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Summons.

Sealed
(~~Listed~~ October 28, 1929.)

STATE OF NEW JERSEY.

To:

PUBLIC SERVICE COORDINATED TRANSPORT:

(SEAL) You are summoned to answer the annexed complaint of the City of Bayonne, a Municipal Corporation of the State of New Jersey, in an action at law in the Supreme Court. And TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the Supreme Court at Trenton within twenty (20) 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, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this 28th day of October, 1929.

FRED L. BLOODGOOD,
Clerk.

JAMES BENNY,
Attorney.

Complaint.

(Filed November , 1929.)

NEW JERSEY SUPREME COURT

CITY OF BAYONNE, Plaintiff, *vs.* PUBLIC SERVICE COORDINATED TRANSPORT, a corporation of New Jersey, Defendant.	Action at Law. Complaint.

The City of Bayonne, the plaintiff herein, says:

1. That 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. That the defendant, the Public Service Coordinated Transport, 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.

3. That on September 18, 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 (2) of said 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 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."

5. That 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, including said Avenue C through which said railway was laid, as provided in said ordinance.

6. That thereafter and sometime prior to May 1, 1928, by mesne conveyances and assignments the defendant, Public Service Coordinated Transport, became owner of 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. That prior to May 1, 1928, the paving along said railway on Avenue C fell into a state of disrepair and became dangerous to pedestrians and others using said highway.

8. That prior to April 23, 1928 and the making of the contract by the City of Bayonne for the repairs to said pavement, notice was given to the said defendant of the dangerous condition of the pavement inside the rails of its railway track on

Avenue C between West 1st street and West 18th street and between West 25th street and West 54th street on said Avenue C in the said City of Bayonne, and although often requested so to do the said defendant absolutely refused and neglected to make such repairs to and repave the said pavement between the rails of their said railway track between said points, and the said City was forced to make said repairs and to repave said Avenue C inside the rails of the track of the defendant, between said points.

9. That on April 23, 1928, the following notice was served upon the defendant:

"To the Public Service Railway Company:

Please take notice that the Board of Commissioners of the City of Bayonne, at a meeting of said Board held April 10th instant, directed me to notify you in writing that the said City of Bayonne claims that the Act, known as Chapter 129 of the Laws of 1927, does not relieve you of the obligation of the contract entered into by you or your predecessor when the franchise was given to lay rails in Avenue C and to operate and maintain a street railway therein.

And you are further notified, that by reason of your neglect to carry out and perform your contract and obligation, the pavement between the tracks of the said railway requires repairing or relaying at this time.

You will further take notice, that the City intends repaving said Avenue C between West 25th street and West 54th street and between West 1st street and West 18th street and will keep a record of all work and materials and the cost thereof in connection with said repavement of Avenue C that is chargeable to said Railway Company under the terms of the contract between the said Company or

its predecessor and the City when the said franchise was granted and given and that a suit will be commenced against you for the recovery of the same.

THIS NOTICE is given in addition to the verbal notice to the same effect heretofore given at a conference between Judge Speer and certain members of the Board of Commissioners at the City Hall, Bayonne.

Dated: April 13, 1928.

(Signed) JAMES BENNY,
City Attorney."

10. That under date of May 4, 1928, the attorney of the defendant addressed and mailed the following letter to the attorney of the City of Bayonne:

"PUBLIC SERVICE COORDINATED TRANSPORT,

80 Park Place, Newark, N. J.

May 4, 1928.

James Benny, Esquire,
City Attorney,
Bayonne, N. J.

My dear Mr. Benny:

In some way there has filtered through to me a notice addressed by you as City Attorney to Public Service Railway Co., relative to our pavement on Avenue C, between West 25th and 54th streets and West 1st and 18th streets, and proposing to inform that company that a record will be kept of work and materials and the cost thereof in connection with the repavement of Avenue C which is chargeable to railway company under the

terms of a contract between said company or its predecessors and the City when the franchise was granted and given, and that a suit will be commenced against it for the recovery of the same.

I am writing this letter to inform you in behalf of the company that there is no obligation whatever upon the railway company to do any of the work mentioned in your notice, and no obligation on its part to pay for any of the work, any of the materials, or any cost of any kind in connection with the repavement of Avenue C, and that there is no sum of any kind chargeable to this company under terms of the contract mentioned or under the terms of any other contract, either between the company or its predecessors and the City or anybody else. I further inform you that even if there were any obligation the notice is insufficient and invalid.

Notice has been taken of the fact that you say a suit will be commenced against the company for the recovery of the sums mentioned. The company cannot, of course, prevent you from bringing the suit, but I may venture the prophecy that by no possibility can there be any recovery under it.

Very truly yours,

(Signed) WILLIAM H. SPEER.
WILLIAM H. SPEER,
General Attorney."

11. That the City of Bayonne, the plaintiff, actually did and paid for the following repairs and repavement between the rails of the track of the said defendant, which, by the terms of the said contract entered into by the defendant, or its predecessors in title, with the plaintiff, are chargeable to the defendant:

To materials and labor furnished in paving area inside the rails occupied by the trolley tracks in Avenue C between West 1st street and West 18th street, being actual cost of said work under contract with Charles T. Kavanagh, dated July 3, 1928.		
Concrete foundation, 1027 cubic yards @ $8.00	$ 8,216.00	
New granite block paving, 7374 square yards @ $5.20	38,344.80	
TOTAL	$46,560.80	
To materials furnished in paving area inside the rails occupied by trolley tracks in Avenue C between West 25th and West 54th streets, being actual cost under contract with Uvalde Asphalt Paving Co., dated June 25, 1928.		
Concrete foundation, 1284 cubic yards @ $8.00	$10,272.00	
New granite block paving, 986 square yards @ $5.53	5,452.58	
Granite block paving relaid, 12,191 square yards @ $1.50	18,286.50	
TOTAL	$34,011.08	

Making a total of eighty thousand five hundred seventy-one dollars and eighty-eight cents ($80,571.88).

12. That the reasonable cost of said work of repairing and repaving inside the rails of said railroad tracks between said points was $80,571.88.

13. The plaintiff will demand judgment for the sum of $80,571.88 with interest thereon from January 1, 1929, and costs of suit.

JAMES BENNY,
Attorney for Plaintiff.

On December 23, 1929, it was consented to that the complaint be amended by laying the venue in Hudson County.

Notice of Motion to Strike Out Complaint.

(Filed .)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

CITY OF BAYONNE, Plaintiff, *vs.* PUBLIC SERVICE COORDINATED TRANSPORT, a corporation of New Jersey, Defendant.	Action at Law. Notice of Motion to Strike out Complaint.

To the Plaintiff, City of Bayonne:

PLEASE TAKE NOTICE that I shall apply to the Supreme Court of the State of New Jersey, at the State House, in the City of Trenton, on Tuesday, the 21st day of January, 1930, at the hour of ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an Order striking out the complaint of the plaintiff, City of Bayonne, in the above-entitled cause, upon the following grounds:

1. The complaint is frivolous.

2. The complaint does not set up facts sufficient to constitute a cause of action against Public Service Coordinated Transport, defendant, in that Chapter 129 of Pamphlet Laws of New Jersey for the year 1927, being "An Act concerning the obligations of street railway companies and

traction companies in connection with the paving, repaving and repair of streets, roads and highways and prescribing the powers of the Board of Public Utility Commissioners in relation thereto", among other things, declares that "The obligations imposed by this act shall be and are in lieu and substitution of any and all other obligations of any such company to pave, repave or repair any street, road or highway, or to pay any part of the cost thereof except as herein provided, and may be enforced in the same manner as similar obligations are or may be enforced under the laws of this State", and the obligation, if any exists, sought to be enforced by the complaint herein is not one of the obligations imposed by that act, but on the contrary is one from which by that act defendant Public Service Coordinated Transport is relieved and absolved; and defendant denies that any such obligation was created by said ordinance, and denies that the City of Bayonne was possessed of legal power to exact the same.

3. Said complaint does not set forth facts sufficient to constitute a cause of action against the defendant therein, inasmuch as under existing legislation in the State of New Jersey no such obligation is either existent or enforceable, and no facts are alleged in said complaint exempting or excluding said plaintiff from the provisions of Chapter 129 of the Laws of 1927.

4. Whatever obligation, if any, was created by the ordinance adopted on September 18, 1885, by the City of Bayonne, as alleged in said complaint, was created (and said ordinance was enacted and the franchises thereunder accepted) subject to the reserved power of the State of New Jersey to act on its own behalf in a manner which might in

effect nullify it, and said State of New Jersey by Chapter 129 of the Laws of 1927 has so acted and has so nullified the alleged obligations of said ordinance of September 18, 1885, which ordinance is the sole source from which an obligation to repair or repave is alleged in said plaintiff's complaint to proceed, and consequently there are no facts sufficient to constitute a cause of action against said defendant alleged in said complaint.

WILLIAM H. SPEER,
Attorney of Defendant.

Dated, December 24, 1929.

Opinion.

(Filed January 28, 1930.)

NEW JERSEY SUPREME COURT.

No. 419, January Term, 1930.

City of Bayonne,
Plaintiff,

vs.

Public Service Coordinated Transport, a corporation of New Jersey,
Defendant.

Argued January 22, 1930; decided on motion to strike complaint.

James Benny, Esq., for plaintiff;

William H. Speer, Esq., for defendant.

Before: Justices Parker, Black and Bodine.

Bodine, J.: The complaint of the City of Bayonne, which the defendant moves to strike, alleges that under city ordinance of September 18, 1885, the defendant's predecessor, the Jersey City & Bergen Railroad Company, laid tracks on Avenue C from First Street to the Morris Canal, and was obliged to pave and repair with Belgian block between the rails of its tracks and for a space two feet wide outside thereof. Prior to August 23, 1928, the paving along Avenue C became dangerous. The defendant refused, upon request, to repair the same and the city incurred

an expense of $80,571.88 for repaving, which it seeks to recover.

The defendant's position is that its obligation is controlled solely by Chapter 129 of the Laws of 1927, and that whatever its duties may have been under the ordinance, the statutory enactment has changed the same and that hence, there can be no recovery. The statute, in so far as pertinent, is:

> "Whenever any municipality, board or body, having authority so to do, shall pave or repave any street or highway upon which are located the tracks of any street railway company or traction company, such company shall, at the same time and at its own cost, and expense, put its tracks and track structure in good operating condition under the jurisdiction and control of the Board of Public Utility Commissioners. The obligations imposed by this act shall be and are in lieu and substitution of any and all other obligations of any such company to pave, repave or repair any street, road or highway, or to pay any part of the cost thereof except as herein provided, and may be enforced in the same manner as similar obligations are or may be enforced under the laws of this state."

We think the statute is controlling.

> "Our constitution does not, like the constitutions of some states, confer upon municipalities the right to grant street franchises. We have been careful to keep the sovereignty of the state unimpaired and have not parceled out the sovereign powers among minor political subdivisions. Municipalities with us act solely by virtue of legislative authority and as legislative agents.
>
> "The powers of municipalities in the granting of franchises to street railways are to be found in the Traction Act of 1893 (Comp. Stat., p. 5021), and the act of 1896 (Comp.

Stat., p. 5040). They are limited to giving consent to the construction, operation and maintenance of the street railway, the location of tracks, and imposing lawful restrictions.

"* * * They nowhere expressly authorize the municipality to contract; they nowhere declare that the consent and acceptance constitute a contract. Section 32 merely declares that the consent and acceptance shall have the 'force and effect' of a contract. This language would be unnecessary if the consent and acceptance were in fact a contract, in the full sense of the word, for a contract necessarily has such force and effect. It must be because the consent and acceptance are in the nature of municipal legislation rather than of private agreement that the legislature thought it necessary to add that they should have the force and effect of a contract." Atl. Coast Elec. Ry. *v.* Public Utility Board, 92 N. J. L. 169, 170.

This view also finds support in the decision of the Supreme Court of the United States. Mr. Justice Butler, saying in *Railroad Com'n of Cal.* v. *Los Angeles Ry. Corp.*, 50 Supreme Court Reporter, 72:

"'The surrender, by contract of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized * * *. The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required'. And dealing with the charter provision there relied on by the company, the court said (211 U. S. 274, 29 S. Ct. 52): 'The charter gave to the council the power "by ordinance * * * to regulate telephone ser-

> vice and the use of telephones within the city * * * and to fix and determine the charges for telephones and telephone service and connections.'' This is an ample authority to exercise the governmental power * * * but entirely unfitted to describe the *authority* to contract. It authorizes command, but not agreement'.''

The legislature has the power to provide and has provided the sole method controlling the pavement, repavement and repair of that portion of the streets and highways used by street railways. The act of 1927 completely supersedes the provisions of the ordinance and governs the liability of the street railway under the circumstances.

However, it appears that while the ordinance calls for paving and repair of a space on the highways between and contiguous to the rails, the city has repaved the street and the space between and contiguous to the rails. The case is, therefore, controlled by *Jersey City* v. *Public Service Rwy. Co.,* 101 N. J. L. 341, where Mr. Chief Justice Gummere said:

> ''The question involved in the determination of this litigation is whether the obligation on the part of the railway company to keep the pavement between its rails and for a space of two feet on the outside thereof in good repair, at its own expense and according to the requirements of the governing body of the municipality, imposes upon it the duty of paying a proportionate part of the cost of a new pavement whenever, in the judgment of the municipal authorities, it is to the interest of the municipality that such improvement should be made. This question is not a novel one in this court. In Dean *v.* Patterson, 67 N. J. L. 199, the Supreme Court held that the provision of an ordinance requiring a street railway company to keep and maintain

the portion of the street inside its rails, and for a designated distance outside of them in good and sufficient repair, did not carry with it the obligation to a proportionate part of the expense of repaving, and this conclusion was approved, on review, by this court. 68 *Id.* 664. In the later case of Freeholders *v.* Jersey City, Hoboken and Paterson Street Railway Co., 85 *Id.* 179, the matter presented for adjudication was essentially the same."

The motion to strike the complaint will be granted.

Order.

(Judgment entered February 14, 1930.)

NEW JERSEY SUPREME COURT.

No. 419, January Term, 1930.

CITY OF BAYONNE, Plaintiff, *vs.* PUBLIC SERVICE COORDINATED TRANSPORT, a corporation of New Jersey, Defendant.	Action at Law. On Motion to Strike Out Complaint. Order.

Plaintiff having filed its complaint herein, and defendant having moved to strike out the same upon the ground that the same is frivolous, does not contain a statement of facts sufficient to constitute a cause of action against defendant, and

that whatever obligation, if any, ever existed, defendant had been relieved and absolved from by Chapter 129 of the Laws of 1927, etc.; and said motion having come on to be heard before the Supreme Court of the State of New Jersey at the State House, in the City of Trenton, on January 22, 1930, in the presence of James Benny, attorney for and of counsel with plaintiff, and William H. Speer, attorney for and of counsel with defendant, and the Court having duly considered said complaint, the oral arguments of counsel and their briefs, and being satisfied that the complaint is open to the objections urged by defendant in its notice of motion, and that said motion should be granted,

It is, on this day of February, A. D. 1930, ordered that defendant's motion to strike out plaintiff's complaint be and the same hereby is granted, and said complaint is struck out, with costs.

Entered February 14, 1930,
on motion of
William H. Speer,
Attorney.

A true copy.

Fred L. Bloodgood,
Clerk.

Notice of Appeal and Grounds of Appeal.

(Filed January 15, 1931.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

CITY OF BAYONNE, Plaintiff, *vs.* PUBLIC SERVICE COORDINATED TRANSPORT, a corporation of New Jersey, Defendant.	Notice of Appeal and Grounds of Appeal.

To:

WILLIAM H. SPEER, Attorney for the defendant, or to whom it may concern:

PLEASE TAKE NOTICE that the plaintiff in the above cause appeals to the Court of Errors and Appeals in the last resort in all cases in New Jersey from the whole of the judgment entered in this cause on the 14th day of February, 1930, on the following grounds, to wit:

1. Because the Supreme Court erred in giving judgment for the defendant instead of the plaintiff.

2. The act passed March 22nd, 1927, entitled, "An act concerning the obligations of street railway companies and traction companies in connection with the paving, repaving and repairing of streets, roads and highways and prescribing the

powers of the board of public utility commissioners in relation thereto", is unconstitutional in that it impairs the obligation of contracts and especially the obligation of the contract entered into by the Jersey City and Bergen Railroad Company, the predecessor in title of the defendant. Said contract was made by said company or its predecessor in title with the plaintiff on the 18th day of September, 1885.

3. The ordinance so passed by the plaintiff, granting the right to the Jersey City and Bergen Railroad Company, the predecessor in title of the defendant, is a contract.

4. The Legislature of the State of New Jersey granted to the City of Bayonne, by its enactment of the act entitled, "An act revising the act to incorporate the City of Bayonne, in the County of Hudson and State of New Jersey, approved March 10, 1869", which revised act was approved March 22, 1872, as well as by other acts of the Legislature, the right to make contracts with railroad companies regulating the use of streets, avenues and public places by such railroad companies.

Respectfully yours,

JAMES BENNY,
Attorney of Plaintiff.

Service of the within notice is hereby acknowledged this 13th day of January, 1931.

WILLIAM H. SPEER,
Attorney of Defendant.

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

New Jersey Court of Errors and Appeals

CITY OF BAYONNE, *Appellant,* *vs.* PUBLIC SERVICE COORDINATED TRANSPORT, a corporation of the State of New Jersey, *Appellee.*	*On Appeal.* #83 May term 1931

BRIEF ON BEHALF OF PUBLIC SERVICE COORDINATED TRANSPORT.

The facts of this case stated in the complaint are few and simple.

It is stated in the complaint that the City of Bayonne is a municipal corporation of New Jersey. Defendant, Public Service Coordinated Transport, is a corporation organized and existing under the laws of the State of New Jersey, from which it derives its powers, and operates a street railway in and along Avenue C and other public streets and highways in the City of Bayonne.

That on September 18, 1885, the City of Bayonne adopted an ordinance giving consent to the Jersey City and Bergen Railroad Company to lay tracks along Avenue C from First Street to the Morris Canal, and other public streets and highways in the City of Bayonne, to operate street railway cars thereon. Section 2 of said ordinance provided:

> "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.''

That pursuant to said consent, Jersey City and Bergen Railroad Company laid its tracks along said streets and operated its cars thereon, and paved that part of the streets, including said Avenue C, thru which said railway was laid, as provided in said ordinance.

That thereafter and prior to May 1, 1928, Public Service Coordinated Transport by mesne conveyances and assignments became owner of said railway and has been since and is now operating the same under said franchise or ordinance under its charter.

That prior to May 1, 1928, the paving along said railway on said Avenue C fell into a state of disrepair and became dangerous to pedestrians and others using said highway. That prior to April 23, 1928, said City of Bayonne gave notice to defendant of the dangerous condition of the pavement inside the rails of its railway tracks on Avenue C between West 1st Street and West 18th Street, and between West 25th Street and West 54th Street, in the City of Bayonne, and requested defendant to make repairs to and repave the pavement between the rails between the points aforesaid, which the company refused to do, and the City was forced to make the repairs and repave said Avenue C inside the rails of the track of the defendant between said points.

That thereafter, on April 23, 1928, notice was served on Public Service Coordinated Transport that the City intended *repaving* said Avenue C between the points aforementioned, and would keep a record of all work and materials and the cost thereof in connection with the repavement of Avenue C chargeable to the railway company, and that suit would be commenced for the recovery of the same.

That on May 4, 1928, Public Service Coordinated Transport replied to this notice that it was under no obligation to pay for any part of the work or materials or any cost of any kind in connection with the repavement of Avenue C. That the City of Bayonne did and paid for certain repairs and repavement between the rails and the tracks of the defendant, the cost of which was $80,571.88, and that the City demanded such sum with interest from January 1, 1929, with costs of suit.

Defendant served notice upon the City that it would move to strike out said complaint on several grounds, among which were that the complaint did not set up facts sufficient to constitute a cause of action against the defendant, in that Chapter 129 of the Laws of New Jersey for the year 1927, being "An Act concerning the obligations of street railway companies and traction companies in connection with the paving, repaving and repair of streets, roads and highways and prescribing the powers of the Board of Public Utility Commissioners in relation thereto," among other things declares that "The obligations imposed by this act shall be and are in lieu and substitution of any and all other obligations of any such company to pave, repave or repair any street, road or highway, or to pay any part of the cost thereof except as herein

provided, and may be enforced in the same manner as similar obligations are or may be enforced under the laws of this State," and that the obligation, if any existed, sought to be enforced by the complaint was not one of the obligations imposed by that act, but on the contrary was one from which by that act Public Service Coordinated Transport was relieved and absolved; and that defendant denied that any such obligation was created by said ordinance, and denied that the City of Bayonne was possessed of any legal power to exact the same. That said complaint did not set forth facts sufficient to constitute a cause of action against the defendant, inasmuch as under existing legislation in the State of New Jersey no such obligation is either existent or enforceable, and no facts were alleged in said complaint exempting or excluding the City of Bayonne from the provisions of Chapter 129 of the Laws of 1927. That whatever obligation, if any, was created by the ordinance adopted on September 18, 1885, by said City of Bayonne, as alleged in the complaint, was created (and said ordinance was enacted and the franchises thereunder accepted) subject to the reserved power on the part of the State of New Jersey to act on its own behalf in a manner which might in effect nullify it, and the said State of New Jersey by Chapter 129 of the Laws of 1927 had so acted and had so nullified the alleged obligations of said ordinance of September 18, 1885, which ordinance is the sole source from which an obligation to repair or repave was alleged in the complaint to proceed, and consequently there were no facts sufficient to constitute a cause of action against the defendant alleged in the complaint.

The motion was heard by the Supreme Court *en banc* on January 22, 1930, which Court handed

down an opinion granting the motion to strike the complaint.

The opinion of the Supreme Court is reported in 148 Atlantic Reporter 611, and it completely disposes of the issues involved in the case and sought to be raised by plaintiff's brief in this court. In the opinion of the Supreme Court it is said, and correctly, that "The powers of municipalities in the granting of franchises to street railways are to be found in the Traction Act of 1893 (Comp. Stat. p. 5021), and the act of 1896 (Comp. Stat., p. 5040). They are limited to giving consent to the construction, operation and maintenance of the street railway, the location of tracks, and imposing lawful restrictions."

While it is true, as said by the Supreme Court, that these are the existing statutes relating to the powers of municipalities in the granting of franchises to street railways, it is quite clear that the so-called granting of franchises is in essence no more than the granting of consent for the use of streets by a corporation whose franchises had already been granted by the legislature of the State. As was accurately stated by Mr. Justice Swayze in his admirable opinion in the Supreme Court in *Collingswood Sewerage Company* vs. *Collingswood,* 91 N. J. L. 20, which statement was afterwards affirmed by the Court of Errors and Appeals in 92 N. J. L. 509—

> "All the franchises, rights, powers and privileges vested in these companies, including the right to lay pipes in the public streets, comes to them *by direct legislative grant.* The authority conferred upon the municipalities is the right to suspend the present enjoyment of them by refusing to consent to the user of their streets, except upon conditions which they may name. And even in the withholding of such consent, and

> in the imposition of conditions if the consent be accorded, the municipalities are exercising a mere delegated authority, are acting as mere agents of the legislature."

It is perfectly clear that the ordinance of September 18, 1885, upon which appellant relies in this case, was not and could not have been passed in pursuance of any power or authority granted by either of those statutes (the act of 1893 or that of 1896), since the ordinance antedated the earlier by eight years and the later by eleven years.

Appellant being aware of the inapplicability of either of these statutes, seeks to derive the power of the City of Bayonne to grant this consent from the act incorporating the City of Bayonne, P. L. 1872, p. 686, which on page 15 of its brief counsel for the City says enacted as follows:

> "That the said board of councilmen shall by their title, The Mayor and Council of the City of Bayonne, have power to pass, enforce, alter and repeal ordinances to take effect within said city for the following purposes, to wit:
>
> 'To regulate the use of streets, avenues and public places by foot passengers, vehicles, railways and engines and dummy engines.' Sec. 40, Subdivision 25."

And he claims it is further enacted by the act of 1872—

> "That the board of councilmen are hereby empowered to cause all or any of the improvements authorized by this act to be made in any of the streets, roads or avenues, whether the same is used as a plank road, railroad or otherwise (except so far as such improvement may interfere with the corporate rights of such plank road or railroad) in and upon all streets, roads or avenues that have been or shall hereafter be dedicated to

> public use, whether they have been actually opened to the public travel or not, and any or all of said improvements may be made in a part of any such street, road or avenue in said city, and the board shall have power to regulate the position and constructon of all railroads to be laid in any street, road or avenue of said city." Sec. 73.

Counsel then says, "Under the above legislation the City passed an ordinance granting to the Jersey City and Bergen Railroad Company a franchise to lay tracks in the City of Bayonne and to operate its cars thereon."

The statutes of 1893 and 1896 avouched by the Supreme Court as being those in which are to be found the powers of municipalities in the granting of franchises to street railways, and which the Supreme Court states "are limited to giving consent to the construction, operation and maintenance of the street railway, the location of tracks, and imposing lawful restrictions," are certainly as strong as if not stronger than the sections of the charter of the City of Bayonne hereinbefore set out. Consequently, the opinion of the Supreme Court in the matter *sub judice* is not at all inimically affected by the citation of the acts of 1893 and 1896 instead of the charter of the City of Bayonne of 1872, and all the observations in the opinion of the Supreme Court are equally applicable to the 1872 charter as to the acts of 1893 and 1896, and are completely dispositive of the case against the claims of the City of Bayonne.

All that any of the legislation hereinbefore set forth—either the acts of 1893 and 1896 or that of 1872—grants is a power in the City to regulate the use of the streets by certain instrumentalities and the position and construction of the tracks thereof to be laid in said streets.

That such grant of power is altogether inefficacious to enable the City to make an irrepealable and unimpairable contract bargaining away the police power of the State is so completely settled in the State of New Jersey and in the Supreme Court of the United States that a citation of the innumerable authorities bearing upon the subject would reach to the extent of a volume.

In *Home Telephone Co.* vs. *Los Angeles,* 211 U. S. 265, this subject was exhaustively dealt with, and the Court there said (p. 272):

> "This ordinance, enacted by the city council, which exercises the legislative and business powers of the city, and, as has been shown, the charter power of regulating telephone service and of fixing the charges, contains, it is contended, the contract whose obligation the subsequent ordinances fixing lower rates, impaired. Two questions obviously arise here. Did the city council have the power to enter into a contract fixing, unalterably, during the term of the franchise, charges for telephone service and disabling itself from exercising the charter power of regulation? If so, was such a contract in fact made? The first of these two questions calls for earlier consideration, for it is needless to consider whether a contract in fact was made until it is determined whether the authority to make the contract was vested in the city. The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. *No other body than the supreme legislature* (in this case, the legislature of the State) *has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of*

any other political subdivision of the State are not sufficient. Specific authority for that purpose is required. This proposition is sustained by all the decisions of this court, which will be referred to hereafter, and we need not delay further upon this point. * * *

"The facts in this case which seem to us material upon the questions of the authority of the city to contract for rates to be maintained during the term of the franchise are as follows: The charter gave to the council the power 'by ordinance * * * to regulate telephone service and the use of telephones within the city, * * * and to fix and determine the charges for telephones and telephone service and connections.' This is an ample authority to exercise the governmental power of *regulating* charges, but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement. Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an ordinance 'to fix and determine the charges.' It authorizes the exercise of the governmental power and nothing else. We find no other provision in the charter which by any possibility can be held to authorize a contract upon this important and vital subject. Those relied on for that purpose are printed in the margin."

But we do not need to travel outside the boundaries of the jurisprudence of our own State to find this question completely set at rest. In *Collingswood Sewerage Co.* vs. *Collingswood*, 92

N. J. L. 510, the Court of Errors and Appeals used the following language:

> "One of the principal grounds of appeal is that the ordinance of the borough, and the acceptance by the sewerage company of the provisions thereof, constitute an inviolable contract between the parties which the board of public utility commissioners has no power to set aside or disregard. We concur in the disposition made of this contention by the Supreme Court, and in the reasoning of Mr. Justice Swayze upon the point. We observe, however, in his opinion, what seems to us to be an inaccurate expression, namely, that 'An ordinance of this kind is a grant upon condition rather than a contract.' The statute of 1898 does not exhibit any purpose on the part of the legislature to clothe the municipalities affected thereby with authority to grant to sewerage companies organized thereunder any franchise, right, power or privilege whatever. On the contrary, all of the franchises, rights, powers and privileges vested in these companies, including the right to lay pipes in the public streets, comes to them by direct legislative grant. The authority conferred upon the municipalities is the right to suspend the present enjoyment of them by refusing to consent to the user of their streets, except upon conditions which they may name. And even in the withholding of such consent, and in the imposition of conditions if the consent be accorded, the municipalities are exercising a mere delegated authority, are acting as mere agents of the legislature. It cannot be doubted that if the right to use the streets of the borough of Collingswood had been granted by the state to the sewerage company without condition or limitation, and the sovereign itself had fixed the maximum charge to be made, it would have power to change the rate whenever in its judgment conditions arose which justified such action. To hold that by delegating the rate-fixing

> power to its creature it had deprived itself of the right thereafter to modify the rate, would be tantamount to declaring that the creature is greater than the creator. It would be strange, indeed, if the state, which has power to terminate the existence of the municipalities created by it whenever it may see fit, could not revoke authority granted by it to them, and, in the exercise of its sovereignty, cancel conditions which it had permitted them to impose upon other classes of corporations which had also been created by it."

A case bearing directly upon this subject is *Public Service Rlwy. Co.* vs. *Board of Public Utility Commrs.*, in which Woolley, *C. J.*, said:

> "Whatever obligation an ordinance locating street railway tracks and prescribing rates of fare may create between a municipality and an utility company, it does not bind the State. Ordinances raising such obligations are enacted, and franchises thereunder are accepted, subject to the reserved power of the State to act on its own behalf in a manner which may in effect nullify them."

This statement of the undoubted governing rule is followed by a full citation of authorities in support thereof.

Some other authorities are cited in the opinion of the Supreme Court in this case, and other cases are *O'Brien* vs. *Public Utility Board,* 92 N. J. L. 45, aff'd 92 N. J. L. 587; *Atlantic Coast, etc. Co.* vs. *Public Utility Board,* 92 N. J. L. 168; *Bayonne* vs. *Passaic Water Co.,* 98 N. J. Eq. 174; *Manigault* vs. *Springs,* 199 U. S. 473. A recent case in New Jersey upon this subject is *Hackensack Water Co.* vs. *Public Utility Board,* 96 N. J. L. 184, and a recent case in the Supreme Court of the United States is *Henderson Water*

Co. vs. *Corp. Comm. of North Carolina,* 269 U. S. 278.

I set down here an excerpt from the opinion of this Court in *Atlantic Coast Elec. Rlwy. Co.* vs. *Public Utility Board,* 92 N. J. L. 172, where the Court said:

> "There is, as we have already said, no express grant of power to the municipality to fix rates or to contract as to rates. The power is implied from the power to grant or refuse consent to a location of tracks and to impose lawful restrictions. *Jersey City and Hoboken Horse R. Co.* v. *Jersey City and Bergen R. Co.,* 21 N. J. Eq. 550; *Jersey City* v. *Jersey City and Bergen Railway Co.,* 70 N. J. L. 360. Neither in section 1 nor section 7 of the act of 1893, nor in the act of 1896, is there any mention of a contract, nor does the title of the ordinance granting consent indicate an intention to contract as to rates of fare, or even to impose lawful restrictions; it purports only to grant consent to the construction, operation and maintenance of a new line of street railway, a location of the route, and a location of the tracks and rails. Since the power to contract as to fares is only an implied power, the implication ought not to be extended so as to restrict the sovereign power of the state unless we are compelled to that result by the necessity of giving meaning to the words 'force and effect of a contract.' Such a result is not necessary. Full effect can be given to the language by holding that the force and effect of a contract given by section 32 is the force and effect of a contract by which the municipality and the railway company—the only parties thereto—are bound, but that no restriction is thereby implied on the sovereign powers of the state, whether to fix just and reasonable rates as subsequent conditions may make desirable, or to exercise the taxing power or the police power. As between the parties, the consent

and acceptance have force and effect as a contract, as was held in *Reed* v. *Inhabitants of Trenton,* 80 N. J. Eq. 503, and in *Asbury Park Street R. R. Co.* v. *Township of Neptune,* 75 *id.* 562; but it is a contract subject to the state's sovereign power over rates, and when as in this case, the state through its board of public utility commissioners exercises its sovereign power over rates, the contract rights of the parties must yield. This gives the municipal action the force and effect of a contract, but not the force and effect of an irrepealable contract.

"Even the implied power of the municipality to contract is under the statute limited. It is implied from the power to impose restrictions, but the statute requires that the restrictions be lawful, and they must like all provisions of municipal ordinances be reasonable. *Rutherford* v. *Hudson R. Traction Co.,* 73 N. J. L. 227. It would not be reasonable for a municipality without express power for the purpose to tie the hands of the state forever.

"Not only must the restrictions be reasonable, they must be lawful. The word 'lawful' may mean lawful at the time of the consent and acceptance, or lawful from time to time and at the time the controversy arises. If we adopt the former meaning, the word at the date of the ordinance in 1897, as applied to rates, meant just and reasonable rates as at common law, and that meant just and reasonable rates from time to time, as cost of service and other circumstances vary; the power to fix unchangeable or unreasonable rates could not be implied from the words 'lawful restrictions.' But it is the latter meaning that had become the settled one in the United States Supreme Court before 1897, the date of the ordinance now before us. In *Ruggles* v. *Illinois* (1883), 108 U. S. 526, the railroad company was authorized to pass by-laws regulating the affairs, business and interest of the com-

pany, provided they were not repugnant to the constitution and laws of the United States or the State of Illinois. Rates of fare had been fixed pursuant to the by-laws. The question arose in a case involving the legality of a passenger fare. The court said: 'Clearly under this authority no by-law can be established by the directors that does not conform to the laws of the state, and this, whether the laws were in force when the amended charter was granted or came into operation afterward. The power of the company for the regulation of its own affairs was thus in express terms subjected to the legislative control of the state. The corporate power was a continuing one and intended for the ordering of the affairs of the company as circumstances might from time to time require. The reversed control by the state was also continuing in its nature, and manifestly intended for the protection of the public whenever in the judgment of the legislative department of the government the necessity should arise.' This rule has been applied in the *Railroad Commission Cases* (1886), 116 *id.* 307, and recently, in *Owensboro* v. *Owensboro Water Works Co.* (1903), 191 *id.* 358, 370. In *Freeport Water Co.* v. *Freeport City* (1901) 180 *id.* 587,600, it was held that a statute authorizing a contract between a city and a water company for water at such rates 'as may be fixed by ordinance,' meant, 'as may be fixed by ordinance from time to time,' and not as may be fixed by ordinance at the date of the contract. In the most recent case it was held that a proviso that rules for the management and operation of lines of a street railway company 'shall not conflict with the laws of the state,' by fair construction means the laws as they shall from time to time exist. *Puget Sound Traction Co.* v. *Reynolds*, (1917) 244 *id.* 574. Following this rule of construction, the lawful restrictions authorized by the Traction act of 1893 must be lawful from time to time, that is at all times,

and hence at the present time; from which it follows that they must not be in conflict with the Public Utility act of 1911."

* * * * * * * *

I set down here for convenient reference Chapter 129 of the Laws of 1927, pp. 243 and 244, which reads as follows:

"An Act concerning the obligations of street railway companies and traction companies in connection with the paving, repaving and repair of streets, roads and highways and prescribing the powers of the Board of Public Utility Commissioners in relation thereto.

"BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

"1. Whenever any street railway company or traction company shall disturb the pavement of any street, road or highway for the construction, reconstruction, repair or removal of its tracks, such company shall, at its own cost and expense, restore said pavement, including the base or foundation thereof, to the same condition as before the disturbance thereof, to the satisfaction of the board or body having charge of such street, road or highway. Whenever any part of the pavement between the tracks and eighteen (18) inches outside thereof on any street, road or highway upon which is located the tracks of any street railway company or traction company has heretofore been or shall hereafter be damaged by reason of the operation of the street railway cars over such tracks and such company at the time of the passage of this act is obligated to repair such damage and fails to repair the same, any State board or any political subdivision of the State having control of any such street, road or highway may apply to the Board of Public Utility Commissioners for an order directing said company to repair the said pavement to the extent that it may

have been damaged as aforesaid, which board is hereby given jurisdiction to hear and determine the matter and to make such order in accordance herewith as in its judgment may be just and reasonable. Whenever any municipality, board or body, having authority so to do, shall pave or repave any street or highway upon which are located the tracks of any street railway company or traction company, such company shall, at the same time and at its own cost and expense, put its tracks and track structure in good operating condition under the jurisdiction and control of the Board of Public Utility Commissioners. The obligations imposed by this act shall be and are in lieu and substitution of any and all other obligations of any such company to pave, repave or repair any street, road or highway, or to pay any part of the cost thereof except as herein provided, and may be enforced in the same manner as similar obligations are or may be enforced under the laws of this State. Nothing herein contained shall be construed to relieve any such company from the repayment of any money which has heretofore been advanced or expended by any S[illegible] county or municipal board or body having control of streets, roads or highways, for any paving heretofore done under and by virtue of a specific contract or agreement made and entered into between any such board or body and such company providing for the repayment thereof, but the obligation for such repayment shall be and remain enforceable as if this act had not been passed.

"2. All acts and parts of acts inconsistent with the provisions of this act be and the same are hereby repealed and this act shall take effect immediately.

"Passed March 23, 1927."

* * * * * * * *

In the brief on behalf of the City of Bayonne, in support of the contention under Point I, to

the effect that "the act, being Chapter 129, Pamphlet Laws of New Jersey for the year 1927, is unconstitutional," it is asserted that its unconstitutionality consists in that it impairs the obligation of the contract made and entered into by the Jersey City and Bergen Railroad Company, the predecessor in title of the defendant, and the City of Bayonne.

Enough has been hereinbefore set forth to completely demolish that suggestion and argument. It has been hereinbefore demonstrated that even if Bayonne possessed power to pass the ordinance, whatever obligation said ordinance may have created between the City of Bayonne and the defendant, it does not bind the State. Ordinances raising such obligations are enacted and franchises thereunder are accepted subject to the reserved power of the State to act on its own behalf in a manner which may in effect nullify them. *Public Service Rlwy. Co.* vs. *Public Utility Board, supra,* and other cases cited.

* * * * * * * * *

The extremity to which appellant's counsel has been driven is demonstrated by the culpable lack of frankness shown in the brief of the City of Bayonne. On page 9 thereof appears the following:

> "*Dillon on Municipal Corporations,* 5th Ed., Vol. 3, Sec. 1242, lays down the law as follows:
>
> "A legislative grant of the right to use the city streets for a public service upon condition of the performance of the service by the grantee, when accepted and acted upon by the grantee, is a contract between the grantee and the State which is protected by the Constitution of the United States and which cannot be impaired by subsequent state legislation. When the grant of the right to

> so use the streets flows from the act of the municipality similar principles apply. The municipality acts by virtue of delegated authority from the Legislature and as a representative or agent of the State for that purpose; hence, an ordinance of the city made pursuant to legislative authority, granting the right to use the streets of the city for a railroad or for gas or water mains and pipes, or for electric poles, wires or conduits, or for any other recognized public service, is, when accepted and acted upon by the grantee, a contract within the protection of the Federal Constitution, and new conditions cannot, in the absence of reserve power, be imposed on the exercise of the right granted."

It will be observed in the above quotation that a period is placed by counsel for appellant after the last word of the quotation, *granted.* If the Court will turn to section 1242 of Dillon on Municipal Corporations, Fifth edition, volume III, it will find that there is a comma after the word *granted,* and then that word is followed by this extremely illuminating language: "*except, as we shall hereafter see, so far as these conditions may be authorized by the exercise of the police power.*" We will therefore look thereafter in Dillon to see how far these conditions may be authorized by the exercise of the police power.

By turning to section 1269 in the same volume, we read—

> "Although a franchise or privilege to use the city streets is, when accepted and acted upon, a contract which cannot be impaired as well as a vested property right which cannot be taken except by the power of eminent domain, these franchises and privileges are not exempt from the exercise of the police power of the State either operating directly by legislative enactment or by delegation to the municipality. It is a general rule that

> the right to exercise the police power cannot be alienated, surrendered, or abridged, either by the legislature or by the municipality acting under legislative authority, by any grant, contract or delegation, because it constitutes the exercise of a governmental function without which the State would become powerless to protect the public welfare. Hence, when a franchise or privilege is granted to use the city streets for a public service, the grantee accepts the right upon the implied condition that it shall be held subject to the reasonable and necessary exercise of the police powers of the State, operating either through legislative enactment or municipal action. * * *"

And we further find, in section 1228 of the same volume, this language of the learned author, which completely disposes of appellant's argument:

> "The city is the creature of the State, and the legislature has supreme control of the affairs of the city, except in so far as it may be restricted by the provisions of the Constitution. It would seem therefore that any stipulation or advantage which the *municipality* may obtain by reason of a condition attached to a consent is within the legislative control to the same extent as any other corporate matter. Whether such a condition or advantage obtained by the municipality by reason of a condition attached to a consent given pursuant to the Constitution be within the control of the legislature or not, it has been held by the Supreme Judicial Court of Massachusetts, and by the Supreme Court of the United States, that such a benefit or advantage, enuring to the municipality by reason of a condition to a consent or grant of a location given or made pursuant to statute, is not exempt from legislative control, and the legislature has the right as respects the municipality to modify or abrogate the conditions on which the locations in

> the street and public ways have been granted, although such conditions may have been originally imposed by the city."

In the foot-note to the above quotation from Dillon, which is found on page 1951 of volume III of the Fifth edition, two cases are cited: the first is *Springfield* vs. *Springfield St. R. Co.,* 182 Mass. 41, in which it was held that the city acted in behalf of the public in regard to certain extensions of location of a street railway, and that the legislature had the right to modify or abrogate the conditions upon which the locations in the streets and public ways had been granted, after such conditions had been originally imposed by the city. In another case decided by the Supreme Judicial Court of Massachusetts at the same time, *Worcester* vs. *Worcester Cons. St. R. Co.,* 182 Mass. 49, which case was taken to the Supreme Court of the United States, and decided in 196 U. S. 539, Mr. Justice Peckham, who delivered the opinion of the United States Supreme Court, said:

> "It seems plain to us that the asserted right to demand the continuance of the obligation to pave and repair the streets, as contained in the orders or decrees of the board of aldermen granting to the defendant the right to extend the locations of its tracks on the conditions named, does not amount to property held by the corporation which the legislature is unable to touch, either by way of limitation or extinguishment. If these restrictions or conditions are to be regarded as a contract, we think the legislature would have the same right to terminate it, with the consent of the railroad company, that the city itself would have. These restrictions and conditions were of a public nature, imposed as a means of collecting from the railroad company part, or possibly the whole, of the expenses of paving or repaving the streets in which the tracks were

> laid, and that method of collection would not become an absolute property right in favor of the city, as against the right of the legislature to alter or abolish it, or substitute some other method with the consent of the company, even through as to the company itself, there might be a contract not alterable except with its consent."

In every case cited by my opponent on his brief, the plaintiff was the company, not the city. Our cases in New Jersey are uniform in holding that while power may have been given to make a contract, no power was given to make an irrepealable contract. The State, whose agent the City is, could waive performance of such a contract, could agree to its entire abrogation, could modify its terms, with the consent of the other party thereto, and surely the *City* could not be heard to complain, much less to defy the State and override its waiver or abrogation, else would the agent be greater than his principal, the creature greater than its creator. So long as the company makes no complaint against the State's action, it is clear from all the cases that the City has no ground to complain.

The Worcester case from which the above excerpt was taken is in all legal respects identical with the case now under review. In that case extensions of location of a street railway were applied for and granted upon the condition or restriction that the street should be paved between the rails and outside thereof to the street curb, and these conditions were accepted and the acceptance duly filed in the city clerk's office. Subsequently the State legislature passed a statute which relieved the street railway company from this obligation. It was held by the Supreme Court of the United States, affirming the decision of the Supreme Judicial Court of

Massachusetts, that this statute was not void as violating the impairment of obligation clause of the Federal Constitution, because it relieved the company from the obligation to pave and repair the streets imposed upon it by the conditions exacted by the municipality.

Inasmuch as the contention of the appellant in this case is that Chapter 129 of the Pamphlet Laws of the State of New Jersey for 1927 is unconstitutional because "it impairs the obligation of the contract made and entered into by the Jersey City and Bergen Railroad Company, the predecessor in title of the defendant" and the City of Bayonne, and inasmuch as the courts of our State and the Supreme Court of the United States in a case on all fours with the case now *sub judice* have settled this question in favor of appellee, it is respectfully contended that the judgment of the Supreme Court should be affirmed.

* * * * * * * * *

Another matter to which in passing I casually advert is that what was done on the streets in question was, as appears by the complaint itself, a complete repavement thereof, and not a repair. The opinion of the Supreme Court in this case deals with that subject and declares that the case is controlled by *Jersey City* vs. *Public Service Rlwy. Co.,* 101 N. J. L. 341, where it was held that an obligation to repair did not carry with it an obligation to repave; consequently, the effort on the part of the City of Bayonne to impose upon the appellee the expense of repavement under the terms of the ordinance, which only required the company 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," shows on the

face of the complaint that appellant stated no cause of action in its complaint, and hence upon that ground, even if the Act of 1927 had never been passed, it should have been dismissed.

In elucidation of the last-above sentence, it will be seen by referring to paragraphs 4 and 5 of the complaint (State of Case, pp. 2 and 3) that the City expressly admits that the Jersey City and Bergen Railroad Company "paved that part of the streets, including said Avenue C through which said railway was laid, as provided in said ordinance." Therefore, the only obligation which rested upon the railway company, if any, was, having paved the streets originally as required by the ordinance, "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." These considerations alone, even if the Act of 1927 had never been passed, or if it were unconstitutional, would result in the striking out of the complaint.

It is therefore respectfully submitted that the judgment of the Supreme Court should be affirmed.

WILLIAM H. SPEER,
Attorney for Public Service
Coordinated Transport, Appellee.

Court of Errors and Appeals

OF THE STATE OF NEW JERSEY.

CITY OF BAYONNE,
Plaintiff-Appellant,

vs.

PUBLIC SERVICE COORDINATED TRANSPORT, a corporation of New Jersey,
Defendant-Appellee.

Brief.

BRIEF ON BEHALF OF THE CITY OF BAYONNE.

Statement of Case.

This is an appeal from an order of the Supreme Court striking out the complaint.

The complaint is that the Public Service Coordinated Transport operates a street railway in and along Avenue C and other public highways and streets of the City of Bayonne.

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

Said ordinance by its second section 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 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.''

That the Jersey City and Bergen Railroad Company accepted the said ordinance and laid its tracks along said Avenue C.

That thereafter, some time prior to May 1st, 1928, by mesne conveyances and assignments, the defendant, Public Service Coordinated Transport, became the owner of said railway and has since been operating the same under said ordinance and the supplements thereto and the amendments thereof.

That prior to May, 1928, the paving along said railway on Avenue C fell into a state of disrepair and became dangerous to pedestrians and others using said highway.

That notice was given to said defendant of the dangerous condition of the pavement inside the rails of its said railway track on said Avenue C between West First Street and West Eighteenth Street, and between West Twenty-fifth Street and West Fifty-fourth Street, on said Avenue C in said City of Bayonne, and that the defendant absolutely refused and neglected to make such repairs to said pavement between the said points. (See notice to said defendant, p. 4, l. 20 of the State of the Case.)

Then follows an itemized statement of the materials and labor furnished by the City of Bayonne, which the City claims the defendant is obliged to pay for. (See p. 7 of the State of the

Case.) Thereupon the defendant gave notice to the complainant of a motion to strike out the complaint on the grounds set forth in said notice. (See p. 8 of the State of the Case.)

ARGUMENT.

POINT I.

The act, being Chapter 129, Pamphlet Laws of New Jersey for the year 1927, is unconstitutional.

It is an act concerning the obligations of street railway companies and traction companies in connection with the paving, repaving and repair of streets, roads and highways and prescribing the powers of the Board of Public Utility Commissioners in relation thereto. Approved March 24th, 1927. The following is a copy, including the title of the act:

> "An Act concerning the obligations of street railway companies and traction companies in connection with the paving, repaving and repair of streets, roads and highways and prescribing the powers of the Board of Public Utility Commissioners in relation thereto.
>
> BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:
>
> 1. Whenever any street railway company or traction company shall disturb the pavement of any street, road or highway for the construction, reconstruction, repair or removal of its tracks, such company shall, at its own cost and expense, restore said pavement, including the base or foundation thereof, to the same condition as before the disturbance thereof, to the satisfaction of the board or body having charge of such street, road or highway. Whenever any part of the

pavement between the tracks and eighteen (18) inches outside thereof on any street, road or highway upon which is located the tracks of any street railway company or traction company has heretofore been or shall hereafter be damaged by reason of the operation of the street railway cars over such tracks and such company at the time of the passage of this act is obligated to repair such damage and fails to repair the same, any State board or any political subdivision of the State having control of any such street, road or highway may apply to the Board of Public Utility Commissioners for an order directing said company to repair the said pavement to the extent that it may have been damaged as aforesaid, which board is hereby given jurisdiction to hear and determine the matter and to make such order in accordance herewith as in its judgment may be just and reasonable. Whenever any municipality, board or body, having authority so to do, shall pave or repave any street or highway upon which are located the tracks of any street railway company or traction company, such company shall, at the same time and at its own cost and expense, put its tracks and track structure in good operating condition under the jurisdiction and control of the Board of Public Utility Commissioners. The obligations imposed by this act shall be and are in lieu and substitution of any and all other obligations of any such company to pave, repave or repair any street, road or highway, or to pay any part of the cost thereof except as herein provided, and may be enforced in the same manner as similar obligations are or may be enforced under the laws of this State. Nothing herein contained shall be construed to relieve any such company from the repayment of any money which has heretofore been advanced or expended by any State, county or municipal board or body having control of streets, roads or highways, for any paving heretofore done

under and by virtue of a specific contract or agreement made and entered into between any such board or body and such company providing for the repayment thereof, but the obligation for such repayment shall be and remain enforceable as if this act had not been passed.

2. All acts and parts of acts inconsistent with the provisions of this act be and the same are hereby repealed and this act shall take effect immediately.

Passed March 23, 1927."

It is unconstitutional in that it impairs the obligation of the contract made and entered into by the Jersey City and Bergen Railroad Company, the predecessor in title of the defendant.

Russell vs. *Sebastian,* 233 U. S. 195.
Decided April 6, 1914.

The plaintiff-in-error was arrested upon a charge of excavating in a street of Los Angeles in violation of a municipal ordinance. He was acting on behalf of the Economic Gas Company, a corporation supplying the inhabitants of the City with gas, and was engaged in preparing to lay its pipes in a street which it had not previously used. The company was proceeding under a claim of right based upon section 19 of Article 11 of the State Constitution of 1879, as amended in 1884, which was as follows:

"Sec. 19. In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual or any company duly incorporated for such purpose, under and by the authority of the laws of this State, shall, under the direction of the superintendent of streets or other officer in control thereof, and under such general regulations as the municipality may prescribe

> for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas or other illuminating light, or with fresh water for domestic or other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

This section of the constitution was amended as follows:

> "Sec. 19. Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries, provided it shall not furnish any service to the inhabitants of any municipality owning or operating works supplying the same service to such inhabitants without the consent of such other municipality expressed by ordinance."

By ordinance approved October 26, 1911, the City of Los Angeles provided that no one should exercise any franchise or privilege to lay or maintain pipes or conduits in the streets for conveying gas, water, *et cetera,* without having obtained

a grant from the city in accordance with the city's charter and the procedure prescribed by the ordinance, unless such person (or corporation) might be entitled to do so by direct and unlimited authority of the constitution of the State of California or of the constitution or laws of the United States. Another ordinance, approved February 21, 1912, declared that it shall be unlawful to make any excavation in a street for any purpose without written permission from the board of public works, and that before issuing the permit the board should require the applicant to show legal authority to use the streets for the purpose specified.

It was under the last mentioned ordinance that the charge was laid against the plaintiff-in-error.

It appeared that the Economic Gas Light Company was organized in 1909 and thereupon undertook to manufacture and distribute gas for light purposes. As there was no gas works owned and controlled by the city, the constitutional provision (as it stood before the amendment of 1911) applied. The company had many miles of mains serving upwards of thirty-five hundred customers. Its plant had been established with the view to an increased demand for its service. It had expended One hundred thousand dollars more than would have been required for works to supply only the territory reached by its pipes at that date. The company had made contracts with many of the inhabitants of the city to supply gas to them and that in order to perform them, it must extend its mains into streets not before used by it. The company had applied to the board of public works for permission to excavate in the designated street not theretofore occupied by it for the purpose of extending its distributing system, in accordance with a former provision of the constitution. The board informed the com-

pany that the company would not be permitted to open the street or to lay its pipes therein unless it first sought and obtained a franchise by purchase in accordance with the ordinance of October 26, 1911. Thereupon the company notified the board that it would extend its mains at the time and place stated and requested the board to direct and superintend the work. It was proceeding accordingly to open a trench for its mains when it was stopped by the arrest of the plaintiff-in-error.

The Supreme Court of the State held that the constitutional amendment authorized the City to enact the ordinance in question and prescribe the terms and conditions upon which franchises of the character described might thereafter be obtained and exercised.

It was further decided that the grant, under the former constitutional provision, took effect only upon acceptance; that the only means whereby a formal manifestation of acceptance could be made was the act of taking possession and occupying the street for the purpose allowed, and, hence, that the vested right of the Economic Gas Company at the time the Constitution was changed went only so far as its actual occupancy and use of the streets then extended; concluding upon this ground that the company had no authority to lay pipes in the new street in order to extend its service into new territory within the city.

Mr. Justice Hughes, who delivered the opinion of the Court, said on page 204:

> "When the voice of the State declares that it is bound if its offer is accepted, and the question simply is with respect to the scope of the obligation, we should be slow to conclude that only a revocable license was intended. Moreover, the provision plainly contemplated the establishment of a plant devoted to the described public service and the

> assumption of the duty to perform that service. That the grant, resulting from an acceptance of the State's offer, constituted a contract and vested in the accepting individual or corporation a property right protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court. (Citing:) New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S. 650, 660; New Orleans Water Works Co. *vs.* Rivers, 115 U. S. 674, 680, 681; Walla Walla *vs.* Walla Walla Co., 172 U. S. 1, 9; Louisville *vs.* Cumberland Telephone Co., 224 U. S. 649, 663, 664; Grand Trunk Rwy. Co. *vs.* South Bend, 227 U. S. 544, 552; Owensboro *vs.* Cumberland Telephone Co., 230 U. S. 58, 65; Boise Water Co. *vs.* Boise City, 230 U. S. 84, 90, 91; Dillon on Municipal Corporations, 5th Ed. Sec. 1242."

The judgment below was reversed and the cause remanded for further proceeding not inconsistent with the above opinion.

Dillon on Municipal Corporations, 5th Ed., Vol. 3, Sec. 1242, lays down the law as follows:

> "A legislative grant of the right to use the city streets for a public service upon condition of the performance of the service by the grantee, when accepted and acted upon by the grantee, is a contract between the grantee and the State which is protected by the Constitution of the United States and which cannot be impaired by subsequent state legislation. When the grant of the right to so use the streets flows from the act of the municipality similar principles apply. The municipality acts by virtue of delegated authority from the Legislature and as a representative or agent of the State for that purpose; hence, an ordinance of the city made pursuant to legislative authority, granting the right to use the streets of the city for a railroad or for gas or water mains and pipes, or for electric poles, wires or conduits, or for any other recognized public service, is, when accepted

and acted upon by the grantee, a contract within the protection of the Federal Constitution, and new conditions cannot, in the absence of reserve power, be imposed on the exercise of the right granted."

City of Owensboro vs. *Cumberland Telephone and Telegraph Co.,* 230 U. S. 58.

Syllabus: Rights conferred by a municipal ordinance on a corporation qualified to conduct public business, come from the State through delegated power to the city.

A municipal ordinance, granting to a corporation qualified to carry on a public business, such as a telephone system, the right to use the streets for that purpose, is more than a mere revocable license. It is the granting of a property right, assignable, taxable and alienable, an asset of value and a basis of credit. * * *

An ordinance requiring a telephone corporation to remove from the street its poles and wires, which had been placed there under a former ordinance granting permission so to do without specifying any period, or else pay a rental prescribed in the original ordinance, was held unconstitutional under the contract clause of the Federal Constitution.

Statement of case: The grantee, under that ordinance, at once proceeded to erect its plant and to place its poles and wires upon the streets, and its successors and assigns have ever since maintained and operated a telephone system. * * * In January, 1909, the city council passed an ordinance requiring the telephone company to remove from its streets and alleys all poles and wires within reasonable time after the passage of the ordinance. * * * The bill was filed for the purpose of enjoining the enforcement of this ordinance. The contention being that it was an impairment of the company's contractual prop-

erty rights in the streets, and, as such, in contravention of the contract and due process clauses of the constitution of the United States. Upon a final hearing the court below sustained the bill and permanently enjoined the enforcement of the repealing ordinance. We find no error in the decree of the court below and it is therefore affirmed. See Hudson Telephone Co. *vs.* Jersey City, 49 N. J. L. 303.

Indianapolis, etc., R. Co. vs. *The Town of New Castle,* 43 Ind. App. 467.

This was an action instituted by appellee in the Henry Circuit Court for the recovery of the cost of paving that portion of a street lying between the ends of appellant's track. The complaint in one paragraph proceeds upon the theory that the appellant is liable for the cost of said improvement by virtue of the franchise granted to appellant by the Board of Trustees of said town on November 13, 1902, whereby appellant agreed that in case any street occupied by said appellant was improved by gravelling or paving, it would pay the cost of such improvement of that portion of such street lying between the ends of the ties of its tracks. The complaint sets out in full the ordinance granting the franchise. It also shows that the street was ordered to be, and was, improved by paving under the statutes of the state enacted for that purpose. That a demand was made on appellant to pay the same and it refused to do so. A demurrer was filed to this complaint, which was overruled and the appellant answered by setting up the ordinance set out in the complaint and then averring that on April 8, 1903, appellee, through its board of trustees amended said ordinance by another which eliminated the contract to improve the streets contained in the first ordinance and which formed the basis of appellee's suit. Said answer also

shows that subsequently to the enactment of said original ordinance appellant laid and temporarily constructed its tracks for the operation of a system of street railway in the street afterwards improved; that said amended ordinance was passed prior to the commencement of such improvement; that said amended ordinance repealed and rendered ineffective said original ordinance and at the time said street was so improved there was no agreement on the part of appellant to pay any portion thereof. To this answer appellee filed a demurrer which was sustained, and appellant refusing to plead further, judgment was rendered in favor of appellee against appellant. From this judgment appellant appeals. * * *

And while there is no provision in the amendatory ordinance that specifically declares that it shall stand as the only ordinance, or that specifically repeals any other ordinance, yet, under the rule that where it clearly appears that the new ordinance was intended to replace the old and embraces the entire regulation on the subject, it must be construed as a repeal of the former ordinance on the same subject. Citing authorities. * * *

It is established in this State that an ordinance, granting a franchise like the one before us, when accepted, is a contract between the parties. Western Pav., etc., Co. *vs.* Citizens St. R. Co., 1891, 128 Ind. 525, 10 L. R. A. 770. That an agreement on the part of a railroad company in such a franchise to keep the street between its tracks in repair, is not an agreement to improve. Western Pav., etc., Co. *vs.* Citizens St. R. Co., *supra;* Columbus St. R., etc., Co. *vs.* City of Columbus, 1909, and cases cited.

Judgment reversed.

Iowa Telephone Co. vs. *City of Keokuk,* 226 Fed. Rep., p. 82.

Syllabus:

2. Under Code Iowa 1873, Sec. 1324, as amended by Acts 19th General Assembly, Chap. 104, to provide that any person or company may construct a telegraph or telephone line along the public highways of the state, a telephone company was authorized to construct its lines in city streets as well as in country highways, since the word "highways" means either country roads or streets of cities and towns.

3. Where a state granted a telephone company the right to construct its lines in city streets, on the faith of which its lines were built, subsequent state legislation could not deprive the company of its franchise in the streets, as such a law would impair the obligation of a contract. The complainant, Iowa Telephone Company, and its grantors have been occupying the streets of Keokuk, Iowa (a special charter city) since about 1882, and large sums of money have been expended in building and equipping its telephone system and exchange to meet the needs of the people and to furnish facilities for long distance messages. On August 2, 1913, an ordinance was duly passed which fixed the maximum rates which could be charged by any telephone company, and which also provided "it shall be unlawful for any person or corporation to operate a telephone plant in the City of Keokuk, without a franchise granted by said city". The Iowa Telephone Company commenced this action to test the validity of said ordinance as it affected said corporation. The case was referred to a Special Master on January 7, 1914, and he filed his report setting forth the facts and holding as conclusions of law that the ordinance was invalid so far as it purported to affect any of the rights of the complainant herein to use the streets, and that it was

also invalid so far as it attempted to fix the maximum rates for telephone service of the complainant in the City of Keokuk. The case comes before the Court upon exceptions to the Master's report.

The exceptions to the Master's report are overruled. Respondent excepts. Counsel for complainant will prepare an enrolled decree and submit it to counsel for respondent, who will within five days present any objections they may have thereto.

Des Moines City Ry. Co. vs. *City of Des Moines,* 151 Fed. Rep. 854.

Syllabus:

2. "A resolution of a city council directing the removal from the streets of the tracks of a street railway company is a law of the state, within the meaning of the contract clause of the Federal Constitution, where under the state law the resolution is as effective for the intended purpose as an ordinance would be."

The City of Des Moines passed a resolution as follows:

> "Be it Resolved by the city council of the City of Des Moines that said companies be and they are hereby ordered to remove all of their tracks, poles and wires from the streets, bridges and public places of the City of Des Moines, and to restore and repair the surface and pavement, where paved, of all of the streets along which they are now operating their lines, and said companies are hereby ordered to commence said removal within twenty-five days after the passage of this resolution.
>
> "Be it further Resolved that should the said railway companies fail to commence such removal within the time above specified, the City Solicitor be and he is hereby instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above resolution.

> "Further Resolved that the City Clerk serve a copy hereof upon the Des Moines City Railway."

Service was made upon the railway company and it protested against the resolution. Complainant has seventy miles of street railway now in operation, costing large sums of money, built under the ordinance of 1866. It claims to own this vast property and to be operating the same. Whether it has such right or not, it makes such claims, and claims a contract therefor, but a claim denied by the city.

Whether there is a contract is the controversy herein. There must be an obligation. But that depends in this case as to whether there is a contract. Whether the resolution of November 21, 1905, is a law, is a legal question, affirmed by the company, and denied by the city. And while the constitution says: "No state shall pass a law impairing a contract," all courts and all lawyers agree that the word "state" means the city or the subdivision or agency of a state cannot be allowed to impair a contract.

The court decided in favor of the complainant.

POINT II.

The City had the power to pass the ordinance of September, 1885, granting the right to the predecessor of the defendant to lay its tracks in Avenue C.

In the act incorporating the City of Bayonne, P. L. 1872, p. 686, it is enacted as follows:

> "That the said board of councilmen shall by their title, The Mayor and Council of the City of Bayonne, have power to pass, enforce, alter and repeal ordinances to take effect

within said city for the following purposes, to wit:

"To regulate the use of streets, avenues and public places by foot passengers, vehicles, railways and engines and dummy engines." Sec. 40, Subdivision 25.

And it is further enacted by the act of 1872 as follows:

"That the board of councilmen are hereby empowered to cause all or any of the improvements authorized by this act to be made in any of the streets, roads or avenues, whether the same is used as a plank road, railroad or otherwise (except so far as such improvement may interfere with the corporate rights of such plank road or railroad) in and upon all streets, roads or avenues that have been or shall hereafter be dedicated to public use, whether they have been actually opened to the public travel or not, and any or all of said improvements may be made in a part of any such street, road or avenue in said city, and the board shall have power to regulate the position and construction of all railroads to be laid in any street, road or avenue of said city." Sec. 73.

Under the above legislation the City passed an ordinance granting to the Jersey City and Bergen Railroad Company a franchise to lay tracks in the City of Bayonne and to operate its cars thereon.

The Jersey City and Bergen Railroad Company is the predecessor in title of the defendant.

The ordinance was passed *prior* to the traction act of 1893 and prior to the act of 1896, and therefore neither of said acts bind the Railroad Company or the City.

In the case of *Bayonne* vs. *Public Service Railway Corporation,* 98 N. J. L., p. 255, it was held that said ordinance only obligates the Railroad

Company to pave inside the rails. The State of the Case (p. 7) indicates that the suit is only for paving the area inside the rails.

POINT III.

The acceptance of the right to use the street constitutes a contract.

The following cases clearly demonstrate that fact:

In *People ex rel. New York Electric Lines Co.* vs. *Ellison,* 115 App. Div. 254, it was decided that in order to constitute a contract between the city and the relator there must not only exist an acceptance but the doing of some act by way of performance under the permission in order to constitute a consideration making the contract binding, and that otherwise the permission would be but a license merely revocable at the pleasure of the city.

In *People* vs. *Squiers,* 14 Daly 154, Allen, J., says with reference to the power of localities in granting privileges for the use of the public streets:

> "Until such grant has been accepted and acted upon, it is a mere revocable license and may be recalled at pleasure, but after it has been accepted and acted upon, it becomes a contract within the meaning of the clause of the constitution, which secures the inviolability of contracts by declaring that no city shall pass any laws impairing their obligation."

Matter of *New York Electric Lines Co.,* 201 N. Y. Rep. 231.

Syllabus: The Legislature has no power to take from a private corporation its vested property rights, but its power in directing the use of pub-

lic streets and highways throughout the State is without limit, and instead of exercising the power directly it may authorize it to be executed by local authority.

The granting of a permit by a city to a corporation to use the streets for a purpose is a license merely revocable at the pleasure of the city, unless it has been accepted and some substantial part of the work contemplated by the permission, and sufficient to create a right of property and thus form a consideration for the contract, has been performed.

In *Capitol City Light & Fuel Co.* vs. *Tallahassee,* 186 U. S. 401, it was held that the privilege granted by the City of Tallahassee of the use of streets for lighting purposes does not become a contract or a vested right so as to be protected by the State or the United States until the company began to do the thing required by its charter as a consideration for the granting of such privilege.

City of Louisville, Kentucky, vs. *Cumberland Telephone & Telegraph Co.,* 224 U. S. 649.

Syllabus: Under the then constitution of Kentucky, in 1886, the Legislature had the sole right to create corporations and grant franchises to use the streets of municipalities. A charter granted by the State, subject to the conditions to be imposed by a municipality, became, after the acceptance of the conditions, a grant not of the municipality but of the State and one which cannot be impaired by an ordinance made by the municipality. The Cumberland Co. filed its bill in the United States Circuit Court for the Western District of Kentucky. The court said: "The Circuit Court properly made the injunction permanent and its decree is affirmed."

American Water Works & Guarantee Co. vs. *Home Water Co.,* 115 Fed. Rep. 171.

Syllabus:

2. Where a city is empowered by the laws of the state to contract for a water supply and to grant an exclusive franchise to use its streets for such purpose to the person contracted with, during the term of the contract, it acts under such power in a legislative and not an administrative capacity, and its enactments thereunder are laws of the state within the meaning of the contract clause of the Federal Constitution.

POINT IV.

If the railway company is not bound by the terms of said ordinance, it should not continue to maintain its tracks on Avenue C.

The only consideration upon which the City granted its permission to the Company to lay its tracks upon the streets is expressed in the ordinance, namely, 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 abutting land owners and the municipality must *consent* to the route of a street railway. P. L. 1896, p. 329; *Specht* vs. *Central Passenger Railroad Co.*, 76 N. J. L., p. 631, 68 Atl. Rep. 785 (Supreme Court); *St. Columba's Church* vs. *Public Service Railway Co.*, 78 Atl. 219 (Court of Err. and App.).

The City of Bayonne would not have passed the ordinance granting such consent except upon the

promise of the Railroad Company to keep in repair so much of the pavement of the street as is specified in the ordinance. Suppose the act of 1927 had been in existence before the ordinance was passed. Is it likely that either the City or the land owners would have consented?

The defendant should be obliged to answer the complaint, and the court below reversed.

All of which is respectfully submitted.

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