through which its railroad may be laid that lies inside of the rails of any of their tracks, and two feet outside thereof, with Belgian block pavement, as soon as and whenever the balance of said street or part thereof is paved, and to keep the said parts of said streets so to be paved by them as aforesaid inside of their tracks at all times in good repair at their own expense."

The respondent contends that under this ordinance it is not obliged to maintain any pavement outside of its rails, and the Trial Court granted its motion for a non-suit on the pleadings.

Two main questions are presented by this appeal.

First: Are the words "rails" and "tracks" as used in this ordinance synonymous, and is the obligation of the respondent to *maintain* the pavement limited to the pavement inside of the *rails?*

Second: Is the language in this ordinance so free from ambiguity as to preclude the plaintiff from introducing evidence tending to show the construction placed upon the ordinance by the parties themselves?

GROUNDS OF APPEAL.

The Trial Court non-suited the plaintiff on the pleadings on the defendant's motion. The appellant contends that the motion for a non-suit should have been denied; that the ordinance imposed an obligation upon the respondent to maintain two feet of the pavement outside of the rails and that, in any event, the plaintiff should have been permitted to introduce evidence that the parties themselves had, by their own conduct, so construed the ordinance.

The Trial Court erred in granting the motion for a non-suit and in refusing to receive testimony bearing on the issues.

BRIEF OF THE ARGUMENT.

I.

The words "rails" and "tracks" as used in this ordinance are not synonymous, and the obligation of the respondent to MAINTAIN the pavement is not limited to the pavement inside of the RAILS but extends to the space occupied by its TRACKS. 10

It is the appellant's contention that the words "rails" and "tracks" are not synonymous; that the word "rails" is limited in its meaning to the metal rails which form *part* of the tracks but are not *the* tracks. The word "tracks" includes not only the rails, but the ties, ballast, way and all the other elements which make up a complete track. 20 That this distinction was in the minds of the parties at the time this ordinance was framed is evident from the use of the phrase "the rails of any of their tracks." It is, of course, a matter of common knowledge that the ties are just as essential to the operation of a railway as the rails themselves, as it would be physically impossible to use the rails unless they were fastened to ties. Consequently, it must be apparent that when the word "tracks" is used, it refers to the combination of rails and ties and other elements which 30 make up a track.

That there was good reason for imposing an obligation upon the Company to maintain the pavement inside of its tracks, rather than inside of its rails, becomes apparent when it is considered that the ties usually protrude for about 18 inches to 2 feet outside of the rails, and it is fair to assume that the Company desired to retain control of the pavement over its ties and it is also natural that the City should look to the Company 40

to maintain the pavement over the ties as the constant vibration of the ties due to the passing of cars would probably put an extraordinary strain upon the pavement immediately over them. The Company was obliged in the first instance to pave "inside of the rails of any of their tracks and two feet outside thereof," and the ordinance provides that the Company shall "keep the said parts of said streets so to be paved by them as aforesaid inside of their *tracks* at all times in good re-
10 pair at their own expense."

If it had been the intention that the Company should keep the said parts of said streets so to be paved by them as aforesaid inside of their *rails* at all times in good repair at their own expense, it would have been a simple matter to have said *rails* instead of *tracks*. But having used the word "tracks" after having just previously referred to the "rails of the tracks," it must be evident that
20 *tracks* was meant and not *rails*. And the track of a railroad is not merely the rails and ties upon which cars run, but it is the "road"; "course"; "way"; (Webster) and includes all that enters into and composes the road, the course and the way. The embankment upon which the rails and ties are laid is a part of the whole that makes a railroad track.

Gates vs. Chicago, St. Paul & K. C. Railroad, 48 N. W. 1040. 82 Iowa 518.

30 "Tracks as used in Laws 1853, Chapter 62, authorizing villages to lay out streets and highways across the track of any railroad signifies the entire roadbed, and not merely the iron or railway, but roadbed, including turnouts and switches or other contrivances."

In Re Village of Herkimer

46 N. Y. Suppl., 43 and 46.

40 *18 App. Div. (N. Y.) 568.*

"In the Act relating to the assessment of street railways and providing that the track shall be assessed as personal property, the word 'track' will be construed to include not only the ties, spikes, rails and switches but also the right to use the bed on which they are placed."

Detroit Citizens Railway Co. vs. Detroit,

125 Mich. 673.

85 N. W. 96. 10

The track is that part of a right of way on which rails and ties are laid.

Drainage Comm. vs. Illinois C. R. R.,

41 N. E. 1073.

158 Ill. 353.

I (A)

A Franchise must be strictly construed against the grantee and in favor of the municipality. 20

It is a well settled rule of construction that grants of franchise rights to street railroad companies are to be strictly construed against the grantees and in favor of the public.

28 Cyc. 883.

36 Cyc. 1363.

State vs. Newport Rwy. Co. 18 Atl. 161.

Chambersburg vs. Chambersburg Elec. Rwy. Co. 101 Atl. 922. 30

"Franchises granted by municipal corpora-
"tions, being considered in derogation of the
"right of the public in free and unobstructed use
"of the streets, are strictly construed and must
"be given the construction most favorable to the
"public when susceptible of two or more construc-
"tions; and a franchise is not to be construed
"more strongly against the municipality than the 40

"public service company because it was prepared
"with care and leisure by the former, and ac-
"cepted by the latter without like opportunity to
"consider its provisions."

"As stated by Mr. Justice Harlan in a noted
"case in the Supreme Court of the United States:

> "It is, we think, important that the Courts should adhere firmly to the salutary doctrine underlying the whole law of municipal corporations and the doctrines of the cases that grants of special privileges affecting the general interests are to be liberally construed in favor of the public, and that no public body charged with public duties be held upon mere implication or presumption to have divested itself of its powers."

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McQuillan on Municipal Corporations, Section 1652.

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"Ordinance granting right to construct and operate a street railway system is to be construed most strongly against the grantee."

Chicago vs. Chicago O. P. E. R. Co.

261 Illinois. 476.

104 N. E. 240.

Black vs. People. 220 Illinois. 444.

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77 N. E. 172.

"The grant of a franchise, insofar as it is ambiguous, is to be strictly construed against the grantee and in favor of the public."

19 Cyc. 1459.

"Grants of privileges to street railway companies by nunicipal corporations should be strictly construed against the grantee."

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Nellis on Street Railways, Section 46.

"Statutes conveying franchises and special privileges belonging to the public should be construed most favorably to the people; and all reasonable doubts in construction should be solved against the persons claiming under the grant; and words or phrases which are ambiguous or admit of different meanings are to receive a construction most favorable to the public."

Nellis on Street Railways, Section 15.

"The rule of strict construction against corporations is peculiarly applicable to grants of exclusive privileges, monopolies and powers in derogation of public rights." 10

Elliott on Railroads, Section 39.

"In determining the rights of a street railway company in the streets, the franchise is to be strictly construed against the company."

Nellis on Street Railways, Section 58.

"The charter of a railway company in common with those of other private corporations is to be strictly but reasonably construed in favor of the public and against the company wherever their interests conflict." 20

Elliot on Railroads, Section 38.

"A doubtful charter does not exist, because whatever is doubtful is decisively certain against the corporation."

Commonwealth vs. Erie Railroad, 27 Pa. State. 339. 30

I (B)

Unless relieved by contract, it is the common law duty of the company to keep in repair the part of the street occupied by its tracks.

"The common law duty of a street railway company to keep the portion of the street or highway occupied by it in repair extends, it has been held, at least to the ends of its cross ties." 40

36 Cyc. 1405.

There is a common law duty on the part of a street railway to keep the portion of the streets occupied by its right of way in good condition and repair.

Chambersburg vs. Chambersburg Elec. Rwy. Co. 101 Atl. 922.
Reading vs. United Traction Co. 52 Atl. 106.
10 *64 Atl. 446.*
Citing:—2 Wood, Railroads, pages 758, 760.
Pearce, Railroads, page 245.
Mills, Em. Dom., Sec. 198.
Elliott, Roads & Streets, page 591.
Worster vs. R. R. Co., 50 N. Y. 203.
No. Hud. Co. Rwy. Co. vs. Hoboken, 41 N. J. L. 71.
Rwy. Co. vs. State, 87 Tenn. 746.

In the case of City of Duluth vs. Duluth Street
20 Railway Co., 165 N. W. 659, the Court said:

"In the absence of contract provisions "the railway company by occupying a por- "tion of the street with its tracks becomes "obligated to keep the space so occupied, "improved or paved to correspond with "the rest of the street.

. . . .

"Where a franchise is granted to occupy "a public street it is to be construed
30 "strictly as against the grantee.

. . . .

"It is true that the liability here claimed "is based upon contract, the franchise, and "not upon a common law obligation. But "it is not amiss in construing this fran- "chise to have in mind that there is high "authority for the rule that in the absence "of contract obligation, it is the duty of the
40 "street railway company, occupying a

"street with its tracks, to maintain by pro-
"per pavement or otherwise the space so
"occupied so as to correspond with the con-
"dition in which the rest of the street is
"kept by the municipality. In Reading vs.
"United Traction Co., 215 Pa. 250; Atlan-
"tic 64, 446, the Court held that no matter
"how street railways come to occupy the
"street, unless expressly relieved from
"keeping in repair the portions occupied,
"the occupation carries with it the liability 10
"to keep in repair saying:—

" 'When street railway companies oc-
'cupy portions of streets, such portions
'are no longer in the free, unencumbered,
'and exclusive use of the public, but to
'the companies is given not only a con-
'current, but a superior right to use them
'and with this right goes a corresponding
'responsibility. . . . It is because the
'municipality, as the agent of the state, 20
'has charge of the streets, that it must
'maintain and keep them in proper re-
'pair, and when the state permits this
'charge, as to portion of the street, to be
'committed to another, it must be under-
'stood as imposing upon such party the
'responsibility that formerly rested upon
'the municipality, unless in the grant, or
'in the municipal consent thereto of the
'right to use a portion of the street, such 30
'responsibility is expressly withheld and
'its imposition continued upon the muni-
'cipality.' "

"Independent of statute or contract when a
"railway is allowed to be constructed in a public
"street, the duty attaches to have and to keep
"that part of the street occupied by its tracks,
"including that part related to the support of the
"rails, in such condition as to be free from pit-
"falls and from danger to the travelling public. 40

" . . . In addition to the element of this duty
" . . . it is only obliged by duty to restore, to
"repair—not to improve—the street."

St. Louis & S. F. R. Co. vs. Jamar.
62 S. 701.

"The state and the defendant both treat the
"case as presenting only the question of duty to
"repair, and it will be considered in that respect.
" . . . Pearce on Railroads, page 245, says:

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"The laying of a railroad across highways often requires excavations and erections, and a greater or less change in the surface. The duty, however, to restore the highway as far as may be, to its former condition, and to erect and maintain structure necessary for such restoration, is presumed to be incumbent upon the company, even without any express requirement imposed by statute. . . . It is a continuing duty."

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. . . .

"In Burritt vs. City of New Haven, 42 Conn.
"174, it is declared that the charters of corpora-
"tions which confer exclusive privileges for the
"particular advantage of the grantees are to be
"considered liberally for the benefit of the pub-
"lic, and strictly as against the corporations, and
"that the duty of a railroad company, under its
"charter, to restore a highway to its former use-
"fulness, was not discharged when it restored it
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"to a proper condition, at the time the railroad
"was constructed, but the duty was a continuing
"one. . . .

"The duty to maintain the usefulness of streets
"under charters which did not in express terms
"impose the obligation to repair was enforced in
"two Minn. cases as reported in 36 N. W. Rep.
"870, and the other in 39 N. W. Rep. 154.
" . . . It is its common law duty to keep the
"space of the highway occupied by its roadbed

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"(which extends, at least, to the ends of its cross "ties) properly graded and in good repair. . . ."

Memphis, Greenwood and Prospect Park Rwy. Co. vs. State. 87 Tenn. 746.

It is the duty of the company to maintain its tracks so as to preserve the public highway in a reasonably safe condition for public use and travel, and it was its duty to do this whether there was any ordinance requiring it to be done or not.

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Citizens Street Rwy. Co. vs. Ballard.
22 Ind. App. 151.

In the absence of any statutory provision a street railway company is bound to keep in repair that part of the street actually occupied by it.

Harrisburg vs. Harrisburg Passenger Rwy. Co. 1 Pears. 298.

Aside from the question of contractual obligation, the company is under a common law duty to keep the portions of the street occupied by its right of way in good condition and repair.

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Reading vs. United Traction Co.
52 Atl. 106.
64 Atl. 446.

Chambersburg vs. Chambersburg Elec. Rwy. Co. 101 Atl. 922.

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II.

The Trial Court Should Have Permitted the Introduction of Testimony to Show the Construction Put Upon the Ordinance by the Parties Themselves.

On the principle of contemporaneous exposition, common usage and practice under the statute or a course of conduct indicating a particular understanding of it, will frequently be of great value
10 in determining its real meaning especially where such usage has been acquiesced in by all parties concerned and has extended over a long period of time.

36 Cyc. 1139, and cases cited.
Also, *Barker vs. Crum. 198 S. W. 211,* and
Macon Co. vs. Williams, 224 S. W. 825.

Where the language of an instrument is doubtful, the construction given to it by the parties themselves is the true one.

20 *Jackson vs. Perine. 35 N. J. L. 137.*
Cited in: 59 N. J. L. 503.
61 N. J. L. 339.
75 N. J. L. 343.
81 N. J. L. 159.
91 N. J. L. 405.

"However general the words of an ancient "grant may be, it is to be construed by evidence "of the manner in which the thing granted has "always been possessed and used, under the "principle that contemporaneous construction of
30 "legislation shall be given effect."

Middlesex County vs. Public Utility Comm. 102 Atl. 1, and cases cited.

"It is a familiar rule that in case of doubt the "practical exposition or construction of a con- "tract by the parties is entitled to great, if not "controlling influence, and will usually be fol- "lowed by the courts."

Elliot on Railroads, Section 40.

40 "This understanding of the statute seems to

"have been acquiesced in by all owners of vessels "in port, and to us is strong evidence of its proper "interpretation."

The Allan Wilde, Central Trans. Co. vs. Commercial Shipping Corp. 264 Fed. 295.

CONCLUSION.

It is respectfully submitted, therefore, that it was the duty of the Company to keep in repair the pavement outside and alongside of its rails to at least the ends of its cross ties. In any event, evidence should have been admitted of the conduct of the parties indicating their own construction of the Company's duty in that respect, and the motion for a non-suit should have been denied.

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Respectfully submitted,

A. A. MELNIKER,

Attorney for Appellant.

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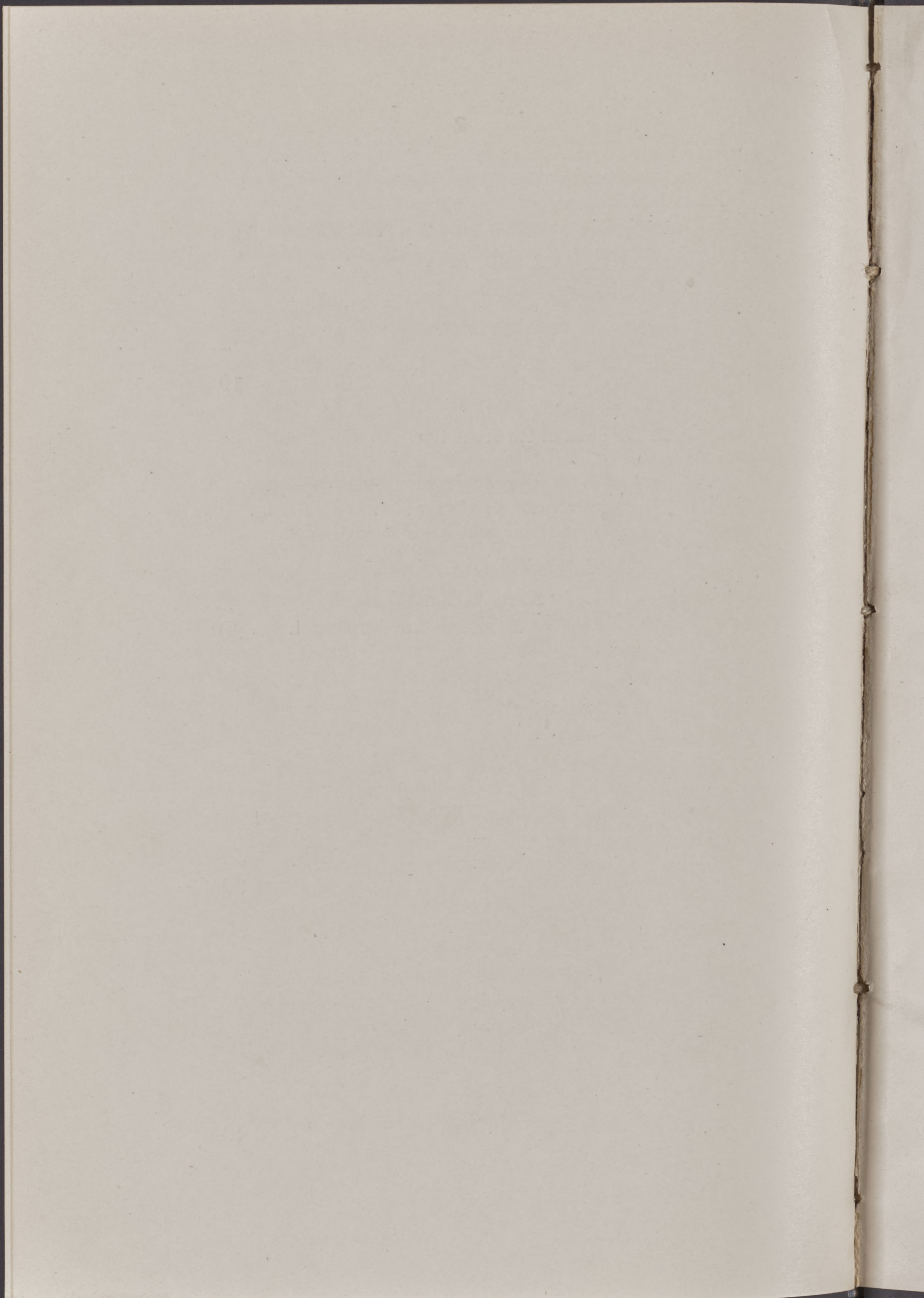

JUN. 1, 1922

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

City of Bayonne, *Plaintiff-Appellant,* *vs.* Public Service Railway Company, *Defendant-Respondent.*	*Action at Law.* *On Appeal from Supreme Court.*

BRIEF OF DEFENDANT-RESPONDENT.

Statement.

This action was brought by the plaintiff against the defendant to recover two sums, one of $15,313.80, and the other of $2,200, which it was alleged the plaintiff had spent for doing repairs to pavement outside of the tracks of the street railway of the defendant in the City of Bayonne on Avenue C between First and Fifty-fourth streets.

The city claimed to have done the work at this expense and demanded payment of the defendant, and alleges the company defendant is liable for it under the provision of an ordinance of the city hereinafter referred to. The defendant has always denied liability for such repairing. This suit was thereupon instituted.

When the case was opened to the court upon the pleadings, it appeared to be simply a matter of law upon the interpretation of the ordinance obligation. By the contention of the defendant a proper interpretation showed no liability and the defendant moved for a non-suit. With this contention by the defendant the trial court agreed and the non-suit was allowed. The plaintiff appeals.

The ordinance provision upon which the plaintiff alleges the liability of the defendant rests, being section 2 of an

ordinance of September 18th, 1885 (Case, p. 11), is as follows:

> "Sec. 2. That said tracks and turnouts shall be laid in substantial manner, under the supervision of the City Surveyor, and it shall be the duty of said Company to pave the part of any street or streets through which its railroad may be laid that lies inside of the rails of any of their tracks, and two feet outside thereof, with Belgian block pavement, as soon as and whenever the balance of said street or part thereof is paved, and to keep the said parts of said streets so to be paved by them as aforesaid inside of their tracks at all times in good repair at their own expense."

The plaintiff claims that "tracks" as used in the ordinance has a different meaning than is usually understood, and means more than the rails which constitute the tracks. In effect, the claim is, that the obligation under the ordinance to pave and the obligation for repair are co-extensive, notwithstanding different words are used to express the obligation. That "inside of their tracks" includes not only between the rails, but the two feet outside of the outer rails. The defendant insists that while the company under certain circumstances may be required to pave two feet outside of and adjoining the rails, its liability for repairs is limited to the space within the rails.

Argument.

A reading of the plain language of section 2 of the ordinance above quoted, it is submitted, leaves not the slightest room on which the City of Bayonne can base a claim to recover. It may be conceded that there are cases such as those cited in plaintiff's brief where the word "tracks" does include more than the rails which make the tracks. These, however, are cases where "tracks" is used as a generic term, referring to the whole railway structure. Each of these cases is deemed exceptional. Such interpre-

tation is never made unless the sense requires it. So far, however, from requiring such an interpretation here, the contrary is rendered necessary by the text itself. This is a case where the surface of the street and paving is concerned. In such a case the definition of track is limited to rails which make the track, see *Wilbur* v. *Trenton Pass. Ry. Co.*, 57 N. J. L., 212; also the difference between "roadbed" or "foundation" and "tracks" is pointed out in *Newark* v. *State Bd. of Taxation*, 66 N. J. L. 466, 468; *Fielders* v. *North Jersey St. Ry. Co.*, 68 N. J. L. 343, 346. The language of the ordinance, which embodies what is claimed to be the contract provision is "and it shall be the duty of said company to pave the part of any street or streets through which its railroad may be laid that lies *inside* of the rails of any of their *tracks,* and two feet outside thereof, with Belgian block pavement, as soon as and whenever the balance of said street or part thereof is paved, and to keep the said parts of said streets so to be paved by them as aforesaid *inside of their tracks* at all times in good repair at their own expense." The words "inside" and "outside" effectually show that *tracks* here mean the two *rails.* Indeed, by the very charter of the company itself (P. L. 1859, page 411), *rails* is used for *track.* So also in the first amendment (P. L. 1860, page 393). While in the third amendment (P. L. 1867, page 53), track is referred to, and "inside of the rails of any of their tracks." Besides this, in the general street railway act of 1886, we have a legislative definition of *tracks* showing it means *rails* (Comp. Stat., p. 5004, sec. 39), as well as in the Traction Act of 1893 (Comp. Stat., p. 5027, sec. 105), and also as to gauge (Comp. Stat., p. 5039, sec. 144). If it had been intended by the ordinance to require the maintenance of all of the pavement which the company thereby was required to lay, it would have been so stated instead of using the words "so to be paved by them as aforesaid *inside of their tracks* at all times in good repair at their own expense." The plaintiff's interpretation must ignore the words *inside of their tracks.* If they are

to be given any meaning at all it is a limitation. Undoubtedly that is what was meant and intended. By the interpretation made by the trial court all of the words of the ordinance have a meaning, and not some ignored. Besides which a good reason exists why such a provision should have been made, as will readily be perceived.

The case of the *City of Boston* v. *Boston Elevated Ry. Co.,* 186 Mass., 274, is quite interesting, as it is a judicial definition of "tracks" by that court, under a statute making a street railway company liable to the city for the amount of damages recovered against it for an injury occasioned by a defect in the pavement "occupied by its tracks." There were double tracks upon the street. There was a defect in the pavement between the two tracks. Damages were recovered against the city and the city brought suit against the company to be repaid under this provision. The court held:

> "The question is what is meant by the phrase 'occupied by its tracks,' in sections 32, 33, c. 113, Pub. St. 1882, which are still in force against the defendant company, Rev. Laws, c. 112, sec. 1. The plaintiff contends that it means so much of the surface of the street as lies within lines drawn parallel to the outer ends of the sleepers on which the rails rest. But we think that it means the rails and the space between them on and over which the cars pass. The provision relates to the surface of the streets, not to what is under the surface, and when considered with reference to the surface of the streets, we think that it is obvious that this is what the phrase must mean."

It seems to us this quite effectually defines "tracks." And in the opinion, and this makes it particularly applicable to the case at bar, the court went on to say:

> "The construction contended for by the plaintiff would make the provision with regard to the repair of unpaved streets 18 inches on each side the track meaningless and unnecessary."

The issue was clearly made by the pleadings. There was no question necessary to be proved to establish this and it was the duty of the court, as he did, to allow the non-suit.

As the suit is based upon contract itself and no ambiguity appears in its terms, we are at a loss to understand why the plaintiff seeks to suggest there may be some common law liability of the defendant, as he does in I (B) of his brief. However, of almost universal application is the rule to the contrary of that claimed by counsel. It is stated by Booth on Street Railways, sec. 242: "According to the decided weight of authority, no duty rests on a street railway company to pave or repave a part or the whole of the streets occupied by it, unless the obligation is created by its charter or is assumed by subsequent agreement resting upon a sufficient consideration." This is, of course, entirely distinct from the obligation to properly lay its tracks, restore the surface disturbed by it in laying the track, and the necessity for maintaining its tracks so as not to permit them to become a nuisance by being out of repair or become an obstruction to public travel. This court, in *Fielders* v. *North Jersey St. Ry. Co.*, 68 N. J. L., 343, above cited, on p. 346 says:

> "It is familiar law that a railway company, having the right to lay tracks in a public street, is bound by the general principles of the common law, and without either a specific statute or ordinance, or a contractual obligation, to lay its tracks in a proper manner, and to keep them in a proper state of repair. 2 Thomp. Negl. (2d ed.) sec. 1353. But the question of the liability of such a company for failing to keep the surface of the street in repair is quite a different question. Such a liability does not result from the mere fact that the corporation has been vested with a franchise or license of using the public street. The liability to maintain the pavement as such, if it exists, must either be rested upon some valid statute or ordinance imposing such a duty or must arise out of the obligations of a contract."

In view of this positive declaration of this court, it is unnecessary for us to criticize and distinguish the cases in this connection cited by counsel. Even if he had been able to do so, this would afford no basis to sustain his claim made under this ordinance. *Hudson County Freeholders* v. *Jersey City, Hoboken & Paterson St. Ry. Co.*, 85 N. J. L., 179. The provision of the ordinance and a proper interpretation thereof are controlling and decisive.

There is no allegation in the complaint that the city advertised for bids and let a contract for this work, as in fact it did not. It, therefore, could not lawfully do this work at the cost of the defendant. It proceeded to do the work as a part of the city expense. If it was sought to make an expenditure to be chargeable against the defendant, then, under the provision of the general act concerning municipalities (P. L. 1917, p. 319, Art. XI, sec. 1, p. 347), as the expenditure was more than $500, bids would have to be asked for and the contract awarded. It is not a case coming within the exception of that provision of the statute which is but a re-enactment in this codification of what has long existed. This express violation of the law would render illegal any claim the municipality sought to assert thereunder. *Atlantic City Water Works Co.* v. *Read,* 50 N. J. L. 665.

We ask that the judgment under review be affirmed.

E. A. ARMSTRONG,
FRANK BERGEN,
Of Counsel with Defendant-Respondent.

June Term, 1922.