New Jersey Court of Errors and Appeals

PUBLIC SERVICE ELECTRIC COMPANY, Respondent, vs. BOARD OF PUBLIC UTILITY COMMISSIONERS and the CITY OF PLAINFIELD, Appellant.	On Certiorari ON APPEAL FROM THE SUPREME COURT

BRIEF OF CHARLES A. REED FOR THE CITY OF PLAINFIELD

I.

STATEMENT OF FACTS

An ordinance adopted by the City of Plainfield in 1898, granted consent of the municipality to the Plainfield Gas and Electric Light Company, to which the Public Service Electric Company succeeded, to erect poles, wires and subways for the distribution of electricity for light, heat and power, and designated streets in which the same might be located and in consideration of such consent the Plainfield Gas and Electric Light Company entered into a contract with the City, expressly binding the Company to carry out and perform all the terms and conditions of such consent and among other things, to furnish light for the City streets at prices not to exceed those then charged, whenever called upon so to do; to refrain from charging to private consumers any greater price for electric light than it was then charging; and to give to the City an option to purchase the entire electric plant of the Company at

the expiration of twenty-five years at a price to be fixed by arbitration as in said contract provided:

The Company also expressly stipulated and admitted that the said consent of the City to the location of its poles and wires was granted, obtained and accepted upon the express condition that so long as the Company continued to use the said streets for its said purposes, the Company would light by electricity, free of charge, such offices, rooms or buildings as were then or might thereafter be occupied by the City for purely City purposes.

See Book, pages 8 to 16.

The Plainfield Gas and Electric Light Company and its successor, the Public Service Electric Company, continued to carry out for nearly fifteen years the condition of its grant requiring it to furnish light to the public buildings, without protest. But under date of December 8th, 1913, it notified the City that it could not lawfully continue so to do and would discontinue to furnish such lighting after February 1st, 1914.

See Book, page 6.

The City thereupon invoked the Board of Public Utility Commissioners to order the Company to perform its duty under said ordinance and agreement. The Company replied that because of the enactment of Chapter 195, Laws of 1911, entitled "An Act concerning public utilities: to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved April 21, 1911, the Company was no longer bound to furnish said lighting and therefore refused so to do.

See Book, page 6, paragraph 6 and "Answer" on page 18.

After hearing, the Board of Public Utility Commissioners ordered the Company to perform its obligation.

See Book, pages 20 to 21.

A writ of **certiorari** was allowed to review this order and the order was set aside. The judgment setting aside this order is brought under review by this appeal.

II.

ARGUMENT.

The questions presented in the attack upon the order of the Board may be summarized as follows:

(1.) Was the obligation of the Company to the City to light its public offices nullified by subsequent legislation?

(2.) If not, had the Board jurisdiction to order the Company to perform its duty imposed by that obligation?

POINTS.

I (a)

The obligation was not affected at all by subsequent legislative enactments.

The legislative policy of requiring public utility corporations to obtain municipal consent as a condition precedent to the use of streets has long been recognized and established.

The special act entitled "An Act to incorporate the Camden and Haddonfield Passenger Railroad Company" (P. L. 1859, p. 96) provided, in the sixth section, that

> "The said railroad shall not be constructed along said market street or other street of said City without the consent of the City Council first had and obtained."

That this policy has also been consistently and continuously applied not only to street railway companies

but also to water companies, gas companies, electric companies and other public utilities desiring to use the streets of cities for the purposes of carrying on their own private business, seems to require no citation of authorities.

The ordinance granting the right to the Plainfield Gas and Electric Light Company to use the streets of Plainfield was authorized and adopted pursuant to the Act entitled "An Act relating to Electric light, heat and power companies" (P. L. 1896, p. 322. Compiled Statutes p. 3152), which specifically declared that

> "No posts or poles shall be erected in any street of any incorporated city or town without first obtaining from the incorporated city or town a designation of the street in which the same shall be placed and the manner of placing same" * * * "and that the public streets in any of the incorporated cities and towns of this state shall be subject to such regulations as may be first imposed by the corporate authorities of such cities and towns."

This statute was followed in 1898 by another entitled "An Act relating to the use of the public streets by electric light, heat and power companies" (P. L. 1898 p. 458. Compiled Statutes p. 3153).

This act was declared to have been intended to cure irregularities and invalidities in municipal grants by cities.

Passaic v. Corporation 75 N. J. Eq. 379.

Taylor v. Corporation 75 N. J. Eq. 371. Affirmed 78 N. J. Eq. 300.

This statute specifically declares that all **contracts entered into by the several municipalities with electric light, heat and power companies,** etc., shall be taken to have been legal and binding, etc.

In construing the act of 1896, by virtue of which the ordinance now under consideration was adopted,

Mr. Justice Van Syckle in delivering the opinion of this court and speaking of the standing of the prosecutors who obtained the writ of certiorari said,

> "They as residents and taxpayers have a right to intervene to contest the validity of an ordinance by which **valuable franchises are granted by the City to a private company.**"
> Meyers v. Electric Company 63 N. J. L. 573.

The **valuable franchise** referred to in that case was, exactly as it was in this case, a designation of streets in which the electric company might erect poles.

The courts of this State have uniformly upheld the power of a municipality to impose conditions on the grant of consent or permission to a Public Utility to use its streets and for that reason alone the declaration above quoted that such consent was a grant of a "**valuable franchise**" was amply justified.

In Township of Franklin vs. Nutley Water Co. 53 N. J. Eq. 601, Vice Chancellor Emery said (607):

> "Where a constitutional or a statutory right of previous consent is conferred upon the municipality, its authorities are entitled to the right of affixing such lawful conditions as the public interests require before the exercise of the right to lay pipes, which is only conferred upon the company on the condition of previously procuring such consent."

In Grey vs. N. Y. & Phila. Traction Co. 56 N. J. Eq. 463, Chancellor McGill said:

> "When control of the use of its highways through such consent in given to a municipality, its authorities may affix to the consent it gives **lawful and reasonable** conditions beneficial to the public."
> See also on this subject:

Jersey City & Bergen R. Co. v. Jersey City & Hoboken Horse R. Co. 20 N. J. Eq. 61.

Jersey City & Hoboken Horse R. Co. v. Jersey City & Bergen R. Co. 21 N. J. Eq. 550.

Davis v. Town of Harrison 46 N. J. L. 79.
Humphreys v. Bayonne 55 N. J. L. 241.
Asbury Park & S. G. Ry. Co. v. Neptune Township 73 N. J. Eq. 323. Affirmed 75 N. J. Eq. 562.
North Jersey Street Ry. Co. v. South Orange 58 N. J. Eq. 83.
Camden v. Public Service Ry. Co. 82 N. J. L. 242. Affirmed 84 N. J. L. 305.
Phillipsburg Electric Co. v. Phillipsburg, 66 N. J. L. 505.
Long Branch Comm'rs. v. Tintern Manor Water Co. 70 N. J. Eq. 71. Affirmed 71 N. J. Eq. 790.

From all these cases it clearly appears that before the adoption of the act creating the Board of Public Utility Commissioners, the municipal authorities had the right and power to impose as a consideration for their consent reasonable conditions, beneficial to the public.

The conditions imposed by Plainfield in 1898 were either reasonable or unreasonable **at that time.** Whether they were reasonable or unreasonable was a question of fact. Were the conditions beneficial to the public? What was the franchise worth to the company? What terms could the City have obtained for its consent from some competing company? What consideration was customary for such consent in other similar municipalities?

Who were better qualified to determine at that time whether the conditions asked by the City for its consent were fair or unfair **than the parties** to the transaction? The company **agreed** to the conditions imposed and for fifteen years without a murmur it performed them. What is there in the Public Utility Act of 1911, or in any other enactment subsequent to the grant to make this condition, which was reasonable when it was imposed, unreasonable or "an undue or unreasonable preference" now?

The Public Utility Act has not changed that situation. It has not altered the common law in that respect in the least. At the most it can only be said to have embodied in statutory form the rule which was already in force, that the conditions imposed by the City must be reasonable conditions.

Public Service Ry. Co. v. Public Utility Commissioners 81 N. J. L. 363.

On page 365 of that report Mr. Justice Minturn says:

> "The Public Utility act does not abrogate the system of three cent fares maintained by the railway company, because section 18 applies only to such preferences as are 'undue or unreasonable.' This was not the enactment of a new condition, nor did it create a new legal **status.** It was the immemorial rule of the common law. * * * When the railway, a decade ago, instituted the system of three cent fares upon some of its lines and entered into the contracts in the form of municipal ordinances on other lines, it did so under the ægis of this common law rule, now transmutted into statute law."

Did the legislature in adopting the Public Utility Act intend that it should apply at all to **purchases** by the company; to the price it should pay for coal or labor, or land, or rent, or materials, or franchises? Did it intend to deprive the municipalities to which applications for further consent will be made, of their right to impose reasonable conditions? Did it intend to make a condition sought to be imposed, unreasonable by statute when it would have been reasonable at common law?

Is it not clear from paragraph (d) section 18 of the statute itself that the legislature intended **by that paragraph** only to prevent the company from making undue or unreasonable preferences to **its customers?** From charging different prices to different persons for the same service? From imposing unreasonable burdens

upon particular persons, localities or traffic and giving unreasonable advantages to other particular persons, localities or traffic similarly situated?

The language which the Supreme Court interprets to destroy our right, concededly lawful in its inception, is as follows:

> Section 18 (d) Chapter 195 P. L. 1911.
>
> "No public utility as herein defined * * * shall make or give, directly or indirectly, any undue or unreasonable preference or advantage to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic to any prejudice or disadvantage in any respect whatsoever."

What is there in that language to indicate any legislative intent to relieve the corporations from their legal obligation to perform such conditions as they had undertaken in exchange for the grant of their franchises? Those obligations must have been reasonable when they were assumed; otherwise no statute would have been necessary to nullify them.

If the legislature intended to nullify such obligations then it must be assumed that it took into consideration the fact that hundreds of grants had been made, pursuant to previous enactments, and that the conditions affixed to these grants were far from uniform.

That street railroad companies had agreed to pave different portions of streets, run cars at different intervals and to pay different license fees to different cities; water companies had agreed to furnish water for engine houses; telephone companies to furnish municipal offices with telephone service; electric companies and gas companies had agreed to light or heat municipal offices. In every different municipality in the state where municipal consent had been given to a public

utility to use a highway for the purpose of its business, some concession by the utility had perhaps been made a condition, and those concessions differed as widely as the different circumstances and the different values of the different grants warranted.

In some instances the street railway company perhaps agreed to pave the entire street through which it passed. In other instances to pave more or less of the street and in still other instances no obligation to pave any portion was imposed.

Such services when rendered pursuant to the conditions of the grant were **not gratuities,** but were clearly obligations upon the company. If the city authorities, by whom consent to use the streets was granted, had **given away** such valuable rights, had neglected to impose reasonable conditions upon their consent, they would have been derelict in their duty and would have subjected themselves to severe criticism, if not to the charge of malfeasance in office.

If then, the legislature intended by subdivision (d) of section 18 or by any other section of the Act of 1911, to **revolutionize** the long standing and well settled policy of the State in respect to such grants, and also to make **unreasonable,** conditions imposed upon them which were reasonable when imposed, **is it not strange that clear, precise and unmistakable language was not used to express such intent? Stranger still that no member of the legislature ever mentioned in debate while the bill was pending, that if enacted into law it would have such an effect. Most marvelous of all that the Public Service Corporation of New Jersey, the chief beneficiary of such an act, which would relieve it to the extent of many thousands annually, never discovered the alleged intent until two years after the bill became a law?**

The Supreme Court in the opinion under review in

this case expressly declares that the condition attached by Plainfield to the grant in this case **imposed originally a legal obligation** upon the company to light the public offices of the City, and it declares (Book p. 42 line 20):

> "Thus we have the case of a contract lawful when made, the performance of which subsequently became unlawful."

If the contract was lawful when made, then the service required by that lawful contract was **not a gratuity.**

Yet the Supreme Court went on to declare that the performance of that contract subsequently became unlawful because the service required by the contract was a **gratuity** (Book p. 43 line 10).

> "Therefore where it appears, as it does in this case, that the gratuity granted by the predecessor of the prosecutor to the City of Plainfield to light all its public buildings, offices and rooms free of charge forever, because it had received the privilege of placing its poles and wires in the streets and subways of the City of Plainfield, no other evidence is required than is furnished by the contract, to demonstrate that the preference or advantage given by the contract is undue and unreasonable and within the inhibition of the public utilities act."

Webster defines "Gratuity." (Noun):

"1. A free gift; a present; a donation; that which is given without a compensation or equivalent."

"2. Something given in return for a favor; an acknowledgement."

"Gratuitous." (Adjective).

"1. Free; voluntary; not required by justice; granted without claim or merit."

"2. Asserted or taken without proof, as a gratuitous argument or affirmation."

"Gratuitously." (Adverb).

"1. Freely; voluntarily; without claim or merit;

without an equivalent or compensation; as labor or services gratuitously bestowed."

"2. Without proof, as a principle gratuitously asserted."

If the Plainfield contract was lawful when made and the company became by reason of that contract legally bound to render to the city the specified service which it solemnly agreed to render as a consideration for the grant, how can it be fairly said now that the service is a **gratuity** or is gratuitiously rendered?

The statute has not changed the character of the service. If it is gratuitous now it was gratuitous in the beginning. If it was gratuitous in the beginning, then it was without consideration in the beginning and uninforceable, and for that reason it never was "a contract lawfully made."

In Dempsey v. N. Y. Central & H. R. R. Co., 146 N. Y. 294; 40 N. E. 868, the defendant corporation refused after January 1, 1895, to issue to the plaintiff an annual pass in accordance with a contract theretofore entered into, on the ground that a constitutional provision becoming effective on that day prohibited it from doing so.

The provision in question was as follows:

> "No public officer or person elected or appointed to a public office under the laws of this State, shall directly or indirectly ask, demand, receive or consent to receive for his own use or benefit * * * any free pass * * * from any corporation, or make use of the same for himself or in conjunction with another."

Demurrer to the complaint being interposed and overruled by the court below the appellate court in affirming that judgment, said:

> "In the case at bar we have the plaintiff, a railroad policeman, traveling over the lines of the defendant in the discharge of his responsible

> duties in preventing depredations upon the property of the defendant and the public by thieves and trespassers, and receiving as compensation for his services $75 a month and an annual pass which he is at liberty to use, not only in his official but in his private business. This is in no sense a **'free pass'** within the meaning of the constitution, but on the contrary is a pass for which the plaintiff has paid a full consideration and he cannot be regarded as a gratuitous passenger."

In Oklahoma City vs. Oklahoma Ry Co., 20 Okla. 1, 93 Pac. 48, the court sustained the condition of a grant of a franchise by a municipality which required the street railway company to furnish free transportation to certain municipal officers notwithstanding a constitutional provision prohibiting the giving of free transportation by any such company.

The court held that in such a case the company is not to be regarded as furnishing "free" transportation, but that the transportation is rather to be regarded as furnished by the City.

In New Jersey the general railroad act under which franchises are granted by the State, required the railroads to carry without charge certain state officers. That requirement is a condition imposed upon the grant by the State.

Are the officers who avail themselves of the transportation thus provided to be regarded as the recipients of a "**gratuity**" from the railroad?

What is the difference in principle whether the condition is imposed by the State direct, or by a municipality acting as an authorized agent of the State?

Subdivision (d) of section 18 of the 1911 act does not use the word **gratuity** at all. That paragraph deals solely with the treatment to be accorded by the utility to its customers.

Subdivision (g) of the same section does deal with gratuities, and declares that no "**official,**" whether he be a local, municipal or county official, shall "**hereafter**" be given any "**discrimination, gratuity** or **free service whatsoever,**" but that nothing in this paragraph shall prevent the entry of any such official in or upon any conveyance or property in the pursuit of his duty in connection with the particular conveyance or property so entered by him.

The effect of subdivision (g) is to prohibit by express terms the giving hereafter of any gratuity or free service to any **official** of any municipality. The language forbidding the gift is clear and unmistakable.

It is consistent with the idea expressed by the Supreme Court in the present case (Book p. 43 line 3).

> "The evil sought to be eradicated was the insidious influence which might be exercised on municipal bodies and officers against the general public welfare, by the donors of such gratuities."

It was a prohibition against granting to **officials** favors which might influence their official action, to the injury of the public whom those officers were bound to serve.

But plain as this language was the court was unable to determine **from that language alone** that the legisature intended to nullify the condition contained in the Perth Amboy grant which required the railway company to carry without charge the Perth Amboy policemen.

Public Service Ry. Co. v. Board of Public Utility Commissioners and City of Perth Amboy. 85 N. J. L. 123. Affirmed 86 N. J. L. 696.

The court in its opinion in that case, on page 125 of the report (85 L.) declared that the intention of

the legislature of 1911 in adopting subdivision (g) of section 18 of the Public Utility Act, was "**manifested by the fact that the following year, 1912, (Pamphlet L. p. 235) they enacted a law referring alone to street railway companies requiring them to grant free transportation to uniformed police officers..*..*..***"

In the case at bar there was no gratuity to any public official. Nor does the language of subdivision (d) express any intent to void any **pre-existing contract.**

And there is no subsequent legislation to manifest any such intent.

On the contrary there was subsequent legislation, which clearly negatives any such idea, adopted by the very same legislature which passed the Utility Act.

The Utility Act was approved April 21, 1911. The Walsh Act, entitled "An Act relating to, regulating and providing for the government of cities, towns, boroughs and other municipalities within this State," was approved four days later—April 25, 1911. (Laws of 1911, pp. 462-483).

Section 7 of the Walsh Act (Laws of 1911, p. 470) provides regarding city officials:

> "No such officers or employes shall accept or receive, directly or indirectly, from any person, firm or corporation operating within the territorial limits of said city, any interurban railway, street railway, gas works, water works, electric light or power plant, heating plant, telephone exchange, or other business using or operating under a public franchise, any frank, free pass, free ticket or free service, or accept or receive, directly or indirectly, from any such person, firm or corporation, any other service upon terms more favorable than is granted to the public generally. * * * Such prohibition of free transportation shall not apply to any policemen or firemen in uniform; **nor shall any free service to city officials heretofore provided by any franchise or ordinance be affected by this section.**"

If the same legislature had knowingly and intentionally destroyed every such contract or condition by the Utility Act adopted a few days earlier, is it probable that this provision carefully safeguarding such contracts and conditions would have been made?

On the contrary, does not this clause manifest legislative intent to avoid any construction which might destroy rights previously acquired by cities in connection with grants such as involved in the case at bar?

> "Words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satisfied."
> Williamson v. N. J. South R. R. 29 N. J. Eq. 311.

The words construed in the following cases were of that character, viz.:

Louisville N. R. Co. v. Motley, 249 U. S. 467. 34 L. R. A. N. S. 671, in which the statute construed declared in express terms that no common carrier shall **engage or participate** in the transportation of passengers without having first filed and published its rates for such transportation, nor shall "**demand, collect or receive a greater or less or different compensation**" than those named in its published tariff.

In construing that language the court said:

> "Our duty is to ascertain the intention of Congress in passing the statute upon which the railroad company relies as prohibitive of the further enforcement of the agreement in suit. That intention is to be gathered from the words of the act interpreted according to their ordinary acceptation, and **when it becomes necessary to do so in the light of the circumstances as they existed when the statute was passed.**"

In that case the court found that the intention to void the contract was so clear that no other construc-

tion could be put upon the act, whether the service was rendered by **virtue of a previously existing contract** or **gratuitously.**

That case did not turn upon the question of whether or not the service contended for was "free." That made no difference because the **rate charged, whether by contract or gratuitously,** did not comply with the published tariffs and was a **different** rate than those charged others.

In Clark v. N. J. Postal Tel. Co. 82 N. J. Eq. 15. the Motley case was cited as authority for the contention that a pass issued in consideration for a sale of property to a telephone company was a "free pass" and therefore prohibited by the Statute construed in the Motley case. I submit that the Motley case did not go to that extent. That it held that whether the pass was "free" or was originally **issued for a valuable consideration,** it was equally prohibited by the statute because the consideration was **different from that charged others** in the same class for the same service.

The Clark case so far as I know has not reached this court.

The Public Utility Act does not absolutely prohibit charging different rates. The most that can be fairly contended is that it prohibits variations which amount to an **undue and unreasonable preference.**

The statute considered in the Motley case prohibited in express terms **even the slightest departure** from the published tariff.

In the Perth Amboy case the legislature had substituted a statutory right to policemen to ride free, for the contractual right which previously existed. Therefore the City really lost nothing.

But in the case at bar no statutory rights have been

substituted for the tremendous loss which, in the aggregate, the municipalities of New Jersey will sustain if the decision now under review is affirmed on the grounds so far argued.

My first contention is that the legislature **did not intend** by the enactment of Chapter 195 Laws of 1911, to nullify, modify or affect in any way the lawful obligation of the Public Service Electric Company to the City of Plainfield.

POINT I. (b)

The title of Chapter 195 Laws of 1911, is not broad enough to give it the effect claimed for it, without violating the constitutional provision that "every law shall embrace but one object and that shall be expressed in the title."

Art.IV. Sec. VII. Paragraph 4.
The title is:

> "An Act concerning public utilities: to create a Board of Public Utility Commissioners and to prescribe its duties and powers."

Had the title been simply "An Act concerning public utilities," it might well be that the nullification of contracts made by such corporations fell within the scope of the title.

But the words "to create a Board of Public Utility Commissioners and to prescribe its duties and powers" are, I submit, words of limitation and restrict the operation of the act to those matters "concerning public utilities" which are germane to the creation of a board of public utility commissioners and to their duties and powers.

If the act does not confer upon the Board either the duty or the power to declare void the contract in-

volved in this suit, then the legislature could not, under this restricted title, declare the contract void; because the title is not broad enough to express such an object.

Mr. Justice Depue in delivering the opinion of the Supreme Court in Grover v. Trustees of Ocean Grove Camp Meeting Association, 45 N. J. L. 400-402, quoted with approval Judge Cooley to the following effect:

> "The legislature may make the title of an act as restrictive as they please, and they may sometimes so frame it as to preclude many matters being included in the act which might, with entire propriety, have been embraced in one enactment with matters indicated by the title, but which must now be excluded because the title has been made unnecessarily restricted. * * * The constitution has made the title the conclusive index to the legislative intent; and it is no answer to say that the title might have been made more comprehensive, if the legislature have not seen fit to make it so."

Again in the same opinion Justice Depue in speaking of the title, quotes with approval Cooley on Const. Lim. and says:

> "The other purpose was to prevent the passage by the legislature of bills containing provisions of which the title prefixed to the bill gave no intimation, and which, therefore, might be overlooked, and carelessly and unintentionally adopted; and also **to apprise the people,** through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered."

What is there about the title of "An Act concerning Public Utilities" when restricted and limited by the words "to create a Board of Public Utility Commissioners and to prescribe its duties and powers" which would call attention to a provision in the act, which provision does not at all relate to the creation of the Board nor confer upon the Board any duty or power whatsoever? Namely, a provision which **ipso facto** de-

stroys contracts theretofore lawfully made between municipalities and public utility companies.

Is it conceivable to any man who has had experience as a member of the legislature that such a bill could have been passed if the members of that body knew that it contained any such "joker"?

The act was heralded as a means of compelling public utilities to treat the public fairly. To give it the construction claimed for it in this case will make it a gift enterprise for the benefit of the corporations.

I submit that the title of the act must be considered as if it read

> **"An Act concerning public utilities to the extent of creating a Board of Public Utility Commissioners and prescribing its duties and powers."**

Also that if so read it cannot be taken to include a provision which in itself and by the mere operation of the law nullifies contracts, which **thereby** go out of existence simultaneously with the birth of the Board.

Is it conceivable that if the public had been fairly apprised that the act was intended to have that effect, it would have been allowed to pass without strong protest?

POINT I. (c)

If my first and second contentions are unsound, I then assert that there is nothing in the record before this court which will justify the finding that the contract between Plainfield and the Electric Company constitutes an undue or unreasonable preference.

Mr. Justice Pitney in Rutherford vs. Hudson River Traction Co. 73 N. J. L. 227-231, in speaking of conditions imposed upon consent of a municipal body to

the location of tracks of a street railway, which condition was claimed by the company to be unreasonable and therefore void, said:

> "The burden of proof that the contract is void because of unreasonable preference, is upon him who asserts it. * * * This rule applies with peculiar force where it is asserted that the unreasonable element consists in its imposition of oppressive burdens upon the recipient of a public franchise, and it appears that the recipient has solemnly accepted the franchise together with its burdens."

The record shows that the Electric Light Company voluntarily accepted the grant from the City and in consideration of that grant agreed to light the City's offices without charge so long as the company continued to use the streets and subways of the city. As the city grew, so would the business of the company grow.

What is there before this court to show that this condition of the grant was unreasonable? What does it amount to in dollars and cents? How much business is the company doing which it would not have done at all except for this grant?

Does the court know whether this particular business amounts to a quarter of a million dollars a year or to half a million? Whether the light furnished amounts to one per cent. of the gross business or to one-half of one per cent?

What concessions have similar companies made for similar grants in other similar cities?

In Asbury Park & S. G. Ry. Co. v. Neptune Township, 73 N. J. Eq. 323, (affirmed 75 N. J. Eq. 562), the ordinance granting consent to locating tracks required the payment annually of "a sum of money equal in every instance to five per centum of the gross receipts from all the business."

That condition was not held to be unreasonable, and yet the Plainfield condition, which requires infinitely less from the grantee, the Supreme Court declares unreasonable upon its face and unsustainable by any evidence which could be produced.

In Long Branch Comm'rs v. Tintern Water Co. 70 N. J. Eq. 71, (affirmed 71 N. J. Eq. 790), it was declared within the power of a municipality to impose terms as to the rates to be charged to both public and private consumers.

In Phillipsburg Electric Co. vs. Phillipburg, 66 N. J. L. 506, the ordinance required certain services to be performed by the company for the town in consideration of the permission granted.

In Public Service Ry. Co. v. Public Utility Comm'rs. 81 N. J. L. 363, the ordinance required the transportation of children to and from school for a three cent fare.

Our reports abound with decisions sustaining a great variety of conditions imposed upon grants of municipal consent to public utilities. There is no standard condition common to all. If some are unreasonable and others are reasonable, which condition is to be taken as a standard? Are all others wiped out by the Public Utility Act prohibiting discrimination?

The Supreme Court in this case has said that the contract is void because it constituted an undue and unreasonable preference or advantage and bases that assertion solely upon the fact that the City requires the company to "light all its public buildings, offices and rooms free of charge forever, because it has received the privilege of placing and maintaining its poles and wires in the streets and subways of the City."

If it was unreasonable to compel the lighting of all

buildings **forever, what would have been reasonable** as compensation for the grant of that particular valuable franchise? Would it have been reasonable to require the lighting of some buildings for some period? If so, how many buildings? And for what period?

Is the City to be deprived of **all** the benefit derived from proper and reasonable conditions imposed, or should it be allowed to reduce its demands from an unreasonable to a reasonable basis?

If it be said that an undue and unreasonable preference is given to the City of Plainfield because it is to be considered as a **present purchaser** of electric light and is paying a different price than that paid by individual consumers, I reply:

(a) That this difference does not, under the circumstances, amount to an undue or unreasonable preference.

(b) That in legal contemplation the contract in effect provides that the company shall pay the city in **light** at **current rates** a toll which might have been imposed in some other form.

(c) That there can be no such thing as an undue or unreasonable advantage or preference as between the City and the inhabitants thereof in a case such as this because the inhabitants and the municipality are identical in interest. Wilcox v. Consolidated Gas Co. 212 U. S. 19.

POINT II.

Had the Board jurisdiction to order the Company to perform the duty imposed upon the company by its acceptance of the grant?

If the obligation had been destroyed, nullified or

forgiven by the same statute which created the Board, the answer is of course obvious.

If the obligation still remained in force and the company was by the terms of the grant and the laws of the State legally obligated to render the service agreed upon, then, as I understand the situation, the statute conferred upon the Board the power and duty to order the company to proceed in the performance of its duty.

If the Company refused to comply with this order the City might invoke the power of the Court of Chancery to compel specific performance or resort to such, if any, other procedure as might be appropriate.

This branch of the case is not of vital importance to the City of Plainfield which alone I represent, and it will be argued with far more ability than I possess by my associate who represents the Board.

Therefore I will not impose upon the court further except to express the fervent hope that the court will in any event dispose finally of the contention that the statute itself has destroyed and nullified the obligation of the company to light the public offices of the City of Plainfield pursuant to the conditions of the grant by the City to the Plainfield Gas and Electric Light Company.

Respectfully submitted,
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November Term, 1915.

New Jersey Court of Errors and Appeals

PUBLIC SERVICE ELECTRIC COMPANY, *Prosecutor-Respondent,* *vs.* BOARD OF PUBLIC UTILITY COMMISSIONERS and THE CITY OF PLAINFIELD, *Defendants-Appellants.*	*On Certiorari.* *On Appeal.*

Brief of Board of Public Utility Commissioners.

I.

Statement of Facts.

On July 12th, 1898, the City of Plainfield designated, by ordinance, certain streets in the city on which the "Plainfield Gas and Electric Company," predecessor of "Public Service Electric Company," might place and maintain poles, conduits and wires, subject to the provisions of the General Statutes of the State of New Jersey in such case made and provided, and subject to the regulations contained in this ordinance, or that may be imposed by the corporate authorities or legislative body of the City of Plainfield. (Case, p. 8.)

On November 28th, 1898, an agreement was entered into between the Plainfield Gas & Electric Light Company and the Inhabitants of the City of Plainfield, which agreement, after reciting the adoption of the ordinance of July 12th, 1898, further recites: "And whereas it was understood and agreed before the passage of the said ordi-

nance and in consideration thereof, that the said Plainfield Gas & Electric Light Company should enter into this contract for the benefit of the Inhabitants of the City of Plainfield and all persons residing therein. Now this indenture witnesseth, that in consideration of the passage and approval of the said ordinance, and of the sum of one dollar paid by said the Inhabitants of the City of Plainfield to the said Plainfield Gas & Electric Light Company, the receipt whereof is hereby acknowledged, the said Plainfield Gas & Electric Light Company hereby covenants and agrees to and with the said Inhabitants of the City of Plainfield that it, the said Plainfield Gas & Electric Light Company, and its successors, will construct, operate and maintain a system of subways or underground conduits for the construction, operation and maintenance of which consent and permission is given in the said ordinance, and also its system of poles and wires for the carrying on of its business, in the manner and upon the terms and conditions mentioned and described in the said ordinance, and also in the manner and upon the terms and conditions herein contained, and will from this time forth, and from time to time, and at all times, faithfully fulfill and perform all the said conditions, terms and requirements, on its part to be kept, fulfilled and performed." (Case, p. 13.)

Among other things the agreement contains the following provision:

"And said Plainfield Gas & Electric Light Company further covenants and agrees as aforesaid, as follows: That said company, its successors or assigns, shall not at any time or times hereafter charge any person or persons, or corporation, within the limits of said city, any higher rates or prices for furnishing electric light than are at

present charged by said company; *that said company, its successors and assigns, will at all times hereafter, while said company, its successors or assigns, shall continue to use any of the streets of the said city, or any of the subways aforesaid, light by electricity, free of charge, the Common Council Chamber, offices of the Mayor, Collector, Street Commissioner, City Clerk, the City Jail, Station House, Almshouse, Fire House, as at present lighted or new in proportion, and all other offices, rooms, or buildings, owned or occupied by the city officers, or that may be hereafter owned or occupied for city purposes, including City Hall if the same shall be built or rented.*''

From 1898 until 1913 this provision as to free service to municipal buildings and offices was observed.

On December 8th, 1913, the Public Service Electric Company notified the city in writing that it could not lawfully continue the free lighting of the public buildings and offices and that it would discontinue such free service on and after February 1, 1914.

The city thereupon filed its petition with the Board of Public Utility Commissioners, and that Board, ''after a hearing, upon notice,'' made an order (Case, p. 29) requiring ''the Public Service Electric Company to conform to the duties imposed on it by an agreement with the City of Plainfield made November twenty-eighth, eighteen hundred and ninety-eight, by the Plainfield Gas and Electric Company (predecessor in title to the Public Service Electric Company), and to furnish free of charge to the City of Plainfield such service as the agreement referred to herein provides shall be furnished by the Plainfield Gas and Electric Company to said city.''

A writ of certiorari to review the order so made was allowed.

The order was set aside by the judgment of the Supreme Court.

The judgment proceeded upon two grounds: (1) that the quoted provision of the agreement requiring free service to the municipality was voided by the later enactment of the provision of the Public Utility Act prohibiting undue and unreasonable discrimination, and (2) that the order was in effect a requirement for the specific performance of a contract and without the jurisdiction conferred upon the Board.

From this judgment an appeal is now taken.

II.

Argument.

POINT I.

The provision for free service to the municipality does not involve undue or unreasonable discrimination and was not voided by the Public Utility Act.

The designation by the ordinance of July 12th, 1898, of certain streets upon which poles and wires might be placed and maintained was made under the provisions of "An Act relating to electric light, heat and power companies" (P. L. 1896, p. 189), the first two sections of which are as follows:

"1. Any corporation organized or to be organized by virtue of the act entitled 'An act concerning corporations,' for the purpose of constructing, maintaining and operating works for the supply and distribution of electricity for electric lights, heat or power, shall have full power to use the public roads or highway, streets, avenues

and alleys in this state for the purpose of erecting posts or poles on the same to sustain the necessary wires and fixtures; upon first obtaining the consent in writing of the owners of the soil, *provided,* however, no post or poles shall be erected in any street of any incorporated city or town *without first obtaining from the incorporated city or town a designation of the street* in which the same shall be placed and the manner of placing the same, and that the same shall be so located as in no way to interfere with the safety or convenience of persons travelling on or over the said roads and highways, and that the public streets in any of the incorporated cities and towns of this state shall be subject to such regulations as may be first imposed by the corporate authorities of such cities and towns.

"2. Any such companies are authorized and empowered to lay pipes or conduits and to lay wires therein beneath the public roads, highways, streets, avenues and alleys as they may deem necessary; provided that said pipes or conduits shall be laid at least two feet below the surface of the same and shall not in anywise unnecessarily obstruct or interfere with public travel, or damage public or private property, and shall not be laid nearer than three feet, except as is hereinafter excepted, to any water or gas main; but no public street shall be opened for the purpose of laying any such pipes, conduits or wires *without the consent of the board of aldermen or common council of such city;* and provided, that such use of the public streets in any of the cities and towns of this state shall be subject to such regulations and restrictions as may be first imposed by the corporate authorities of such cities or towns."

Under this statute the permission of the city is a prerequisite to the right of the company to enter the streets.

Meyers v. *Electric Co.,* 60 N. J. L., 350 (Sup. Ct.).

Same Case, 63 N. J. L., 573 (Ct. E. & A.).

Other statutes relating to public utilities contain similar provisions making the permission of the municipality a prerequisite to the right of the company to enter the streets.

See:

"An act to provide for the incorporation of street railway companies and to regulate the same" (P. L. 1886, pg. 185, secs. 8, 11).

"An act to prohibit the laying or construction of any street or horse railroad along the streets of any municipality of this state without the consent of the governing body having control of the streets in such municipality" (P. L. 1893, pg. 144).

"An act to authorize the formation of traction companies for the construction and operation of street railways, or railroads operated as street railways, and to regulate the same" (P. L. 1893, pg. 302, sec. 7).

"An act to regulate the construction, operation and maintenance of street railroads in this state" (P. L. 1896, pg. 329).

"An act to authorize the formation of gas light corporations and regulate the same" (Rev. 1877, pg. 462, sec. 17, amended, P. L. 1902, p. 231).

"A supplement to the act entitled 'An act to authorize the formation of gas light corporations and regulate the same'" (P. L. 1879, pg. 316).

"An act relating to steam heat and power companies" (P. L. 1896, pg. 317).

"An act to incorporate and regulate telegraph companies" (Rev. 1877, p. 1174, sec. 8, as amended by P. L. 1909, p. 288).

"An act for the construction, maintenance and operation of water works for the purpose of supplying cities, towns, townships, villages, boroughs and other municipalities in this state with water" (Rev. 1877, pg. 1365, sec. 2, 12).

"An act for the construction, maintenance and operation of systems of sewerage in any municipality in this state" (P. L. 1898, pg. 484, sec. 2).

Under each of these statutes the municipality being vested with the power to grant or withhold permission, is empowered to impose conditions upon its grant of permission.

Jersey City & Bergen R. R. Co. v. *Jersey City & Hoboken Horse R. Co.,* 20 N. J. E., 61.

Jersey City & Hoboken Horse R. Co. v. *Jersey City & Bergen R. Co.,* 21 N. J. E., 550.

Davis v. *Town of Harrison,* 46 N. J. L., 80.

Humphreys v. *Bayonne,* 55 N. J. L., 241.

Township of Franklin v. *Nutley Water Co.,* 53 N. J. E., 601.

Grey v. *N. Y. & Phila. Traction Co.,* 56 N. J. E., 463.

Asbury Park & S. G. Ry. Co. v. *Neptune Township,* 73 N. J. E., 323.

The extent to which the municipalities of the state have availed themselves of this power, and the variety of the conditions which they have imposed in its exercise, is indicated by the following cases:

In *Jersey City & Bergen R. Co.* v. *Jersey City & Hoboken Horse R. Co.,* 20 N. J. E., 61; 21 N. J. E., 550, the ordinance required that another company should have the joint use of the tracks; prescribed the kind of rail and width of track; required the paving with Belgian pavement of the same between the rails and for two feet outside and the keeping of the paving in repair;

required the payment by the company of city taxes though exempt by charter, and limited the rate of fare to five cents within the city.

In *North Jersey Street Ry. Co.* v. *South Orange,* 58 N. J. E., 83, the ordinance of permission required that cars should be run under a headway of twenty minutes and should be continued up to midnight, and further required that the road should be built and cars run outside of the limits of the township of South Orange in such manner as to make an unbroken line to the city of Newark.

The ordinance in *Camden* v. *Public Service Ry. Co.,* 82 N. J. L., 242, provided that all cars should stop at street crossings clear of said crossings on signal to let off and take on passengers.

The ordinance involved in *Phillipsburg Electric Co.* v. *Phillipsburg,* 66 N. J. L., 506, required certain services to be performed by the company for the town in consideration of the permission granted.

In *Bulmer* v. *Wildwood Water Works Co.,* 1 Reports N. J. Board P. U. Com'rs., 31, the ordinance granting consent required extensions to be made where there were at least three customers on each five hundred feet asked for.

In *Long Branch Comm'n.* v. *Tintern Manor Water Co.,* 70 N. J. E., 71, it was declared that it was within the power of a municipality to impose terms as to the rates to be charged to both public and private consumers.

In *Chalmers* v. *Wildwood Water Works Co.,* 1 Rep. N. J. B. P. U. Com'rs., 154, the requirement attached to the grant was that "all water supplied to private consumers shall not exceed the rate of twenty-five (25) cents per one thousand

(1000) gallons, providing, however, that the minimum rate to be charged each consumer will be eight dollars ($8) per annum."

Ordinances granting consent considered in *Public Service Ry. Co.* v. *Public Utility Com'rs.*, 81 N. J. L., 364, required the transportation of children to and from school for a three-cent fare.

In *Public Service Ry. Co.* v. *Public Utility Com'rs.*, 82 N. J. L., 312, the ordinances consenting required the establishment and maintenance of a system of transfers for a continuous ride within the city limits for a single fare and the giving and receiving of like transfers from the lines of other railway companies.

In *Asbury Park & S. G. Ry. Co.* v. *Neptune Twp.*, 73 N. J. E., 323, the ordinance granting consent required the payment annually of "a sum of money equal in every instance to five per centum of the gross receipts from all the business."

In *Jersey City* v. *Jersey City, etc., R. R. Co.*, 71 N. J. L., 366, the ordinance was conditioned by the requirement of an annual license fee for each car run.

In *Rutherford* v. *Hudson River Traction Co.*, 73 N. J. L., 227, the ordinance granting permission required the paving of certain streets in which tracks were to be laid to the width thereof.

In *Montclair Water Co.* v. *Montclair*, 81 N. J. L., 572, the condition imposed was that the company furnish water to the municipality for certain municipal purposes for a term of years in consideration of "a sum equal to the annual taxes for the current year which shall be assessed upon the franchise and real and personal property of the company actually used in connection with the business of supplying water (including real estate

at the pump house and standpipe), payable annually on or before December 15th."

In *Public Service Ry. Co.* v. *Board of Public Utility Commissioners,* 85 N. J. L., 123; 86 N. J. L., 696, the ordinance granting permission imposed the condition that "all policemen and paid firemen, while on duty, shall be permitted to ride on the cars of the said companies * * * free of all charges."

The common law required those engaged in the conduct of a business "affected with a public interest" to serve all without undue or unreasonable discrimination.

Messenger v. *Pennsylvania R. R. Co.*, 36 N. J. L., 407.

Union Locomotive and Express Co. v. *Erie Railway Co.,* 37 N. J. L., 23.

Public Service Ry. Co. v. *Public Utility Com'rs.*, 81 N. J. L., 364.

Notwithstanding this rule of the common law, our courts, as before indicated, uniformly recognized the power of the municipalities to attach conditions, varying in their terms, to their grants of permission, and declared that the public utilities accepting such grants were obligated to the performance of the conditions so attached, and could not, while retaining the benefits of the grants, successfully question the power to annex a given condition.

Nowhere in the line of cases cited recognizing this power in the municipalities is it suggested either by court or by counsel, that the exercise by a municipality of its power to attach conditions to its grant of permission, and the acceptance by a public utility of such grant subject to the conditions imposed, was prevented by, and constituted a violation of, the rule of the common law directed against undue or unreasonable discrimination.

Section 18 (d) of the Public Utility Act (P. L. 1911, chapter 195, pg. 374) provides, that no public utility as therein defined shall "make or give, directly or indirectly, any undue or unreasonable preference or advantage to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic to any prejudice or disadvantage in any respect whatever."

The court below concluded that this section of the Public Utility Act made compliance by the company with the requirement as to free service to the municipality unlawful. It is submitted that the court erred in this conclusion.

The section is, except in a particular hereinafter referred to, a mere redeclaration of the rule of the common law directed against undue or unreasonable discrimination.

In one respect the statutory prohibition extends the rule of the common law.

It prohibits the grant of any undue or unreasonable preference or advantage not only to any person or corporation but to "*any locality*" as well.

The words "*any locality*" are not, however, used in the sense of "*any municipality.*"

The purpose of the insertion of the words "any locality" in the statutory prohibition is clear. While discrimination in rates between individuals was, at the common law, unlawful, even though the higher rate was reasonable in itself, this was not true as to discrimination between localities. If a general rate charged to all shippers, for instance, in a certain locality was reasonable in itself it was not rendered unlawful because shippers in another locality were charged a lower

rate. It was to meet this situation that the words "any locality" were included in the statutory prohibition.

Railroad Rate Regulation, Beale & Wyman (2d ed.), sec. 752, etc.

Wyman, Public Service Corporations, sec. 1371.

The common law did not prohibit nor does this section of the Public Utility Act, which, except in the one particular noted, is merely declaratory of the common law, prohibit *all* preferences or advantages.

The common law forbade and this section prohibits, only such preferences and advantages as are *undue* or *unreasonable.*

In *Hays & Co.* v. *The Pennsylvania Coal Co.,* 12 Fed., 309,

Baxter, *C. J.,* said:

> "It is enough for present purposes to say that the defendant has no right to make unreasonable and unjust discriminations. But what are such discriminations? No rule can be formulated with sufficient flexibility to apply to every case that may arise. It may, however, be said that it is only when the discrimination inures to the undue advantage of one man, in consequence of some injustice inflicted on another, that the law intervenes for the protection of the latter. Harmless discrimination may be indulged in."

In *United States* v. *Chicago & N. W. Ry. Co.,* 127 Fed., 785.

Bunn, *District Judge,* said (789):

> "The interstate commerce act is not aimed at putting down just discrimination in the transportation of persons or property. This has always been held legal in this country and in England, and is, indeed, in great measure,

> the life and soul of the business, both to the railroad companies and the public. By its means new industries are built up, and old ones sustained, to the advantage alike of the public and the transportation companies. Nobody is injured by it, but, on the contrary, everybody is benefited, because the public in this way is best served. It is only unfair and unjust discrimination that the statute as well as the common law, is aimed at."

In *Wilcox* v. *Consolidated Gas Co.*, 212 U. S., 19.

HELD, that the furnishing of gas to a city at a lower rate than to general consumers is not an unreasonable discrimination, since this is in the interest of the public:

Mr. Justice Peckham said (54):

> "Lastly, it is suggested that there is an illegal discrimination as between the city and the consumer individually. We see no discrimination which is illegal, or for which good reasons could not be given."

See also *Interstate Commerce Commission* v. *B. & O. Railroad,* 145 U. S., 263, 278.

If the common law rule against undue and unreasonable discrimination did not prevent the municipalities of the State from attaching to their grants of permission such conditions as in the judgment of their governing bodies were required in the public interest, including the requirement of free service, no reason is apparent why this section of the statute which, in general, redeclares the common law rule, should be given effect to retroactively nullify such conditions lawfully imposed before its enactment and to prevent the imposing of such conditions in the future.

The statutes before referred to, and the adjudications thereunder, extending over a long period of years, established definitely the policy of the

State to make municipal permission a prerequisite to any special use of the public highways and to leave the municipality free to grant or withhold permission, and in granting permission to impose such conditions as the municipal governing body might deem requisite in the public interest.

Surely the mere conversion into a statute of a rule of the common law which was in effect throughout the period of the enactment of these statutes and the making these adjudications which formulated the policy of the State, does not justify a conclusion of legislative intent to abrogate the conditions theretofore imposed in accordance with such State policy, and to alter the policy of the State as to the future and preclude the imposing of such conditions thereafter.

The conclusion reached by the court below is of grave concern to each of the municipalities of the State. It deprives them of the benefit of the conditions which, with legislative sanction, they imposed upon, and so of the consideration which, with legislative sanction, they exacted in making, grants of permission.

The conclusion reached by the court below relieves the public utilities of the State of the various duties which they assumed by acceptance of the municipal permission subject to the conditions imposed, but leaves intact in such public utilities the rights which they acquired under the "contract-ordinances," granting such permission.

Since the municipalities are mere sub-divisions and agencies of the State it was, of course, within the legislative power to produce the result to which the conclusion reached by the court below leads.

It is, however, submitted that had such been the legislative intent, that intent, because of the radical change in State policy effected and the serious consequences which would result to the

municipalities of the State, would have been clearly and unmistakably manifested, and not left to be inferred from the enactment of a statutory provision which, in its terms, does no more than redeclare a rule of the common law and extend the rule to a single instance not thereby covered.

The conclusion reached by the court below not only ignores the considerations heretofore set out, but is also wholly at variance with the conclusion reached elsewhere.

McQuillin, Municipal Corporations, sec. 1697, p. 3594.

> "Discriminations in favor of the public at large are not opposed to public policy inasmuch as they benefit the people generally by relieving them of part of their burdens and such discrimination cannot be held illegal in the absence of legislation upon the subject."

Superior v. *Douglas County Tel. Co.,* 141 Wis. 363; 122 N. W. 1023.

An action to enjoin defendant telephone company from discontinuing maintenance of telephones in plaintiff's city and public library buildings under an agreement to do so free of charge, and to nullify the action of the State Railroad Commission requiring such discontinuance.

The agreement provided for the placing of one telephone in each of eleven of the municipality's departments in its city building and one in its public library building.

On October 14th, 1908, the commission, basing its action on the law of 1907 creating such commission, ordered the company to disregard the agreement and the company pursuant to such order notified city of discontinuance of free service after November 10th, 1908.

A motion on behalf of the city for a temporary injunction was denied.

Appeal. Denial of temporary injunction reversed.

Marshall, *J.*, said (368):

> "The contract in this case having been made before the legislation occurred prohibiting discriminatory rates, such legislation does not cut any figure in the case. If the contract were valid when made, it is within the constitutional protection precluding the legislature from impairing the obligations of contracts. Moreover, it is by no means certain but that the special circumstances in this case would, in any event, take the same out of the common law rule mentioned. We need not go further on this branch of the case than to suggest that it is not every discrimination in the treatment by public service corporations of their customers which is condemned by the common law. Only *unjust discriminations* are so condemned. For special reasons, in the absence of any written law on the subject, such a corporation may make a different rate to one person than to another, or accept pay from one upon a money rate and from another in service of a legitimate character or some other reasonable equivalent, so long as the compensation demanded is within reason under the circumstances. This subject covers a broad field. We leave it without stating much more than the rule in general, nothing further being at all necessary to the case in hand."

And again at page 369, he said:

> "Public policy as bearing on the validity, or in other words the judicial enforceability, of contracts, is that principle which maintains

that a person cannot rightfully do or bind himself to do that which is inimical to the public good. So where a contractual situation is found to be clearly within the principle condemning it, it cannot properly be said to be illegitimate *merely because there is discrimination.*

Discriminatory contracts between public utility corporations and their patrons which are held to be void as inimical to the public good are so held because *unreasonable advantage* is thereby given to one customer or a class over others, whereas all have a moral and legal right to equality of treatment. *In case of the contract being between a private corporation and the state or other public corporation, whatever advantage the particular has over general customers, obviously, inures to the benefit of the latter in the aggregate.* In other words, in the ultimate there is no discrimination which is 'inimical to the public good,' and hence no violation of public policy. Such is the situation here."

N. Y. Telephone Co. v. *Siegel Cooper Co.*, 202 N. Y., 502.

An appeal from a judgment in favor of plaintiff telephone company which claims that it is entitled to recover the sum of $35,928.92 besides interest for telephone service. Defendant, conducting a department store, claims to be entitled to 25% discount. The question presented was whether a telephone company, with an exclusive right to use the streets of the City of New York in order to carry on its business, may make a discount of 25% from its usual charges for telephone service in favor of the city itself, regularly incorporated charitable institutions, and regularly ordained

clergymen, without entitling all its other patrons to a like discount for service of the same kind.

Judgment affirmed.

Vann, *J.*, said:

"Whether discrimination is unreasonable or not is usually a question of fact, but the parties in this case have made no stipulation on that subject in their statement of the facts, and we cannot find a fact, even if we think that the facts as agreed upon would permit the inference. The defense, therefore, must fail, regardless of any other consideration, unless we hold that one or more of the discriminations in question was unreasonable as a matter of law.

"No discrimination was made by the plaintiff in favor of any class of customers, except the three expressly named; and for time out of mind discounts have been allowed by common carriers and others conducting a business in which the public has an interest, for services rendered to clergymen and institutions of charity, because they are engaged in the work of benefiting mankind, and are supported by contributions from the public. For these reasons, their property is exempt from taxation wholly or in part. They carry on no business, do not compete with others, and are not engaged in making money. It is the general belief that they render full value for what they receive by caring for the sick and wounded or helping all to lead orderly lives. * * *

"Moreover, the law against unreasonable discriminations rests on public policy. It is forbidden because it is opposed to the interest of the public, which requires that all should be treated alike under like circum-

stances. *Discriminations, however, in favor of the public, are not opposed to public policy, because they benefit the people generally by relieving them of part of their burdens.* In the absence of legislation upon the subject, such discriminations cannot be held illegal, as matter of law, without overturning the foundations upon which the rule itself is built. * * *

"We think that according to the common law, as in force prior to recent legislation on the subject, the discriminations in question were neither unreasonable nor unjust as matter of law, because they were in favor of the public, and because the favored classes were in a different situation and were surrounded by different circumstances from those affecting the general patrons of the plaintiff."

See further,

Knott v. *Southwestern Telegraph & Telephone Co.* (decision of Missouri Public Service Commission), P. U. R. 1915 E., 963, 981.

The case of *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U. S., 467, cited in the opinion below, has no relevancy to the question which was before the court below.

The statute under consideration in that case, and upon which the decision turned, was section six of the Interstate Commerce Act as amended, which requires the filing and publication by carriers of their rates, fares and charges and provides that they shall not "charge or demand or collect, or receive *a greater or less or different compensation for such transportation.*"

This provision of the Interstate Commerce Act, of course, altered the rule of the common law and confined the carriers to the filed and pub-

lished rates, and prohibited the charge or receipt of a *greater or less* or *different* compensation, than that shown by the tariffs so filed and published.

The compensation required by the tariffs is compensation *in money*. The acceptance of different compensation, that is to say compensation other than money, is therefore prohibited by the act.

Our Public Utility Act contains no similar provision.

It does not in itself require the filing and publication of rates, etc.

It does not prohibit the charge or receipt of a greater or less or different compensation than the filed and published rates.

In its enactment the Legislature went no further than to redeclare the rules of the common law as to rates and as to discrimination and create an administrative tribunal with power sufficient to secure continuous compliance with such rules.

Nor does the conclusion reached by the court below find support in the case of *Public Service Railway Co.* v. *Board of Public Utility Commissioners,* 85 N. J. L., 123; 86 N. J. L., 696.

The "contract-ordinance" there considered contained a condition requiring that "all policemen and paid firemen, while on duty, shall be permitted to ride on the cars of the said companies, its lessees or assignees, free of all charge."

It was *held* that this provision was nullified by the later enactment of subdivision (g) of Section 18 of the Public Utility Act, which, in terms, forbids the granting of any gratuity or free service to any municipal officer.

POINT II.

The order set aside by the Court below was within the jurisdiction of the Board.

The original Public Utility Act (P. L., 1910, Chap. 41, p. 56), by its fifth section, provided that the Board should have power "after hearing upon notice by order in writing: (*a*) To require every public utility as herein defined to comply with the laws of this State relating thereto, and to perform the public duties imposed upon it thereby."

This provision was superseded by Section 17 (a) of the present act (P. L. 1911, chap. 195), which is as follows: "The Board shall have power, after hearing upon notice, by order in writing, to require every public utility as herein defined: '(a) *To comply with the laws of this State and any municipal ordinance relating thereto and to conform to the duties imposed upon it thereby or by the provisions of its own charter, whether obtained under any general or special law of this State.*' "

The court below reached the conclusion that the order under review was not justified by this section and said (Case, p. 43): "The Board of Public Utility Commissioners by the statute creating the Commission has the power to enforce certain legal obligations of the prosecutor, but the language is not broad enough to confer on the Board the power to enforce specific performance of contracts. This order made directs the specific performance of the contract between the parties.

"What would be the legal effect of the statute, if it were broad enough to confer such a power on the Board need not now be considered.

"Nor is it necessary to consider whether the Board would have had the power to enforce the contractural relation if it had existed in the ordinance."

It is submitted that in this conclusion the court below erred and that the order set aside is within the power conferred upon the Board.

It is not contended that by Section 17 (a) of the Public Utility Act above quoted, jurisdiction is conferred upon the Board to require, by order, compliance by a public utility with every duty imposed by the common law, the statutes of the State, and ordinances of the municipalities.

The whole scheme of the statute of which the section is a part makes against such a contention.

It is, however, contended that this provision applies in so far as the common law, statutes and ordinances relate to and impose duties upon a public utility in the performance of its functions as a public utility, that is to say, in general, as to service, the instrumentalities of service, and the rates for service.

The distinction will be made clear by reference to the following cases:

Willcox, et al. v. *Richmond Light & R. Co., et al.,* 142 App. Div., 44; 128 N. Y. S., 266 (affirmed 202 N. Y., 515).

J. J. Cole v. *Fort Scott & Nevada Light, Heat & Power Co.,* 1 Mo. P. S. Comm. Rep., 209.

The remedy afforded by this section is cumulative.

It takes away no existing right. Nor does it in anyway interfere with the existing jurisdiction of any court, or of the right of any one to resort to and, a final determination by, an appropriate judicial tribunal.

An order made by the Board is not self-executing.

The enforcement of compliance with such an order requires that recourse be had to an appropriate judicial proceeding.

Section 33 of the Public Utility Act specifically provides that: "Observance of the orders of the Board may be enforced by mandamus, or injunction in appropriate cases, or by suit in equity to compel the specific performance of the order or orders so made, or of the duties imposed by law upon such public utility."

See

Michigan R. R. Commission, et al. v. *Detroit & M. Ry. Co.* (Mich.), 148 N. W., 385, where Stone, *J.*, said:

"It has been decided in the courts of last resort of other states that mandamus is the appropriate remedy to compel compliance by railroad companies with proper commission orders. State *ex rel.* Skeen *v.* Ogden Rapid Transit Co., 38 Utah, 242; 112 Pac., 120; State *ex rel.* Railroad Commissioners *v.* Atlantic -Coast Line R. Co., 60 Fla., 465; 54 South., 394."

A moving cause for affording, where the duty is imposed by ordinance, a remedy through recourse by the municipality to the Board and the making of an order by it, which may be enforced by mandamus and by action in equity may, perhaps, be found in the unsatisfactory condition of the law in the restrictions imposed upon the use of the writ of mandamus by municipalities in enforcing compliance with ordinance conditions in *Newark* v. *North Jersey Street Railway Co.*, 73 N. J. L. 265, an adjudication which, it is submit-

ted, was unsound, but which unreversed is controlling.

Oklahoma City v. *Oklahoma Ry. Co.*, 20 Okla., 1; 93 Pac., 48.

People ex rel. Jackson v. *Suburban R. Co.*, 178 Ill., 594; 53 N. E., 349.

That the provisions of the Public Utility Act extend to a contract-ordinance provision in enforcement of which in the present state of the law, a writ of mandamus would not issue is indicated by *Public Service Railway Co.* v. *Board of Public Utility Commissioners and William Mungle*, 85 N. J. L., 123; 86 N. J. L., 696, where an order of the Board requiring the issuance of transfers by a street railway company at designated connecting points in accordance with contract-ordinances was sustained.

Section 17 (a) brings into play, in enforcement of observance by a public utility of the legal duties which rest upon it in its character as a public utility, the power of the Legislature to constitute non-observance of such duties an offense and to impose a penalty therefor.

For failure to comply with a lawful order of the Board the statute imposes a penalty (Section 33).

Liability to the penalty so imposed arises only when two factors conjoin: (1) a violation of the duty imposed, and (2) non-compliance with an order of the Board requiring compliance with such duty, made after hearing upon notice.

It is submitted that no constitutional provision prevents the Legislature from adopting the course which, if the contention now made as to the scope and effect of the section is sound, it has pursued, particularly since the statute subjects the order to judicial review.

The only limitation to the defining of the offenses by the legislative power are the guaranties contained in the constitution.

Morgan v. *Nolte,* 37 Ohio St., 23.

White, *J.* (25):

"The only limitation to the creation of offenses by the legislative power, are the guaranties contained in the bill of rights * * *."

People v. *West,* 106 N. Y., 293,

Andrews, *J.* (295):

"The validity of the statute in question is assailed on the ground that it converts what is or may be an innocent act into a criminal offense, and that it is a restriction upon that natural liberty of every owner of property to use it in any lawful way. The power of the legislature to define and declare public offenses is unlimited except in so far as it is restrained by constitutional provisions and guaranties. A legislative act is presumptively valid, and whoever questions its validity must be able to point to some limitation or restriction, or to some guaranty in the Constitution of the State or the United States which it violates, before its operation can be stayed or the court be called upon to pronounce it void. * * * It is not a good objection to a statute prohibiting a particular act and making its commission a public offense that the prohibited act was before the statute lawful or even innocent, and without any element of moral turpitude. It is the province of the legislature to determine in the interest of the public what shall be permitted or forbidden, and that statutes contain very many instances of acts prohibited, the criminality of which consists solely in the fact that they are pro-

hibited, and not at all in their intrinsic quality. The unnecessary multiplication of mere statutory offenses is undoubtedly an evil, and the general interests are best promoted by allowing the largest practicable liberty of individual action, but nevertheless the justice and wisdom of penal legislation, and its extent within constitutional limits, is a matter resting in the judgment of the legislative branch of the government with which courts cannot interfere."

Lawton et al. v. *Steele,* 119 N. Y., 226,

Andrews, *J.* (233):

"The legislature may not declare that to be a crime which in its nature is and must be under all circumstances innocent, nor can it in defining crimes, or in declaring their punishment, take away or impair any inalienable right secured by the Constitution. But it may, acting within these limits, make acts criminal which before were innocent, and ordain punishment in future cases where before none could have been inflicted. This, in its nature, is a legislative power, which by the Constitution of the State, is committed to the discretion of the legislative body."

State v. *Shevlin-Carpenter Co.,* 99 Minn., 158; 108 N. W., 935,

Brown, *J.*:

"One of the exclusive provinces of the legislative department of government is to declare what acts or omissions shall constitute a crime, to define the same, and provide such punishment therefor as may be deemed appropriate; and unless the constitutional rights of the citizen be invaded, its determination in all such matters is conclusive upon the courts."

It is within the legislative power therefore to impose a penalty upon non-compliance with the orders of an administrative body and to make the non-observance of such orders an offense.

In such an instance of exercise of legislative power the violation is not made an offense by the administrative body but by the Legislature through the statute; the offense is not against the administrative tribunal, but against the State; the penalty is not fixed by the administrative body, but by the Legislature.

United States v. *Grimaud,* 220 U. S., 506.

Health Department of the City of New York v. *Rector, etc., of Trinity Church,* 145 N. Y. 32; 27 L. R. A., 710; 39 N. E. 833.

State v. *Snyder,* 131 La. ——; 59 So. 44.

If the provision requiring the furnishing of free service to the municipal buildings and offices had been embodied in the ordinance of July 12th, 1898, granting the municipal permission, there could have been no question that the duty imposed was one to which the Board could, by order, require the public utility to conform.

The duty, then involving service, would relate to the performance by the company of its function as a public utility and such duty would have been clearly imposed by ordinance and the requirements of section 17 (a) of the statute would thus have been fulfilled.

The provision, however, was not contained in the ordinance of July 12th, 1898. It was embodied in a separate agreement.

It is submitted that this fact does not operate to change the nature of the duty imposed and that such duty is imposed by law within the meaning of section 17 (a).

The statute (P. L. 1896, p. 189) under which the ordinance granting the municipal permission was

adopted provides for the consent of the municipality to the use of the streets and that such use "shall be subject to such regulations and restrictions as may be first imposed by the corporate authorities of such cities or towns."

The ordinance of July 12th, 1898, provides that the permission is given "subject to the provisions of the General Statutes of the State of New Jersey in such case made and provided, and subject to the regulations contained in this ordinance, or that may be imposed by the corporate authorities or legislative body of the City of Plainfield."

The agreement of November 28th, 1898, recites that is was understood and agreed before the passage of said ordinance that the contract should be entered into. It further recites that it is entered into in consideration of the passage and approval of said ordinance.

It contains an undertaking on the part of the company to construct, operate and maintain a system of underground conduits for the construction of which consent and permission is given in said ordinance, and also its system of poles and wires for the carrying on of its business "in the manner and upon the terms and conditions mentioned and described in said ordinance, and also in the manner and upon the terms and conditions herein contained, and will from this time forth, and from time to time, and at all times, faithfully fulfill and perform all the said conditions, terms and requirements, on its part to be kept, fulfilled and performed" (Case, p. 13).

Under the adjudications of our courts the ordinance of July 12th, 1898, had the effect of a contract.

Rutherford vs. *Hudson River Traction Co.*, 73 N. J. L., 227, 238.

As a contract, the agreement of November 28th, 1898, must be treated as part of the ordinance, since the ordinance is the foundation of the agreement.

The duty to furnish free service which is here in question therefore rests upon (1) the statute, (2) the ordinance, (3) the agreement, the ordinance furnishing the consideration for the agreement; the agreement furnishing the consideration for the grant of permission made by the ordinance.

In this situation may it not reasonably be said that an order which requires the performance of such duty requires compliance with the laws of this State and with a municipal ordinance and commands conformity with the duties imposed thereby?

The jurisdiction of the Board to make the order, however, may, if the ground upon which it has been sought to sustain it fails, be rested upon another ground.

Section 18 (c) of the Public Utility Act provides that *"No public utility as herein defined, shall, * * * withhold or refuse any service which can reasonably be demanded and furnished when ordered by said Board."*

Here the service, the continuance of which the order requires, and which the public utility gave notice that it would withhold or refuse, can clearly be reasonably demanded and furnished, if, as is contended, the public utility was not relieved from the duty to furnish such service by the enactment of the provision of the Public Utility Act directed against undue and unreasonable discrimination, and such duty consequently still continues to exist.

The requirement of section 18 (c) of compliance with an order of the Board must be operative to confer upon the Board power, by order, to require any service which can reasonably be demanded and furnished.

It would be absurd to require compliance with such an order and yet withhold power to make such an order.

Section 15 of the statute sets this matter at rest. It provides that "the board shall have general supervision and regulation of, jurisdiction and control over all public utilities, and also over their property, property rights, equipment, facilities and franchises *so far as may be necessary for the purpose of carrying out the provisions of this act.*"

If service should be withheld from, or refused to, an applicant ready to comply with all reasonable regulations of a public utility, section 18 (c) would be effective to confer jurisdiction to order that service be afforded.

If jurisdiction is conferred to order service under these circumstances and, in effect, to require a public utility to accept an application for service and so to enter into a contractual relation with the applicant, the fact that a contract for service already exists, which service a public utility withholds or refuses, cannot take the subject matter of the section—service—out of the operation of the section, and out of the jurisdiction thereby conferred.

The section makes no distinction in the power of the Board between the case in which service has been withheld from, or refused to, an applicant for service and that in which service has been withheld from, or refused to, one with whom the public utility has entered into a contract to furnish service.

Conclusion.

It is respectfully submitted that the judgment below should be reversed and that the order set aside by such judgment should be affirmed.

Respectfully submitted,

GROVER C. RICHMAN,
FRANK H. SOMMER,
Attorneys for and of Counsel with Board of Public Utility Commissioners.

November Term, 1915.

New Jersey Court of Errors and Appeals

PUBLIC SERVICE ELECTRIC COMPANY, *Respondent,*	*On Certiorari.*
vs.	*On Appeal from Supreme Court.*
BOARD OF PUBLIC UTILITY COMMISSIONERS AND THE CITY OF PLAINFIELD, *Appellants.*	

Brief for Respondent.

On the 12th day of July, 1898, the common council of Plainfield passed an ordinance designating certain streets on which Plainfield Gas and Electric Light Company might place and maintain poles and wires, and also indicating the manner in which the poles should be placed (case, pp. 8-12). On the 28th of November following the city and the company entered into an agreement which recites that it had been understood and agreed before the passage of the ordinance, and in consideration thereof, that the company should enter into it for the benefit of the city (case, pp. 12-16). The contract contains a provision that the company shall "at all times hereafter, while the company, its successors or assigns, shall continue to use any of the streets of the said city, or any of the subways aforesaid, light by electricity, free of charge, the common council chamber, offices of the mayor, collector, street commissioner, city clerk, the city jail, station house, almshouse, fire houses, as at

present lighted or new in proportion, and all other offices, rooms or buildings, owned or occupied by the city officers, or that may be hereafter owned or occupied for city purposes, including city hall if the same shall be built or rented." (Case, p. 14.)

That is the pertinent part of the contract and the provision out of which this litigation has arisen.

The present respondent is the successor of Plainfield Gas & Electric Light Company, and is now engaged, and for several years past has been engaged in operating the electric property formerly owned by that company.

The utility act of 1911 (P. L., p. 374) provides, in sec. 18, that no public utility as therein defined shall—

> "(a) Make, impose or exact any unjust or unreasonable, unjustly discriminatory or unduly preferential individual or joint rate, commutation rate, mileage and other special rate, toll, fare, charge or schedule for any product or service supplied or rendered by it within this state." * * *
>
> "(d) Make or give, directly or indirectly, any undue or unreasonable preference or advantage to any person or corporation *or to any locality* or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation *or locality* or any particular description of traffic to any prejudice or disadvantage in any respect whatsoever."

On account of the passage of that act the respondent insists that it can no longer furnish the light provided for in the agreement of November 28, 1898, free of charge, and upon its refusal to do so the city presented a petition to the board of

public utility commissioners praying that the board should make an order requiring the respondent to comply with the terms of the said ordinance and agreement, and to continue to light the municipal buildings in conformity with the duties by said ordinance and contract imposed upon it. (Case, page 3.)

The respondent replied to the petition filed by the city, and the city filed a brief rejoinder (case, pp. 17-19). The matter was heard before the board of public utility commissioners, which made an order directing the company "to conform to the duties imposed on it" by the agreement of November 28, 1898, "and to furnish free of charge to the city of Plainfield such service as the agreement referred to herein provides shall be furnished by the Plainfield Gas & Electric Company to said city." (Case, p. 20.)

The Legal Questions.

I.

A contract to which a municipality is a party may be abrogated by the state if the other party to the contract does not object. Such a contract is not protected as to the municipality by the contract clause of the constitution of this state or of the United States. *Cortelyou* v. *Anderson,* 73 N. J. L., 427; *Public Service Ry. Co.* v. *Bd. Public Ut. Comrs., et al.,* 85 N. J. L., 122; affirmed on opinion of supreme court, 86 N. J. L., 696; *Borough of North Wildwood* v. *Bd. Public Ut. Comrs. et al.,* opinion of supreme court filed November 3, 1915.

II.

The order under review is an effort by the Board of Public Utility Commissioners to enforce specific performance of a contract, which is within the exclusive jurisdiction of the Court of Chancery.

The petition in this case is in substance and effect a bill for specific performance of a contract, and the order of the board purports to be a decree for specific performance of a contract. It will be noticed that the order of the board directs the company to perform the duties imposed on it *by the agreement,* and directs the company to furnish to the city such service as *the agreement* provides.

The board of public utility commissioners has no jurisdiction to entertain a bill or petition for the purpose of requiring the specific performance of a contract. The board, however, undertakes to justify its jurisdiction by virtue of paragraph (a) of section 17 of the public utility act which provides that the board shall have power to require public utilities—

> "(a) To comply with the laws of this state and any municipal ordinance relating thereto and to conform to the duties imposed upon it thereby or by the provisions of its own charter, whether obtained under any general or special law of this state."

In taking this position the board mis-read the provision which it relied on. That provision has nothing whatever to do with contracts or contractual relations, but only with the performance of franchise obligations imposed by statutes or by ordinances authorized by statute and to require adequate service.

It appears to be the opinion of the board that the provisions of this contract (exhibit B, case, p.

12) must be read into and considered as a part of the ordinance (exhibit A, case, p. 8), and when so considered it comes within the purview of paragraph (a) of section 17 of the utility law Whether the contract is a separate paper, as in this case, or is embodied in the ordinance itself, makes no difference. It is a contract nevertheless, and must be judged and treated accordingly. Being a contract, it may be enforced only in judicial proceedings by the courts established for the purpose, and not by a board without authority to enforce specific performance of contracts. **A hearing before a board attempting to exercise the exclusive jurisdiction of the court of chancery is not the day in court, nor the due process of law, to which the respondent is entitled.**

It is well settled that specific performance of contracts is within the jurisdiction of courts of equity *exclusively* (Pomeroy Eq., sec. 138, 3rd ed.), although certain duties imposed by law on corporations may be enforced by mandamus; but in either case the enforcement of the right claimed must be made by the regularly established courts of the state; and it is well known that the jurisdiction of a constitutional court of this state cannot be taken away by legislation, or even transferred from one constitutional court to another. *Flanigan* v. *Smelting Co.*, 63 N. J. L., 647. Speaking of the supreme court this court said in that case (p. 651):

> "To abolish the court, to alter its organic character, to impair its jurisdiction, to diminish its authority, are beyond legislative power, because that character, jurisdiction and authority form part of a body of law which, upon wise grounds, has been made immutable by any mere legislative act."

That remark, for the same reason, applies to the court of chancery. Indeed, the first ten pages of the opinion in that case which deal with the alleged power of the legislature to dissipate the jurisdiction of a constitutional court, is an impressive and timely warning.

In the important case of *Hutton* v. *Camden,* 39 N. J. L., 122, an effort was made to sustain a decision of a board of health that a building lot had become a nuisance and an order that it must be filled up to a given grade within a certain time. This court, after holding that the order of the board was ineffective because made without notice, proceeded to say (p. 129):

> "But to rest here would be to put this matter on too narrow a ground. There is an infirmity in all proceedings of this nature, which lies deeper than the one just noticed. Assuming the power in this board derived from the legislature, to adjudge the fact of the existence of a nuisance, and also assuming such jurisdiction to have been regularly exercised, and upon notice to the parties interested, still, I think, it is obvious, that in a case such as that before this court, the finding of the sanitary board cannot operate, in any respect, as a judgment at law would, upon the rights involved. It will require but little reflection to satisfy any mind accustomed to judge by legal standards, of the truth of this remark. To fully estimate the character and extent of the power claimed, will conduct us to its instant rejection. The authority to decide when a nuisance exists, is an authority to find facts, to estimate their force, and to apply rules of law to the case thus made. **This is a judicial function, and it is a function applicable to a numerous class of important interests.** The

use of land and buildings, the enjoyment of water rights, the practice of many trades and occupations, and the business of manufacturing in particular localities, all fall, on some occasions, in important respects, within its sphere. To say to a man that he shall not use his property as he pleases, under certain conditions, is to deprive him, *pro tanto*, of the enjoyment of such property. To find conclusively against him, that a state of facts exists with respect to the use of his property, or the pursuit of his business, which subjects him to the condemnation of the law, is to affect his rights in a vital point. The next thing to depriving a man of his property, is to circumscribe him in its use, and the right to use property is as much under the protection of the law as the property itself, in any other aspect, is, **and the one interest can no more be taken out of the hands of the ordinary tribunals than the other can.** If a man's property cannot be taken away from him except upon trial by jury, or by the exercise of the right of eminent domain upon compensation made, neither can he, in any other mode, be limited in the use of it. The right to abate public nuisances, whether we regard it as existing in the municipalities, or in the community, or in the hand of the individual, is a common law right, and is derived in every instance of its exercise, from the same source—that of necessity. It is akin to the right of destroying property for the public safety, in case of the prevalence of a devastating fire or other controlling exigency. But the necessity must be present to justify the exercise of the right, and whether present or not, must be submitted to a jury under the guidance of a court. The finding of a sanitary committee, or of a municipal council, or

of any other body of a similar kind, can have no effect whatever, for any purpose, upon the ultimate disposition of a matter of this kind. It cannot be used as evidence in any legal proceeding for the end of establishing finally, the fact of nuisance, and if it can be made testimony for any purpose, it would seem that it can be such only to show that the persons acting in pursuance of it were devoid of that malicious spirit which sometimes aggravates a trespass, and swells the damages. I repeat that the question of nuisance can conclusively be decided, for all legal uses, by the established courts of law or equity alone, and that the resolutions of officers, or of boards organized by force of municipal charters, cannot, to any degree, control such decision."

The opinion then proceeds to cite authorities to support the position taken.

In the present case the board of public utility commissioners undertook to adjudicate upon the disputed question as to the existence of the contract, and having reached the conclusion that the contract existed, the board proceeded to order its specific performance. **Their order, in a word, purports to be a judgment or decree in a judicial proceeding, based on pleadings, proofs and a judicial opinion, called a report, and the order includes a writ or execution to enforce it.** (Case, pp. 3, 17, 20, 22.)

The power of the board of public utility commissioners to enforce provisions in ordinances of a legislative character, or duties that might be imposed on public utility corporations under the police power without their consent, may be conceded, but the right to enforce specific performance of contracts sometimes incorporated in ordi-

nances locating street railway tracks or pole lines is another matter. Ordinances granting consent of municipalities to construct public utilities generally are legislative in character. *Moore* v. *Haddonfield,* 62 N. J. L., 386-390. Occasionally in such ordinances contracts are incorporated even with legislative authority, and in discussing such ordinances they are sometimes said to be contracts or ordinance-contracts and sometimes legislative proceedings, while in fact many of them are of a dual nature and the parts are separable. This fact was noticed and the distinction recognized in the case of *Pleasantville* v. *Atlantic City Traction Co.,* 75 N. J. L., 279, where the cases of *Rutherford* v. *Hudson River Traction Co.,* 73 N. J. L., 227, and *Newark* v. *North Jersey Street Railway Co.,* 73 N. J. L., 265, were examined and found to be in harmony, because the decision in one case rested upon the legislative quality of the ordinance and in the other on its contractual feature.

It seems to be conceded by counsel for the board of public utility commissioners in their brief that the utility board cannot decree and enforce specific performance of contracts (pp. 20 &c), but may compel the performance of duties imposed by legislation or in pursuance of the police power. In the case of *Newark* v. *North Jersey Street Railway Co., supra,* a provision in an ordinance relating to transfers under consideration in that case derived its efficacy, the court said, "wholly from the assent of the company thereto, given as a consideration on which certain privileges were granted to the city;" that the assent of the company thereto consummated a contract, and therefore a denial of the rights thereby created could be enforced only by a private action on the part of the party aggrieved. Such an action of course can only be prosecuted in the established judicial tribunals.

It would have been the duty of the supreme court in this case to set aside the order of the utility board even if that court had been convinced that the company should continue to light the public buildings of the city free of charge. If the board had no jurisdiction to enforce specific performance of the contract, as the supreme court held, it could only be enforced properly by a decree in chancery, and it is clearly beyond the jurisdiction of the supreme court to exercise equity jurisdiction by affirming an illegal order of the utility board. *Rosenfeld* v. *Einstein,* 46 N. J. L., 479. If the claim of the city to have its public buildings lighted free of charge were a legal duty of the company and not a contractual obligation, the proper way to enforce that duty would have been by mandamus issued by the supreme court, *Bridgeton* v. *Traction Company,* 62 N. J. L., 592, but the supreme court would not have undertaken to exercise that jurisdiction by affirming an order of a tribunal that had no authority to issue a writ of mandamus. The jurisdiction of the supreme court on application for mandamus, and the jurisdiction of the court of chancery on application for specific performance, **is original and not appellate, and litigants have a right to be heard in those courts in the first instance.**

III.

One of the principal objects of the Utility Act was to abolish discriminations of all kinds by utility corporations in their dealings with municipal corporations and other corporations, and with individuals.

The briefs submitted on the part of the appellants in this case were evidently prepared under the impression that although the utility law was

enacted to bring about uniformity and impartiality by utility corporations in their treatment of all who required their services, nevertheless whenever the process of bringing about that method of treatment threatens to deprive a municipal corporation of some special privilege every imaginable effort must be made to construe the statute so as to preserve the unjust discrimination. There is nothing in the act to justify such an interpretation. It will be obvious from even a casual reading of the act, and the impression will be confirmed by its careful study, that one of its principal objects was not only *to prohibit,* but *to terminate* discrimination by utility corporations among their customers, and the state in its determination to do so made no distinction between individuals, municipal corporations, and other corporations. The state agreed and declared that its municipal corporations should be treated precisely as all other corporations and all individuals who must patronize public utility corporations are treated—that is, without discrimination, favoritism, or injustice.

That the statute was intended to abolish objectionable conditions and practices that were believed to prevail before its passage, and which to some extent did prevail, is no doubt true. It may be conceded that some of those conditions came about by agreements with municipalities and ordinances supposed to be authorized, or at least not forbidden, by statute law. **That fact, however, cannot justify or support a construction of the utility law so as to destroy discriminations that seem to favor utility corporations and preserve discriminations that seem to favor municipal corporations.**

In construing a similar provision in the interstate commerce act, the supreme court of the United States said, in *Louisville & Nashville R. R.*

Co. v. *Mottley,* 219 U. S., 467—a leading case on this subject:

> "The purpose of congress was to cut up by the roots every form of discrimination, favoritism and inequality, except in the cases of certain excepted classes to which Mottley and his wife did not belong and which exceptions rested upon peculiar grounds." (p. 478).

In that case it was held that a railroad company could no longer continue to perform a contract for carriage for compensation differing from the rates payable by others. It appeared that in 1871 Mottley and his wife had been seriously injured in a railroad accident, and in settlement of their claim for damages passes for life were given to them; and it was held that on the passage of the interstate commerce act the passes were nullified by reason of the clause to which reference is made.

Suppose two manufacturing corporations were engaged in business on opposite sides of the same street in a municipality, and a utility corporation should charge one of the corporations eight cents a kilowatt hour and the other five cents a kilowatt hour for electricity used for the same purpose, such as operating machinery. The courts would prohibit a continuation of that "undue and unreasonable" practice as soon as possible after the matter should be brought to their attention. And the reason that would lead the courts to put a stop to it applies quite as strongly to the same discrimination between two municipal corporations supplied by the same electric company under similar conditions. In fact, Plainfield and North Plainfield furnish a striking illustration of the injustice and unreasonableness of the contract now under consideration. It would be impossible for a stranger visiting those towns to determine from personal

observation where the city ends and the borough begins. To a person not familiar with the boundaries of the city and borough the entire community would seem to be one city. Suppose, therefore, that the respondent in this case should light the public buildings of the city at a cost to the company of $2400 a year, and exact no payment from the city for the light furnished, as it did in 1913, case, p. 36, and should light the public buildings of the adjoining borough, containing over 8000 inhabitants, and charge the customary rate, as it probably does, it is clear that the injustice could not be distinguished from that of the case of the two manufacturing establishments referred to. What the respondent gives to the city of Plainfield it gets and must get from its other customers, and whether the donation is made in pursuance of a contract or not is entirely immaterial. Discrimination among municipal corporations is quite as obnoxious to the utility act and to the policy established by that act as discrimination among other corporations or individuals, and its substantial effect is the same.

The alarming consequences that counsel for the appellants anticipate from an affirmance of the judgment under review rest on no substantial foundation. Similar fears were expressed by counsel in their brief in the case of *Public Service Ry. Co.* v. *Board of Public Ut. Comrs.*, 85 N. J. L., 123, and repeated in this court on the argument of the appeal from the decision of the supreme court, 86 N. J. L., 696. In that case it was held that a contract to carry policemen free of charge had been abrogated by the utility act, and that decision is controlling in this case. Nearly all of the provisions in ordinances granting municipal consent to utility corporations are based on the police

power, and could be imposed upon such corporations after construction of their works and without their consent. See *C. B. & Q. R. R. Co.* v. *Chicago,* 166 U. S., 226; *C. B. & Q. R. R. Co.* v. *Nebraska,* 170 U. S., 57; and *C. B. & Q. R. R. Co.* v. *Drainage Commissioners,* 200 U. S., 561. **Inequalities created by agreement or by practices condemned by sound public policy, whether originally lawful or not, ought to be abolished.** The policy of the state indicated by the statute under consideration is to bring about uniformity in conditions, and equality in service by public utility corporations on reasonable terms. Arguments more or less plausible can easily be urged in favor of the continuance of almost every discrimination, and if allowed to prevail would frustrate the purpose of the law. The purpose of the state in this matter is also shown by other legislation, notably by the franchise tax law of 1900. (P. L. 1900, page 502.) That statute provides for the payment by certain utility corporations of a percentage of their gross receipts to the municipalities in which their business is carried on, and contains a provision in section 7 that all money payable by any utility corporation to any taxing district under any contract, agreement, resolution or ordinance (except money expended for paving or repairing any street, highway or other public place, or taxes upon property real and personal), shall be paid, "and when paid shall be considered a payment on account of, or in full, as the case may be, for the franchise tax to be apportioned according to the provisions hereof." See also P. L. 1906, page 644. By the operation of those statutes much of the inequality in the terms under which public utility corporations carry on business in this state has already been eliminated. The experience in that important instance of discrimination by muni-

cipalities in their dealings with utility corporations indicates how similar undue and unreasonable discriminations may be successfully dealt with.

It is respectfully submitted that the judgment of the supreme court should be affirmed.

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NEW JERSEY
Court of Errors and Appeals

PUBLIC SERVICE ELECTRIC COMPANY,
Respondent,
v.
BOARD OF PUBLIC UTILITY COMMISSIONERS AND THE CITY OF PLAINFIELD,
Appellants.

On Certiorari.
On Appeal from the Supreme Court.

Brief Filed by Permission of the Court by the New Jersey State League of Municipalities.

The New Jersey State League of Municipalities was formed in accordance with the provisions of

Chapter 163 *of the Laws of* 1915
(*P. L.* 1915, *p.* 321).

> "For the purpose of securing concerted action among such municipalities in behalf of such measures as such organization shall determine to be in the common interest of the said municipalities."

It now numbers among its membership most of the larger municipalities of the State, including such cities as Newark, Jersey City, Trenton, Camden and Passaic,

and a large number of the smaller cities, towns, boroughs and townships.

Practically all of these municipalities are vitally interested in the question of the relationship between municipalities and public utility companies, especially with regard to the limitations which the municipalities may impose upon such companies in the interests of municipalities themselves and of their inhabitants. For this reason application was made somewhat late, perhaps, but prior to the consideration of this case by the Court, for leave to file a brief on behalf of the municipalities of the State as organized through the League. The shortness of time, however, is allowed by the Court for the filing of this brief is such as to prevent the full and careful presentation which the League would desire to make and counsel desire to express their regret that the present brief, hurriedly prepared, does not do justice to the importance of the case and fails to measure up to the standard which counsel would wish, in return for the permission of this Court to be heard in a matter in which the League, as such, is not directly involved.

The opinion of the Supreme Court in the case at bar in setting aside the order of the Utility Commissioners was based on two grounds, first, that the contract of the City of Plainfield with the Plainfield Gas and Electric Light Company transgressed the provisions of section 18 D of the Public Utilities Act,

P. L. 1911, *p.* 381,

and, secondly, on the ground that the Public Utility Board was without jurisdiction to make the order, it being in the nature of an order for the specific performance of a contract. Deeply as the municipalities are interested in the sustaining of the jurisdiction of the Public Utilities Commission as a board which affords an impartial and speedy hearing on disputes arising between municipalities and Public Utilities, still they feel that this question is one of less importance to the municipalities, since even without the Board,

other, if somewhat less convenient, remedies for the review of such question are provided through the regularly constituted judicial system of the State.

The first ground for setting aside the order, however, is one which touches practically every municipality in the State, very nearly, and it is to this phase of the case that we would especially direct the Court's attention, briefly, and without the citation of numerous authorities, which already appear on the briefs of the appellants.

For many years, from the time of the decision in the Court of Chancery in the case of

Jersey City and Bergen R. R. Co. v. *Jersey City and Hoboken Horse Ry. Co.*, 20 *N. J. Eq.* 61,

until the very recent case of

Camden v. *Public Service Ry. Co.*, 82 *N. J. L.* 242 (*affirmed in* 84 *N. J. L.* 305),

the courts of our State have consistently affirmed the right of municipalities to impose terms upon Public Utilities Companies when they have applied in accordance with statutory requirements to the municipalities for leave to enter their territory and to use their highways, and the municipalities have during this whole period quite consistently insisted that in exchange "for the valuable franchise" (as such a grant is termed in the case of

Myers v. *Electric Co.*, 63 *N. J. L.* 573),

the Public Utilities should make return of some kind in value. The type of return so demanded may be roughly divided into two classes. The first class is where the return is made directly to the municipality and involves either the payment of money (now in a lump sum, now in license fees, now on a percentage basis, figured on gross receipts) or the performance of specific acts of service by the Utility (now in the supplying of the specific utility commodity, now in the performance of services not directly related to the utilitise'

business). Examples of practically all these types under the first class are to be found in the cases cited in appellants' briefs; were contained in the ordinances before this Court in the case of

Eggers v. *City of Newark*, 77 *N. J. L.* 198;

and will be found in the ordinances of the various cities, towns and even smaller municipalities throughout the State. The most frequent of the type here referred to and which may be found recurring in the ordinances in every section of New Jersey are those imposing license fees upon traction companies of 5 per cent. of their gross receipts; imposing license fees varying from $5 to $20 upon the individual cars of such companies; requiring the paving by such companies sometimes of the whole street and sometimes of that part of the street lying between the tracks and for a designated distance on each side varying from 18 inches to 3 feet; requiring electric light companies to supply certain public buildings or certain designated portions of the public highways with lighting facilities without charge; requiring telephone companies to supply municipal offices with free service or at reduced rates; requiring such companies to carry, without charge, through their underground conduits or upon their poles, necessary wires for police and fire signal systems and in many instances requiring the maintenance of such systems.

In the second class of cases the municipality itself receives no direct benefit but imposes conditions upon the operation of the Utility within its borders which result in benefit to its citizens or in indirect benefits to itself. Such cases are those fixing the rates for water and light; fixing trolley fares; requiring transfers to be given; providing for the stopping of cars at designated places; requiring traction companies to permit the user of their tracks by other traction companies upon equitable terms or companies maintaining sub-surface conduits to permit their user by rivals or other com-

panies requiring such facilities. Probably the most frequent of these provisions is that relating to five-cent trolley fares and transfers provided for in the ordinance above referred to as before this Court in the Eggers case and found in ordinances in such widely-scattered parts of the State and in municipalities of such discrepant size as Montclair, Plainfield, Camden and Elizabeth. Numerous ordinances provide also for the three-cent fare for school children, reviewed and sustained by the Supreme Court in the case of

Public Service Ry. Co. v. *Public Utility Comm.*, 81 *N. J. L.* 364.

In the case at bar the provision alleged to be objectionable falls within the first of these two classes, and it would seem a logical necessity that if the judgment of the Supreme Court in this case be sustained, the whole mass of ordinance provisions introduced for the direct benefit of municipalities must fall. Such a construction would relieve the traction companies throughout the State of the 5 per cent. contracts which they have solemnly entered into, and would throw the municipalities who have vigilantly safeguarded their rights and interests back upon the 2 per cent. provision contained in the so-called Voorhees Act. It would mean the relieving of the trolley companies from liability for maintaining the streets which by their operations are seriously damaged; it would relieve the telephone and lighting companies from the duty of maintaining conduits for municipal use, likewise a matter of solemn contract.

For there is no logical distinction between benefits received in kind and benefits received in cash. It is a matter of supreme indifference to municipalities whether they receive services from the company which are necessary to the municipality, and for which the municipality would have to pay money, or whether they receive an equivalent sum of money and pay for the services. In either event the municipality is receiving

a preference or advantage. As soon as the municipalities are held by this Court to be upon the same basis in their dealings with the Public Utilities as is the ordinary consumer or user of Public Utilities, just so soon must it be conceded that in that respect the municipality has ceased to be an arm of the State, and has become an ordinary private corporation. And yet, the the Supreme Court itself has held that where public interest or the public policy of the State dictates, a discrimination which, if it were not thus connected with such public interests or policy, would be undue and unreasonable, ceases by this very fact to be improper, and is not prohibited by the act.

We refer to the case above cited,

Public Service Ry. Co. v. *Public Utility Comm.*, 81 *N. J. L.* 364,

where it was held that the regulation providing for a three-cent trolley fare for school children was not *ipso facto* abrogated by the passage of the Public Utilities Act. As the Court says in that case:

> "This company (Public Service Railway Company) had practically converted itself by its low fares into an auxiliary of the State in assisting in the spread and maintenance of education by facilitating the transportation of school children at low fares."

The necessary inference from this statement, in which we heartily concur, is that where a railroad company in giving a preference is doing so as an auxiliary of the State, such preference ceases to be objectionable. Nor unless we are to open ourselves to the charge of waxing sentimental over the public school system or of attributing magic properties to anything in connection with that system or of holding that that which would be illegal in every other case becomes legal when brought within the sacred circle of our public school system, can it make any difference whether the Public Utility is acting as an auxiliary of the State for the

benefit of that system or as an auxiliary in helping the several municipalities, themselves arms of the State government, to bear their constantly increasing and perplexing burdens.

It follows, therefore, that as soon as the preference or advantage complained of is in favor of a municipality—in other words, in favor of the State itself—the Utility granting such preference or advantage is an auxiliary of the State, in that it is an aid to an arm of the State, and the preference or advantage cannot be declared *ipso facto* to be unreasonable or undue. The question of the reasonableness is then one for the Public Utility Commission, and where there is any evidence before that board tending to establish the reasonableness of the regulation, the matter becomes a question of fact for the determination of the Public Utilities Commission, and is not properly reviewable by the Supreme Court. Such is the position taken by the Supreme Court in the case last cited, and such is the reasonable view to be taken. The proceedings of the Public Utilities Board should be reviewed on matters involving decisions of questions of fact in the same way as the decisions in any other regularly constituted tribunal.

We respectfully urge that the construction given to section 18 D by the Supreme Court is strained and illogical. The Court states in its opinion:

> "The Public Utilities Act in forbidding discrimination made the performance of this contract unlawful."

We respectfully submit that the Public Utilities Act does not prohibit anything but *undue* or *unreasonable* preference or advantage. The Court in its opinion says that this point was urged upon the Court, and then says:

> "This contention clearly ignores the spirit of this legislation. One of its objects was to abrogate the granting of gratuities to municipali-

ties, and thereby prevent reciprocal favors from being granted to the donors."

The Court here shows clearly that it ignored the wording of the act, although that wording was specifically called to its attention. If the Court's opinion, as last above stated, is a true construction of the act, then the words "undue" and unreasonable" are meaningless in the act. The act should have read:

"No preference or advantage shall be given."

Again we respectfully urge that nowheres in the act does it appear that one of its objects was the abrogation of "gratuities" (to use the Court's own term) to municipalities.

In the case of

Public Service Ry. Co. v. *Bd. of Public Utility Commrs.*, 85 *N. J. L.* 123 (*affmd. in this Court*, 86 *N. J. L.* 696),

the Supreme Court in its opinion states that the intent of the Legislature not to prohibit the granting of a "gratuity" to municipalities in permitting police officers to ride free of charge in the discharge of their duty upon trolley cars, is shown from the fact that the Legislature of 1912 enacted a law requiring the Street Railway Companies to grant such free transportation. The original act prohibiting passes to municipal officers was too broad and included a case which the Legislature had not in mind. It is, of course, quite proper to prohibit municipal officers from receiving "gratuities" from Public Utility Companies. If the opinion of the Supreme Court in the case at bar had stated that one of the objects was to abrogate the granting of gratuities to municipal officers we would fully concur in the statement of the Court. The distinction which the Court fails to make is between the granting of advantages to municipalities and the granting of gratuities to the individual officers. In the one case the advantage inures to the benefit of the municipality as a whole and cannot operate as an incentive to the

officers, who are only incidentally benefited as members of the community, to grant undue favors to the utility; in the other case the advantage is directly to the officer, and an officer dealing thus with a friendly utility, in the weakness of human nature, might very probably look with more than just favor upon the beneficient corporation. This was the evil which the act sought to abolish, not the obtaining of a fair and reasonable advantage by the State through its arms, the several municipalities. Had the latter been the object of the Legislature, the Legislature would never have corrected by amendment its too broad exclusion of municipal officers by regranting the right of free transportation to police officers.

Finally, the above-cited section of the Supreme Court opinion errs in calling the duties imposed upon Public Utilities by municipalities "gratuities," and in using that word clearly shows the confusion in its mind between favors to officers and advantages to the municipality itself. That a man, through the mere fact of his holding public office, should be permitted, in the absence of statute requiring such service in his favor, to receive passes upon trolleys, free telephone service at his house or electric light in his store, is markedly improper, and such service is properly called a "gratuity," if nothing is expected in return, a "bribe" if special consideration is demanded.

But the provisions of municipal ordinances are a very different matter. The Public Utility comes to the municipality in pursuance of legislative requirement and prays of the municipality the privilege, not the right, of entering the municipality for its private gain. Had the Legislature intended that the municipality might not impose terms upon the Utility, there would be no sense in the provision requiring municipal consent, and such has been the view of this question consistently taken by our courts. The result is that the municipality and the Utility deal with one another at arm's length

as free agents. The Utility makes its request, and as an inducement to the granting of it shows the municipality wherein the municipality will be advantaged. The municipality in turn considers the request and the offer, and determines what in its opinion is a fair return to be made by the Utility to the municipality for the granting of rights without which the Utility could not operate. The municipality, in effect, leases to the Utility the rights in its streets and over its public places upon a rental agreed to, and which, were it unreasonable, the Utility would not accede to. No better proof of the reasonableness of the various provisions of these municipal ordinances, and especially of the provision in the contract at bar, can be had than the mere consideration of the fact that the various Utility Companies now complaining have, despite the burdens thus placed upon them in the past two decades, developed from small and struggling companies into the tremendous organization of the present day. To hold that because a provision in the contract is to the effect that all city buildings are to be illuminated, and that this may mean in the future a large increase in the burden upon the Utility, and that for that reason the regulation is unreasonable, is as ridiculous as to hold that a return based upon gross receipts is unreasonable because the receipts may at some future time be greater than they are at the time when the privilege was granted. The increase in the extent of municipal buildings is always correlated with the increase in the size of the municipality, and that in turn with the increase in the business of a company such as an electric lighting company.

To return a moment to the consideration of the "gratuity." We feel that our argument has established the fact that the "gratuity" is a misnomer, and that in fact the "gratuity" so called is a valuable consideration for a valuable right. And on this phase of the question the Supreme Court again fails in its reasoning. The opinion says:

> "Thus we have a case of a contract, lawful when made, the performance of which subsequently becomes unlawful. It is perfectly well settled that the effect of this is to excuse the promisor from performance."

True, but subject to this qualification, which the Court fails to make, that where the thing to be done forms the consideration of a contract and subsequently becomes unlawful, although lawful at the time of the making of the contract, the effect of this subsequent illegality is not merely to relieve the promisor from performing his promise, but is to abrogate the contract. If, for example, A should agree in the spring of the year to deliver to B in the fall, for a fixed sum of money, a certain number of birds, and after the making of the contract the Legislature should pass an act making it unlawful to shoot such birds and making it unlawful for anyone to have in his possession any such birds, whether dead or alive, A, it is true, would be relieved from his contract, and no action for breach of contract would lie against him on the part of B. On the other hand, B could not be made to pay A for the birds, which lawfully contracted for, A could no longer lawfully deliver.

If we should apply this doctrine to the case at bar we would have the following situation: The Plainfield Gas and Electric Company contracted with the City of Plainfield for the right to enter that city and to carry on its business. The Supreme Court subsequently states that the consideration which the company had agreed to pay to the municipality has become unlawful and therefore the company may not continue its payment. The City of Plainfield is then in the position where it may not enforce the performance by the company of its original legal obligation, but the effect of this situation is not merely to relieve the company of its duty of payment, but is to abrogate the contract so that the company in continuing its business

in the City of Plainfield is acting illegally and without the consent of that city. Surely this Court is not going to hold that the Legislature, by language, dubious at the best, as is indicated by the divergence of opinion between two regularly constituted tribunals, the Utility Board and the Supreme Court, intended to bring about a state of affairs throughout this commonwealth which would mean the abrogation of practically all permits to all Utilities in the municipalities of the State and the making of their continued operation within those municipalities without the sanction of the municipalities required by the laws establishing the Utility.

To sum up, therefore, we contend that there is no distinction in principle between the rendition of services in kind by a Utility and the rendition of services not connected with its regular business or the payment of money. That if the principle invoked by the Public Service Electric Company is logically applied, it would involve the nullification of all of the conditions imposed by the several municipalities for the granting of permission to Utilities to operate within them. That not all preferences or advantages are prohibited by the statute, but only undue or unreasonable ones, and that where the preference or advantage is not to an individual but to a municipality, an arm of the State, the Utility granting such preferences or advantage is an auxiliary of the State itself and that the question of reasonableness of the advantage becomes then one of fact for the determination of the Utility Board whose judgment will not be reviewed by the courts if there be any evidence to sustain it. That the prohibition against "gratuities" applies not to municipalities but merely to their officers considered as individuals and that this intent is evidenced by the correction of too broad an exclusion of municipal officers from the right of receiving gratuities in the case of police office, by the enactment of corrective legislation at the following session. That in any event the terms imposed by municipalities

upon the Utilities cannot be considered as gratuities, but must be considered as valuable consideration for valuable rights. That the doctrine invoked by the Supreme Court that the promisor is relieved from the fulfillment of promise, originally lawful but subsequently made unlawful, is subject to the qualification that the promisee is likewise relieved from his part of the agreement, a doctrine, which, if applied to the judgment of the Supreme Court, would result in the nullification of all municipal consents granted upon terms and would make the operation of Public Utilities in practically all of the municipalities of the State unlawful as being continued without the assent of the several municipalities required by the respective acts under which the Utilities are organized.

Respectfully submitted,

JOHN MILTON,
ALBERT O. MILLER, JR.,
SPAULDING FRAZER,
Of Counsel with the New Jersey State League of Municipalities.

New Jersey Court of Errors and Appeals

PUBLIC SERVICE ELECTRIC COMPANY, *Respondent,* *vs.* BOARD OF PUBLIC UTILITY COMMISSIONERS AND THE CITY OF PLAINFIELD, *Appellants.*	*On Certiorari.* *Appeal from the Supreme Court.*

Brief for Respondent in Reply to the Brief Submitted on Behalf of League of Municipalities.

The brief filed in this case on behalf of the league of municipalities contains but little that has not been discussed in the briefs heretofore filed by the parties to the record. Nevertheless, some reply to it may be expected.

All briefs for the municipalities seem to have been prepared on the theory that the respondent is seeking to repudiate a contract made by one of its predecessors, and therefore the case should be considered under the prejudice that would naturally attend such an effort by the company. That view of the matter, however, is entirely erroneous. The company has not attempted to do anything of the kind. The agreement to light the public buildings of Plainfield was faithfully performed by the Plainfield Gas and Electric Company down to the time when that company came under the control of the respondent, and thereafter it was faithfully performed by the respondent itself without the slight-

est objection down to, and even after, the time when it became unlawful to do so.

It has been said in this discussion, and it is probably true, that sub-division (d) of section 18 of the utility act is nothing but a re-statement of the common law, except in so far as it relates to localities. Prior to the passage of the utility act it was not unlawful for public utility corporations to discriminate between localities or municipalities. **Consequently the entire effect of sub-division (d) was to prohibit discrimination between localities, which, of course, include municipalities, and to place municipalities on the same basis as other parties who have occasion to patronize public utility corporations. If it has not that effect the reference to localities is wholly without meaning or effect; in fact, the entire sub-division is useless.** It is not to be presumed that the legislature intended to accomplish nothing by inserting sub-division (d) in the statute.

If there could be any doubt about the intention of the legislature, by enacting sub-division (d), to prohibit utility corporations from discriminating or continuing to discriminate between municipalities, it would be entirely removed by chapter 14 of the laws of 1913. That statute makes discrimination, including discrimination between municipalities, not only unlawful, but a criminal offense, if the effect or intent thereof is to establish or maintain a virtual monopoly hindering competition or restricting trade. The act declares:

> "It shall be unlawful for any person, firm, corporation or association engaged in the production, manufacture, distribution or sale of any commodity of general use or rendering any service to the public to discriminate between different persons, firms, associations

> or corporations **or different sections, communities, or cities of the state** by selling such commodity or rendering such service at a lower rate in one section, community or city than another,'' &c.

While perhaps that act does not apply to the present situation, it is a clear declaration of the purpose of the legislature to prohibit discrimination between municipalities as well as between persons, firms, associations and corporations not municipal.

That it was the purpose of the legislature to place municipalities on the same footing with other patrons of utility corporations is not only obvious from sub-division (d) and the act of 1913, but there was a good and sufficient reason for doing so. When, as in former years, utility corporations operated exclusively in single municipalities, there could be no serious discrimination in favor of or against any municipality, as any discrimination could only be between the municipality and its inhabitants; but when the same utility corporation came to operate in many municipalities, as the respondent does, it became quite as important to prohibit such corporations from discriminating between municipalities as it ever was to prohibit them from discriminating between their other customers. To light the public buildings of one municipality at a cost of several thousand dollars a year, without charge, is clearly an injustice to every other municipality served by the same utility corporation in which a charge for such lighting is made. It is precisely the same as lighting one man's dwelling free, and charging his next door neighbor the usual rate; and, as already observed in the earlier discussion of this case, it makes no difference whether that discrimination is brought about by contract or otherwise.

Counsel for the municipalities argue as if the amount expended by the electric company to light the public buildings of Plainfield would be saved by the company if the city should be required to pay it. That cannot be so if the mandate and policy of the utility act shall be observed. Under any theory of rate making that has ever been propounded, the amount expended by the electric company for lighting the public buildings of Plainfield must be charged as an operating expense, and consequently paid by the other municipalities in which the company operates, and by its other customers. It is, therefore, an undue and unreasonable discrimination against them.

The enforcement of sub-division (d) can deprive no municipal corporation in this state of any advantage that it is justly entitled to hold, and only municipal corporations that possess unfair advantages have any interest to complain of its enforcement. The provision is not retroactive. It does not propose to undo anything that has been accomplished, nor to disturb contracts that have been performed, **but only to prohibit substantial discrimination hereafter.** If this part of the statute cannot be held to terminate the discrimination involved in this case, it would be useless to invoke the provision in any other case, and it would be necessary to admit that it is without force and void. It is also obvious that if this provision cannot be enforced so as to prohibit discrimination between municipalities it cannot prohibit discrimination between other customers of utility corporations, because the prohibition relating to municipalities is in the same paragraph with the prohibition of discrimination between other customers. Being in the same clause which re-states the law as to discrimination between other customers of utility corporations, it must have the same

effect in its application to municipalities as the rest of the paragraph has to other customers. *Noscitur a sociis.*

No doubt it will take time—perhaps much time—to bring about the condition contemplated by the statute; but that is no reason for refusing to enforce the law whenever practicable. In the enforcement in recent years of legislation requiring transportation and commercial corporations to change their methods, arguments such as have been advanced on the part of the appellants in this case were not availing. Every important change for the better must disturb the *status quo;* and whether a proposed change is worth the disturbance is for the legislature to decide, and the legislature has decided in respect of the matter now under consideration that it is.

The question of the jurisdiction of the utility commission to make the order under review is not discussed in the brief submitted on behalf of the league of municipalities. It is not seriously denied in any of the briefs filed on behalf of the appellants that the board of utility commissioners attempted by their order to enforce specific performance of a contract. Nor can it be denied that the court of chancery of this state possesses exclusive jurisdiction to enforce specific performance of contracts. Such jurisdiction cannot be conferred on the utility commission. That the existence and jurisdiction of the constitutional courts of this state are beyond the power of the legislature has been repeatedly held by this court, by the supreme court, and by the court of chancery, and never more distinctly than in the case of *Flanagan v. Plainfield,* 44 N. J. L., 118, where the supreme court said (at pp. 123-4), referring to a statute attempt-

ing to confer jurisdiction on the circuit courts to allow writs of *certiorari*:

> "The power to send these writs cannot be distributed and lodged in other courts at the legislative will. No tribunal of co-ordinate jurisdiction can be erected. The right to invest the circuit courts with the *certiorari* power necessarily implies the right to confer it upon other inferior jurisdictions. * * * This, it is manifest, would destroy the due subordination of the several courts, and disturb the harmony of the judicial system, which it is the purpose of the constitution to guard and perpetuate."

That passage was quoted with approval by this court in *Flanigan* v. *Smelting Co.*, 63 N. J. L., 647, 652.

It is not deemed necessary to discuss the multitude of hypothetical cases proposed in the briefs submitted on the part of the appellants. Each case as it comes before the court should be argued and considered on its merits. Nor is it necessary to consider the unseemly efforts by a portion of the press, and by other artificial means, to prevent, if possible, a fair consideration and impartial decision of the issue involved in this case.

FRANK BERGEN,
Counsel for Respondent.

INDEX

WRIT OF CERTIORARI.

Returnable May 5, 1914.

NEW JERSEY, ss.

The State of New Jersey to Alfred N. Barber, Secretary of the Board of Public Utility Commissioners, Greeting:

(L. S.)

We being willing, for certain reasons, to be certified of a certain order made by Board of Public Utility Commissioners on the first day of April, A. D. nineteen hundred and fourteen, commanding Public Service Electric Company to furnish free to the City of Plainfield the service called for in an agreement with the City of Plainfield, referred to in said order;

We do command you that the said order, together with the record and proceedings before you and all things touching and concerning the same as fully and entirely as before you they remain, to our Justices of our Supreme Court, at Trenton, on the fifth day of May, A. D. nineteen hundred and fourteen, you do certify and send, together with this writ, that therein may be done what of right and according to the laws and constitution of the State ought to be done.

Witness, the Honorable William S. Gummere, our Chief Justice of our Supreme Court, this sixteenth day of April, A. D. nineteen hundred and fourteen.

WM. C. GEBHARDT,
Clerk.

FRANK BERGEN,
Attorney.

Return.

Endorsed:

New Jersey Supreme Court

PUBLIC SERVICE ELECTRIC COMPANY,
Prosecutor,
vs.
BOARD OF PUBLIC UTILITY COMMISSIONERS AND THE CITY OF PLAINFIELD,
Defendants.
} On Certiorari.

WRIT.

Returnable May 5, 1914.

FRANK BERGEN,
Attorney for Prosecutor,
No. 755 Broad Street,
Newark, N. J.

Allocatur:
J. J. BERGEN,
J. S. C.

RETURN.

I, Alfred N. Barber, Secretary of the Board of Public Utility Commissioners, herewith send to the Supreme Court of the State of New Jersey, the order bearing date the first day of April, A. D. nineteen hundred and fourteen, in the within writ referred to, together with the Commission's report containing the finding of facts and conclusions thereon, with all things touching and concerning the same as fully as before said board they appear and remain, as is within commanded.

In witness whereof, I have hereunto set my hand and affixed the seal of said board.

ALFRED N. BARBER,
(L. S.) Secretary.

PETITION.

BOARD OF PUBLIC UTILITY COMMISSIONERS.

THE INHABITANTS OF THE CITY OF PLAINFIELD, vs. PUBLIC SERVICE ELECTRIC COMPANY.	Petition to Enforce Contract Respecting Electric Lighting of Public Buildings.

To the Honorable Board of Public Utility Commissioners in the State of New Jersey:

1. The petition of The Inhabitants of the City of Plainfield, hereinafter called the City of Plainfield, respectfully shows that during the year eighteen hundred and ninety-eight the petitioner, by their Common Council, enacted a certain ordinance entitled:

> "An ordinance designating the streets and highways of the City of Plainfield in, through and upon which the posts or poles of the Plainfield Gas and Electric Light Company may be placed and maintained, and the manner of placing the same, and providing for the construction, maintenance and use by said company of under-ground conduits, cables, wires, manholes and appurtenances for the distribution of electricity for light, heat and power."

which ordinance was duly approved and went into effect on the twelfth day of July, eighteen hundred and ninety-eight, and has remained in effect since that date.

A true copy of the said ordinance is hereto annexed and made a part hereof and designated exhibit "A."

2. That on the twenty-eighth day of November next following the adoption of the said ordinance, the said Plainfield Gas and Electric Light Company and the said The Inhabitants of the City of Plainfield, under their respective seals and in due form of law, made and entered into a written agreement, a true copy whereof is annexed hereto and made a part hereof and designated exhibit "B."

3. That the said written agreement designated as aforesaid exhibit "B," referred specifically to the aforesaid ordinance and contained, among other things, the following:

"And whereas, it was understood and agreed before the passage of the said ordinance, and in consideration thereof, that the said Plainfield Gas & Electric Light Company should enter into this contract for the benefit of the said Inhabitants of the City of Plainfield and all persons residing therein:

"Now this indenture witnesseth, that in consideration of the passage and approval of the said ordinance, and of the sum of one dollar paid by the said The Inhabitants of the City of Plainfield to the said Plainfield Gas & Electric Light Company, the receipt whereof is hereby acknowledged, the said Plainfield Gas & Electric Light Company hereby covenants and agrees to and with the said Inhabitants of the City of Plainfield that * * * said company, its successors or assigns, will at all times hereafter, while said company, its successors or assigns, shall continue to use any of the streets of the said city, or any of the subways aforesaid, light by electricity, free of charge, the Common Council Chamber, offices of the Mayor, Collector, Street Commissioner, City Clerk, the City Jail, Station House, Almshouse, Fire Houses, as at present light-

ed or new in proportion, and all other offices, rooms or buildings, owned or occupied by the city officers, or that may hereafter be owned or occupied for city purposes, including City Hall if the same shall be built or rented;"

and your petitioner shows that by the said agreement designated Exhibit "B," the said Plainfield Gas and Electric Light Company formally accepted the aforesaid ordinance and all its terms and conditions.

4. That subsequently the Public Service Electric Company took over the rights and privileges and duties formerly of the Plainfield Gas and Electric Light Company, and the said ordinance and its terms and provisions, and the said agreement and its terms and provisions became binding upon the said Public Service Electric Company, a public utility.

5. That since the date of the said agreement, designated Exhibit "B," the Plainfield Gas and Electric Light Company and its successors and assigns and at the present time the said Public Service Electric Company, its successor and assign, has continued to use the streets of the said City of Plainfield and subways in said ordinance and agreement mentioned and has continued to light by electricity, free of charge, the offices and buildings owned or occupied by the city for city purposes, but that the said the Public Service Electric Company, on or about the eighth day of December, nineteen hundred and thirteen, served upon the City of Plainfield notice in writing that after the first of February, nineteen hundred and fourteen, it, the said Public Service Electric Company will discontinue, decline and refuse further so to do, which said notice was in the words and figures following, to wit:

Petition.

PUBLIC SERVICE CORPORATION
OF NEW JERSEY

Frank Bergen, General Counsel.
E. A. Armstrong, Assistant Counsel.
L. D. H. Gilmour, Assistant Counsel.

Newark, N. J., December 8, 1913.

Hon. Percy H. Stewart,
Mayor of Plainfield,
Plainfield, N. J.

My dear Mayor:—

As outlined in our several interviews with you and Senator Reed, Public Service Electric Company is convinced that it cannot longer continue to lawfully furnish free lighting to the municipal buildings in the City of Plainfield, and unless a contract for that purpose is made before the first of February next, the company will be constrained to discontinue the lighting of such buildings at that time.

Yours very truly,
L. D. H. GILMOUR,
Assistant General Counsel.

6. That the said Public Service Electric Company asserts that the contract and agreement hereinbefore designated Exhibit "B," in so far as it provides for lighting of municipal buildings of the city without charge, is, because of the enactment by the Legislature of the State of New Jersey of Chapter 195 of the Laws of 1911, entitled "An Act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved April 21, 1911, no longer binding upon said company and refuses to furnish any further light service, under said agreement, to the said city after February first, nineteen hundred and fourteen, while the said city claims that the said mentioned legisla-

tion did not effect said contract, but that the same is in force and binding in all respects.

Therefore, your petitioners pray that this matter may be heard and determined to the end that your honorable body may make an order requiring the said Public Service Electric Company to comply with the terms of the aforesaid ordinance and the aforesaid agreement, and to continue to light the municipal buildings of the said City of Plainfield in conformance with the duties by said ordinance and contract imposed upon it.

And your petitioners will ever pray, etc.

THE INHABITANTS OF THE
CITY OF PLAINFIELD,

By PERCY H. STEWART,
Mayor.

Attest:

JAMES T. Mac MURRAY,
City Clerk.

CHAS. A. REED,
Counsel to the Corporation.

Dated January 7th, 1914.

Exhibit A.

EXHIBIT "A."

An ordinance designating the streets and highways of the City of Plainfield, in, through and upon which the posts or poles of the Plainfield Gas and Electric Light Company may be placed and maintained, and the manner of placing the same, and providing for the construction, maintenance and use by said company of underground conduits, cables, wires, manholes and appurtenances for the distribution of electricity for light, heat and power.

The Inhabitants of the City of Plainfield, by their Common Council, do enact as follows:

Section 1. That the following streets and highways of the City of Plainfield are hereby designated as and for the streets and highways in, through or upon which the posts or poles of said Plainfield Gas and Electric Light Company may be placed, maintained and used by said company, subject to the provisions of the General Statutes of the State of New Jersey in such case made and provided, and subject to the regulations contained in this ordinance, or that may be imposed by the corporate authorities or legislative body of the City of Plainfield:

Albert street, Arlington avenue, Arlington place, Berckman street, Belvidere avenue, Berkeley avenue, Church street, Carlton avenue, Central avenue, Charlotte road, College place, Compton avenue, Cottage place, Crescent avenue, Clinton avenue, Dunellen avenue, Division street, Eighth street, west; Elizabeth street, Elmwood place, Elm place, Essex street, Evona avenue, Field avenue, First place, Fifth street, east; Fifth street, west; Fourth street, east; Fourth street, west; Franklin place, Front street, east; Front street, west; Fifth street, west of Grant avenue; Giraud avenue, Grant avenue, Grove street, Hillside avenue, Irving place, Kensington avenue, Lee place, Madison avenue, Martine avenue, Monroe avenue,

Exhibit A.

Muhlenberg place, Netherwood avenue, New street, Ninth street, east; Ninth street, west; North avenue, east of Richmond street; North avenue, between Park avenue and Watchung avenue; Norwood avenue, Park avenue, Park terrace, Plainfield avenue, Prospect avenue, Putnam avenue, Ravine road, Rahway road, Richmond street, Sanford avenue, Scott avenue, Second street, east; Second street, west; Second street, south; Second place, Sixth street, east; Sixth street, west; Park avenue to Plainfield avenue, Sixth street, west, west of Grant avenue, Seventh street, east; seventh street, west; Sherman avenue, Somerset street, South avenue, Spooner avenue, Stelie avenue, Third street, east; Third street, west; Third place, Washington street, Washington avenue, Watchung avenue, Webster place, West End avenue, Westervelt avenue, Woodland avenue.

Section 2. That the manner of placing said posts or poles shall be as follows:

They shall be firmly planted in the ground, adjacent to and within eighteen inches of the curb line on streets where curb lines have been established, and secured by cement or grouting wherever necessary to maintain the poles in an erect position, and said posts or poles shall not be less than one hundred feet apart.

Section 3. That said Plainfield Gas and Electric Light Company be and is hereby authorized to construct and maintain for the uses of its business of generating and distributing electricity for the purposes of light, heat and power, a system of subways or underground conduits, including the necessary manholes and street openings and lateral connections to property lines beneath the surface of the streets and other highways in said city, and to drain same to storm sewers, and to place, maintain and operate in its system of subways or underground conduits the wires, cables or other electrical conductors necessary for its business, and to construct, maintain and use

for such purposes a system of electrical conductors in connection with the necessary poles and appurtenances for the distribution of electricity from such conduits.

Sec. 4. That said system of subways herein authorized shall be constructed as follows: The same shall be at least three feet below the surface of the streets where located, with manholes where necessary, level with the surface of the street; the trenches shall be carefully back-filled and the material thoroughly rammed to the satisfaction of the street commissioner; the work of rolling and repairing the pavement shall be done by the street commissioner, and the cost of said work shall be paid by said Plainfield Gas and Electric Light Company; and all the work of constructing shall be carried on under the supervision of the street commissioner. In case the said company shall fail to restore, relay or repair, or cause to be restored, relaid or repaired, any pavement or street surface within forty-eight hours after receiving notice from the street commissioner that such work is required, said street commissioner shall have the right to cause such work to be done and the cost thereof shall be paid by the said company.

Sec. 5. That said company shall indemnify the said inhabitants of the City of Plainfield against, and assume all liability and damages which may at any time arise, come or occur to said city from any injury to persons or property from the doing of any work herein authorized, or any work done upon, under or along any of the streets of the said city by said company, or from neglect of the company or its employees to comply with the provisions of any ordinance of said city relative to the use of streets or highways or public places, particularly as to the erection and maintenance of lights and guards, at or about excavations; and the acceptance by the company of this ordinance shall be an agreement by it to

Exhibit A.

pay to the Common Council of Plainfield any sum of money for which the city may become liable from or by reason of such injury or damage.

Sec. 6. That said company shall construct such subways and appurtenances at the rate of at least sixteen hundred feet (1,600) each year from the date of the approval or final adoption of this ordinance until the following streets are clear of wires and poles of said company, viz:

West Front street and East Front street from Central avenue to Watchung avenue;

Park avenue from Front street to Fourth street.

North avenue from Park avenue to Watchung avenue;

Watchung avenue from East Front street to East Fourth street.

The Common Council shall have option to designate in what order subways in the streets specified in this section shall be laid; and the said company shall be at liberty to construct subways in the other streets specified in the first section of this ordinance earlier than herein specified, upon said company applying to the Common Council and obtaining special permission in the premises.

Sec. 7. That this ordinance shall be void unless said company shall file with the clerk of said city its acceptance hereof within twenty days from and after the passage hereof, which acceptance shall be taken and construed to be a consent to the terms and provisions hereof, and an agreement by said company to perform whatever is hereby required within the time or times herein limited, and the said company shall also within said period of twenty days file with the treasurer of said city a bond, with sureties to be approved by the Mayor, in the sum of ten thousand dollars, conditioned for the faithful performance of the terms and conditions of this ordinance.

Exhibit B.

Sec. 8. That said company shall pay into the treasury of said city all advertising and printing fees incurred by the city under this ordinance, and this ordinance shall take effect immediately.

Approved July 12th, 1898.

EXHIBIT "B."

This agreement, made this twenty-eighth day of November, in the year eighteen hundred and ninety-eight, between the Plainfield Gas & Electric Light Company, a corporation of the State of New Jersey, of the first part, and Inhabitants of the City of Plainfield, a municipal corporation of said State, of the second part, witnesseth:

Whereas, the Mayor and Common Council of the City of Plainfield have recently passed and approved an ordinance entitled "An ordinance designating the streets and highways of the City of Plainfield, in through, and upon which the posts or poles of the Plainfield Gas & Electric Light Company may be placed and maintained, and the manner of placing the same, and providing for the construction, maintenance and use of said company of underground conduits, cables, wires, manholes and appurtenances for the distribution of electricity for light, heat and power," which ordinance was duly passed by the said Common Council on July 5th, 1898, and approved by the Mayor of said city on July 12th, 1898.

And whereas, it was understood and agreed before the passage of the said ordinance, and in consideration thereof, that the said Plainfield Gas & Electric Light Company should enter into this contract for the benefit of the said Inhabitants of the City of Plainfield and all persons residing therein;

Now this indenture witnesseth, that in consideration of the passage and approval of the said ordinance, and of the sum of one dollar paid by the said

Exhibit B.

the Inhabitants of the City of Plainfield to the said Plainfield Gas & Electric Light Company, the receipt whereof is hereby acknowledged, the said Plainfield Gas & Electric Light Company hereby covenants and agrees to and with the said Inhabitants of the City of Plainfield that it, the said Plainfield Gas & Electric Light Company, and its successors, will construct, operate and maintain a system of subways or underground conduits for the construction, operation and maintenance of which consent and permission is given in the said ordinance, and also its system of poles and wires for the carrying on of its business, in the manner and upon the terms and conditions mentioned and described in the said ordinance, and also in the manner and upon the terms and conditions herein contained, and will from this time forth, and from time to time, and at all times, faithfully fulfill and perform all the said conditions, terms and requirements, on its part to be kept, fulfilled and performed.

And the said Plainfield Gas & Electric Light Company further covenants and agrees to and with the said Inhabitants of the City of Plainfield, that it, the said Plainfield Gas & Electric Light Company, its successors and assigns, will from time to time, and at all times, so long as said company, its successors or assigns, shall continue to make use of any of the rights and privileges conferred upon it by said ordinance, or any other ordinance of the City of Plainfield, give the option to said Inhabitants of the City of Plainfield to call upon said company to light the streets and public places of said city year by year, or a term or series of years, or one or more years, or any number of years, whether consecutive years or not, or any period or periods of time to be from time to time designated by the Common Council of said city at its option and discretion, and in any and all such cases, said company will, in compliance with such call, light the streets and public places of said city for such periods of time as may from time to time be

designated by the Common Council, at prices not in excess of the prices now paid by said Inhabitants of the City of Plainfield, one intent hereof being to entitle said Inhabitants of the City of Plainfield to call upon said company to light the streets and public places of said city as aforesaid, for any given year, and at its option to skip a year or years and again exercise the option for a succeeding year or years, one or more at a time, continuously or otherwise, and to provide that said Inhabitants of the City of Plainfield shall not lose any right or option under this contract by failing to have said Plainfield Gas & Electric Light Company light the streets and public places of said city continuously.

And said Plainfield Gas & Electric Light Company further covenants and agrees as aforesaid, as follows: That said company, its successors or assigns, shall not at any time or times hereafter charge any person or persons, or corporation, within the limits of said city, any higher rates or prices for furnishing electric light than are at present charged by said company; that said company, its successors and assigns, will at all times hereafter, while said company, its successors or assigns, shall continue to use any of the streets of the said city, or any of the subways aforesaid, light by electricity, free of charge the Common Council Chamber, offices of the Mayor, Collector, Street Commissioner, City Clerk, the City Jail, Station House, Almshouse, Fire Houses, as at present lighted or new in proportion, and all other offices, rooms, or buildings, owned or occupied by the city officers, or that may be hereafter owned or occupied for city purposes, including City Hall if the same shall be built or rented; that said company will cause all trenches in any of the streets or public places of said city in which shall be laid any of the conduits of said city, whether for the purpose of original laying of conduits or for curb connections or for repairs, to be carefully backfilled and the material thoroughly rammed to the satisfaction of the Street Commissioner, and

Exhibit B.

cause the work of rolling and repairing the pavements in connection therewith to be done by the Street Commisioner, and the cost thereof to be paid by said company.

And the said Plainfield Gas & Electric Light Company hereby further covenants and agrees as aforesaid, that at the expiration of twenty-five years from the date of the approval or final adoption of this ordinance, said Inhabitants of the City of Plainfield shall have the option of purchasing the entire electric plant of the said company, its successors or assigns, at a price to be determined in manner following, that is to say: the said company, upon receiving thirty days' notice of the desire of said city to consider said option, shall nominate an arbitrator, or, upon failure so to do, said arbitrator shall be nominated by the Mayor for the time being of said City of Plainfield; said Inhabitants of the City of Plainfield, by their Common Council shall thereupon nominate a second arbitrator, and thereupon the two so nominated shall select a third arbitrator within thirty days from the selection of the second arbitrator as aforesaid, and upon the failure of the first two to agree upon the third arbitrator within said time limited, the third arbitrator shall be chosen by the Judge of the Union County Circuit Court, or, on his neglect or refusal to appoint, by the Mayor of the City for the time being; that the price agreed upon by two or more of the said arbitrators shall be the price at which the said city shall have the option to purchase as aforesaid, and the said city shall elect within sixty days after said price shall have been determined as aforesaid, whether to exercise its option and purchase, or refuse so to do; that in case of a refusal to exercise said option by purchasing, the said city shall at the expiration of thirty years from the date of approval or final adoption of this ordinance, have a similar option to purchase, to be exercised in like manner as above specified, with reference

to the first option; and so on at the expiration of every five years succeeding.

And it is further understood and agreed as aforesaid, that the said Inhabitants of the City of Plainfield is not to be taken by anything contained in said ordinance, or this contract, to obligate itself to renew any existing contract, or any contract hereafter to be made, or to be taken to obligate itself to refuse electric lighting or other privileges or franchises to any other person or persons, or corporation.

In witness whereof, the said Plainfield Gas & Electric Light Company has caused these presents to be signed by its president, and has affixed hereto its corporate seal, by authority of the Board of Directors, of said company, and the said Inhabitants of the City of Plainfield has caused these presents to be executed on its part by the Mayor of said City and its corporate seal to be hereto affixed and attested by the City Clerk.

PLAINFIELD GAS & ELECTRIC LIGHT CO.
By H. G. RUNKLE,
(Seal) President.

Attest:

J. C. POPE,
Secretary.

INHABTANTS OF THE CITY OF
PLAINFIELD,
By CHAS. J. FISK,
(Seal) Mayor.

Attest:

J. T. MACMURRAY,
City Clerk.

ANSWER.

BOARD OF PUBLIC UTILITY COMMISSIONERS.

THE INHABITANTS OF THE CITY OF PLAINFIELD, vs. PUBLIC SERVICE ELECTRIC COMPANY.	Petition to Enforce Contract Respecting Electric Lighting of Public Buildings.

The answer of Public Service Electric Company in the foregoing matter respectfully shows:

First. This respondent admits the passage of the ordinance set out in the first section of complainant's petition, and that the same became effective as therein stated.

Second. This respondent admits the execution of the agreement referred to in the second clause of complainant's petition.

Third. This respondent admits that said agreement contained substantially the clause set out in the third section of complainant's petition but denies that said agreement was by way of acceptance of the ordinance referred to in Section 1 of complainant's petition, and insists that said ordinance was duly accepted within twenty days of the date of its passage.

Fourth. This respondent admits the allegations contained in Section 4 of complainant's petition.

Fifth. This respondent admits the allegations contained in Section 5 of complainant's petition.

Answer.

Sixth. This respondent admits and insists that it is unlawful for it to continue to furnish free lighting service to the City of Plainfield together with street lighting service at its standard rates and it further insists that, by virtue of an Act of the Legislature of the State of New Jersey, approved March 23, 1900, P. L. 502, this respondent was, and is, entitled to deduct from the franchise tax payable under said act the amount of such lighting as it has furnished free to the City of Plainfield computed at its regular rates, and insists, that by virtue of this and other Acts of the Legislature, it is not obligated to furnish any free lighting to the City of Plainfield.

Respectfully submitted,

PUBLIC SERVICE ELECTRC
COMPANY,

By J. J. BURLEIGH,
Vice-President.

Dated Newark, N. J., January 13, 1914.

Rejoinder.

REJOINDER.

BOARD OF PUBLIC UTILITY COMMISSIONERS.

THE INHABITANTS OF THE CITY OF PLAINFIELD, vs. PUBLIC SERVICE ELECTRIC COMPANY.	On Petition to Enforce Contract, etc.

The rejoinder of the petitioner to the answer of the respondent.

As to the sixth clause of said answer in which the respondent sets up new matter, the petitioner rejoins: That the question of furnishing street lighting service at standard rates to the petitioner is not raised by the petitioner, nor is that question involved in the petitioner's complaint.

Also that the question of whether or not the respondent may be entitled to deduct from its franchise tax the value of electric light furnished as part consideration for the grant of franchise by the petitioner to the respondent, can only be determined by a tribunal having jurisdiction over such tax matters, which the Board of Public Utility Commissioners lacks.

And further that if the respondent has the right to make such deduction, then the contract which it now refuses to perform, is by its own showing, clearly in force.

Respectfully submitted,
THE INHABITANTS OF THE CITY
OF PLAINFIELD,
By PERCY H. STEWART,
Mayor

JAMES T. MACMURRAY,
City Clerk.

CHAS. A. REED,
Counsel to the Corporation.

ORDER.

STATE OF NEW JERSEY

BOARD OF PUBLIC UTILITY COMMISSIONERS.

IN THE MATTER OF THE COMPLAINT OF THE INHABITANTS OF THE CITY OF PLAINFIELD AGAINST THE PUBLIC SERVICE ELECTRIC COMPANY REGARDING ENFORCEMENT OF CONTRACT RESPECTING ELECTRIC LIGHTING OF PUBLIC BUILDINGS.	Order.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having on the date hereof made and filed a report, containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, the Board of Public Utility Commissioners

Hereby orders the Public Service Electric Company to conform to the duties imposed on it by an agreement with the City of Plainfield made November twenty-eighth, eighteen hundred and ninety-eight, by the Plainfield Gas and Electric Light Company (predecessor in title to the Public Service Electric Company), and to furnish free of charge to the City of Plainfield such service as the agreement referred to herein provides shall be furnished by the Plainfield Gas and Electric Company to said city.

This order shall take effect April 21st, 1914.

Dated April 1st, 1914.

Order.

BOARD OF PUBLIC UTILITY COMMISSIONERS,
By RALPH W. E. DONGES,
President.

(Seal)

Attest:
ALFRED N. BARBER,
Secretary.
(Seal)

I hereby certify the foregoing to be a true copy of order adopted by the Board of Public Utility Commissioners at its meeting held Wednesday, April 1st, 1914, and recorded in the minutes of said meeting.

ALFRED N. BARBER,
Secretary.

Report.

REPORT.

STATE OF NEW JERSEY.

BOARD OF PUBLIC UTLITY COMMISSIONERS.

IN THE MATTER OF THE COMPLAINT OF THE INHABITANTS OF THE CITY OF PLAINFIELD AGAINST THE PUBLIC SERVICE ELECTRIC COMPANY REGARDING ENFORCEMENT OF CONTRACT RESPECTING ELECTRIC LIGHTING OF PUBLIC BUILDINGS. } Report.

Charles A. Reed, for the petitioner.

L. D. H. Gilmour, for the respondent.

By petition filed with this board on January 12th, 1914, the petitioners ask this board to enter an order requiring the respondent to comply with the terms of a certain ordinance and a certain agreement; and in conformity therewith to continue to light the municipal buildings of the City of Plainfield without charge.

The case was heard at the State House in the City of Trenton on January 27, 1914, both parties being represented by counsel.

The essential facts in the case are practically undisputed.

It appears that the City of Plainfield by ordinance approved July 12, 1898, granted to respondent's predecessor in title the right to place distributing apparatus in public streets of the city. Said ordinance

designated where and how such apparatus should be located and maintained.

There is no allegation that said ordinance was not duly accepted by the franchisee.

On November 28th, 1898, the city and the franchisee made an agreement, reciting, inter alia, that:

> "It was understood and agreed before the passage of said ordinance" (referring to the ordinance of July 12, 1898), "and in consideration thereof, that the said Plainfield Gas and Electric Light Company" (respondent's predecessor in title) "should enter into this contract for the benefit of the said Inhabitants of the City of Plainfield and all persons residing therein."

Among the covenants in said agreement contained is one whereby the franchisee undertakes

> "while said company, its successors or assigns, shall continue to use any of the streets of the said city, or any of the subways aforesaid (to) light by electricity, free of charge, the Common Council Chambers, offices of the Mayor, Collector, Street Commissioner, City Clerk, the City Jail, Station House, Almshouse, Fire Houses, as at present lighted or new in proportion, and all other offices, rooms or buildings, owned or occupied by the city officers, or that may be hereafter owned or occupied for city purposes, including City Hall if the same shall be built or rented, etc."

This covenant in the agreement is quite apart from and independent of another in the same agreement whereby the city at its option may call upon the franchisee to light the city streets. The city expressly reserved its right to take city lighting from other parties, and to resume such service at the hands of the franchisee thereafter, if the city saw fit.

Report.

It is in evidence that Public Service Electric Company by letter of December 8, 1913, notified the Mayor of Plainfield that it

> "is convinced that it cannot longer continue to lawfully furnish free lighting to the municipal buildings in the City of Plainfield, and unless a contract for that purpose is made before the first of February next, the Company will be constrained to discontinue the lighting of such buildings at that time."

In this posture of affairs the city petitioned this board, as above recited, to make an order requiring the respondent to comply with the terms of the ordinance and the covenants of the agreement as set forth above, and in conformity therewith to continue to light, without charge, the municipal buildings of Plainfield.

What are the grounds upon which the Board may order a public utility to fulfill covenants embodied in a contract related as in this case to a duly accepted ordinance?

The petitioners rest their request for such an order upon Chapter 195 of the Laws of 1911 (II, 17, (a)). This provides that the Board shall have power, after hearing, by order in writing, to require every public utility

> (a) "To comply with the laws of this State and any municipal ordinance relating thereto and to conform to the duties imposed upon it thereby or by the provisions of its own charter, whether obtained under any general or special law of this State."

Petitioner's contention is that the laws of the State require an observance of contract obligations; that

the lighting of the city buildings without charge is a contract obligation of the respondent; that respondent refuses to observe said contract obligation; and that therefore this Board has jurisdiction and should order compliance with the contract.

The Board is clearly of opinion that the section of the statute cited warrants the Board to order a public utility to comply with the laws of this State which relate to the utility by reason of the utility's specific character as a duly delegated agent of the State for affording service, safe, adequate and proper, at reasonable rates, and without undue or unjust discrimination.

But it is a hazardous pressing of the language of the statute which would make it imply that this Board may order a public utility to make a payment of money lawfully due to a contractor for work done, or to comply with a contract which differs in no way from a contract assumed by private parties.

The enforcement of obligations such as that just instanced, of a public utility, it was clearly never intended to impose upon an administrative board, or to withdraw even in the first instance from the jurisdiction of the courts.

If the obligation of the respondent to light without charge the public buildings of Plainfield as a continuous payment for respondent's right of entry upon and occupancy of streets of Plainfield, said rights being obtained when its franchise from Plainfield was bargained for, were one flowing wholly from a contract that in its nature is entirely akin to a contract between two private individuals it would be an obligation not intended for this board's cognizance or enforcement under the statute.

But this Board is not persuaded that the contractual obligation of the respondent to light the city buildings free of charge is one arising from a contract such as might be concluded by the respondent in a

quasi-private capacity. The passage and acceptance of the ordinance approved July 12, 1898, created certain contractual rights and obligations between the city and the franchisee. Some of these rights and obligations, such as the designation of streets on which the franchisee's distributing apparatus may be placed, are described in the ordinance. But the rights and obligations created by the passage and acceptance of the ordinance are not set forth in their entirety in the ordinance, but are defined in the subsequent agreement. This fact is attested by the preamble of the agreement of November 28, 1898, wherein it is explicitly stated that:

> "It was understood and agreed **before the passage of the said ordinance and in consideration** thereof, that the said Plainfield Gas and Electric Light Company should enter into this contract for the benefit of the said Inhabitants of the City of Plainfield and all persons residing therein."

Hence the omission of the ordinance to recite each and all of these contractual rights and obligations **in extenso** does not operate to deprive the rights and obligations subsequently set forth in the agreement, of the binding force imparted to them by the passage and acceptance of the ordinance. By necessary implication the rights and obligations recited in the agreement become part and parcel of the contract created by the passage and acceptance of the ordinance, although their reduction to writing was subsequent to the approval of the ordinance. Being a necessary and pre-destined complement to the contractual rights and obligations named preliminarily in the ordinance, this Board has no alternative but to regard them to all intents and purposes as part of the contract effected by the passage and acceptance of the ordinance, and as entitled under the statute to the same enforcement

as though the original ordinance had set them all forth at length.

The case before the Board was argued largely by the respondent on the ground that the Public Utility Act in forbidding undue or unjust discrimination precludes the lighting of municipal buildings in one case without payment and the exacting of payment in other cases for a service physically similar. It was argued that the prohibition of undue or unjust discrimination was an implied repealer by the State of rights theretofore existing by contract in favor of certain municipalities; that the State by this section of the act waived for itself and for its creatures, the various municipalities, rights previously enjoyed under contracts or franchise ordinances, unless such rights had in all cases been uniformly granted to all municipalities by the utility.

The Board is of the opinion that this contention is groundless. Undue or unjust discrimination was forbidden at the common law prior to the enactment of Chapter 195, Laws of 1911. If such rights which municipalities have obtained by contract, whether incorporated in ordinances or not, when bargaining in respect of franchise grants, are void now, they have long been void hitherto. That such rights have been upheld in many adjudications precludes the assumption that they were void or have become void. Such a position may readily prove a double-edged tool for public utilities. If the covenants under which they obtained rights of entry always were void, the franchises in question are, many of them, in a parlous state. The utilities are not entitled to the rights they have obtained by such contracts, unless they honor the valid considerations required of them by virtue of such contracts.

The Board is of the opinion that when a public utility bargains with a municipality for rights of entry upon and occupancy of the public street, the public

utility acts in a unique capacity; that in such unique capacity it may assume obligations to make a return for such franchise privileges as it seeks, and may express such obligations in terms of money, or of service. It may in such capacity lawfully undertake to pave the streets traversed by its cars. It may in such capacity undertake to pay to the municipality in money a certain portion of its receipts. It may, in such capacity, undertake to afford a stipulated amount of free service, such as free lighting, or free telephone service for municipal buildings.

The essential thing is that the obligation so undertaken, even though expressed in terms of service to be rendered without money payment, is one assumed by the public utility **as a bargainer with a body politic,** not as a duly deputized and enfranchised agency required to afford service to the generality of consumers without undue or unjust discrimination.

It is one thing to promise service without charge when the utility bargains with a body politic for a franchise; it is a radically different thing for a utility duly enfranchised to sell service to the public generally. In the one case the utility buys particular privileges from a particular body politic; in the other case, the utility sells services to consumers generally. In the one case it buys a franchise; in the other it sells a service.

The Board therefore is clearly of opinion that for the respondent to light without charge the public buildings of the City of Plainfield does not involve undue or unjust discrimination, but that the respondent is bound to afford such lighting service without charge to the City of Plainfield.

The alternative contention of the respondent that such lighting service without charge is a tax, and may be deducted by the respondent under the Voorhees' Act from the taxes paid to the municipality, is a matter not within the competence of this board.

Report of Proceedings.

An order will enter conformably with the determination above made.

Dated April 1st, 1914.

BOARD OF PUBLIC
UTILITY COMMISSIONERS,

By RALPH W. E. DONGES,
President.

Attest:
ALFRED N. BARBER,
Secretary.

I HEREBY CERTIFY the foregoing to be a true copy of Report made and filed by the Board of Public Utility Commissioners at its meeting held Wednesday, April 1st, 1914.

ALFRED N. BARBER,
(Seal) Secretary.

(RECORD OF PROCEEDINGS BEFORE THE COMMISSION, PAGES 6-13.)

"COMMISSIONER DONGES: Then I suggest that the contract and agreement be put in. It is altogether a matter of argument, no testimony.

"MR. GILMOUR: Yes, sir; no testimony, except this. I think this is a fact and I think Senator Reed will agree we may introduce it. I have had made up a schedule showing the price of lights under the old agreement, the total cost of street lighting, the amount of free lighting, the franchise tax paid to the city of Plainfield and the cost of the same lighting under the new rates. [Schedule attached.]

"COMMISSIONER DONGES: The question is, whether or not the Public Service Electric Company is required, under this agreement, to furnish service free of charge to the city of Plainfield.

"MR. REED: That is it—not exactly, I don't admit it is free of charge.

"COMMISSIONER DONGES: Without any payment of money at this time; in consideration of the franchise granted.

"MR. REED: (Reads from the contract). That is what they agreed to do in consideration of this ordinance.

"COMMISSIONER DONGES: Senator Reed, are you prepared now to prove the ordinance and the agreement before us, the compliance by the Plainfield company and later by the Public Service?

"MR. REED: If you please, sir, all the documents are attached as copies to the complaint, and the Public Service has admitted them in its answer, informally, and as I understand it there is no question of fact in dispute between us.

"COMMISSIONER DONGES: It better be stipulated in terms on the record.

"MR. GILMOUR: The answer admits that the copy of the ordinance attached to the complaint and the copy of agreement are copies of papers in existence. It does not admit that the agreement was the acceptance of the ordinance.

"COMMISSIONER DONGES: That is in dispute and it also is in dispute as to the obligation of the com-

pany to furnish service in accordance with the terms of the agreement.

"MR. GILMOUR: At the present time and under present conditions, yes, sir.

"MR. REED: There is, therefore, no question of fact in dispute so far as I see.

"COMMISSIONER DONGES: It is agreed that—down to what time was service furnished?

"MR. GILMOUR: Down to now. We are still furnishing it. We have served them notice that on the first of February we will discontinue free service.

"COMMISSIONER DONGES: Copy of the notice is here?

"MR. GILMOUR: Yes, and admitted.

"COMMISSIONER DONGES: And it is agreed that on the first of February it is the purpose of the Public Service Electric Company to discontinue furnishing service under the terms of this agreement?

"MR.GILMOUR: Free, yes, sir.

"COMMISSIONER DONGES: That is true.

"MR. GILMOUR: Yes, sir; we will furnish them service at standard rates. The notice calls attention to the fact that after the first of February they will be expected to pay standard rates.

"COMMISSIONER DONGES: That notice was given with a view to discontinuing?

"MR. GILMOUR: Yes, sir, and to present this question here.

"COMMISSIONER DONGES: So there is no fact in dispute, except that the agreement under date of November 28, 1898, was an acceptance of the ordinances; that you dispute?

"MR. GILMOUR: That we dispute, and Senator Reed in his reply to the answer practically waives that statement in his original complaint. This ordinance was passed in July, 1898, and provides that a bond shall be filed with the city and the acceptance shall be filed within twenty days. That acceptance was due within twenty days after the approval of the ordinance, that would be the first of August. That acceptance, it is fair to suppose, was filed because the subways were constructed, and the business was conducted. If it was filed it was filed in the city clerk's office and is in their possession and not ours.

"COMMISSIONER DONGES: Do you assert such an acceptance was in fact filed?

"MR. GILMOUR: Yes, with a bond; both bond and acceptance were filed?

"COMMISSIONER DONGES: Within twenty days?

"MR. GILMOUR: Within twenty days, and afterwards this agreement was made.

"MR. REED: I am willing to assume for the sake of this case, that such was the case.

"COMMISSIONER DONGES: You are willing, without admitting it.

"MR. REED: Yes, I am willing to assume it is so.

"MR. GILMOUR: He admits it for the purpose of this case.

"MR. REED: I am unable to discover it. I don't think it makes a bit of difference for the purpose of this case whether they file formal acceptance of the ordinance or not. The question is whether they are bound to furnish us with these lights, and it don't make any difference whether they accept the ordinance or not.

"COMMISSIONER DANIELS: How about the subsequent contract, the contract subsequent to it, according unpaid service to the city buildings? Do you now admit that may not have been the confirmation of the original ordinance?

"MR. REED: I know it was the confirmation of it, beyond a doubt. That was the consideration the company was to pay for the ordinance.

"COMMISSIONER DANIELS: I guess the position is, it was an implied confirmation, but not a specific confirmation.

"COMMISSIONER DONGES: Do I understand your position is, and you are now willing to stand upon this position, that the agreement of November 28, 1898, is not in any way related to the passage and acceptance of the ordinance?

"MR. REED: Not at all. I say the ordinance was passed and the contract here was given in consideration of that ordinance which went to this company, and it says so in so many terms.

"COMMISSIONER DONGES: Which agreement?

"MR. REED: The agreement states that the agreement is made in consideration of the fact that the ordinance was passed; that the agreement was made before the ordinance was passed, that if they would pass the ordinance they would enter into the contract. The agreement so recites. I would like to hand you a copy.

"COMMISSIONER DONGES: (Reads section second of the ordinance.)

"MR. REED: My contention is that the company whether or not it filed that particular agreement, it filed another in which they agreed to do certain things. I am not here to say the company's franchise was void; that isn't the issue. If that were the question I might say because they have never filed an acceptance, they never had any franchise.

"COMMISSIONER DONGES: Isn't your position then that subsequent to the passage of the ordinance and the acceptance of the grants therein contained by the company, an agreement was made between the company and the municipality, which agreement you now ask this Board to enforce?

"MR. REED: Yes, that agreement was a part of the consideration for the passage of the ordinance. They are estopped from denying that. They said so over their own seal.

"COMMISSIONER DONGES: In their answer to this case?

"MR. REED: The agreement is set out in the petition, and the answer admits it. The agreement is set

out in the complaint in full and the ordinance in full. The answer of the company admits that contract was made and that ordinance was passed. (Reads first three admissions of respondent.) If I were questioning the validity of the ordinance, I should say it was necessary to establish the fact that it had been accepted, but I am objecting because they refuse to carry out now, after some fifteen years, an agreement which they made, as they say themselves; and which was the consideration on which the ordinance was passed. That is what their agreement states.

"COMMISSIONER DONGES: And your position is that an agreement reciting it was entered into in consideration of the grants made by the municipality to one of the parties to that agreement, that it has the same force and effect as if the provision of the agreement were contained in the franchise?

"MR. REED: Absolutely.

"COMMISSIONER DONGES: Notwithstanding that the agreement was made and executed several months after the passage and acceptance of the ordinance by the company.

"MR. REED: Absolutely, that was a part of the transaction."

SCHEDULE.

CITY OF PLAINFIELD.

Installation December 31, 1913.

	1078— 25 C. P. Inc. @	$ 15.50	
	3—1,200 C. P. Arcs @	100.00	
10	Present bill per annum		$17,009.00
	Free electricity, 1913		2,401.50
	Franchise Tax, 1913		2,438.00
	Per annum at standard rates—5 year contract		15,345.14
	Amount per annum at existing rates for street lighting and lighting public buildings, ex-franchise tax which company claims it may apply against free		
20	lighting		$17,009.00
	Deduct net franchise tax payable	$2,438.00	
		2,401.50	
			36.50
	Net amount per annum		$16,972.50
	Amount per annum at standard rates for street lighting		$15,345.14
30	Add public buildings		2,401.50
			$17,746.64
	Deduct franchise tax		2,438.00
			$15,308.64
	Reduction per annum		$16,972.50
			$15,308.64
40			$ 1,663.86

REASONS.

Filed

NEW JERSEY SUPREME COURT.

PUBLIC SERVICE ELECTRIC COMPANY, Prosecutor, vs. BOARD OF PUBLIC UTILITY COMMISSIONERS AND THE CITY OF PLAINFIELD, Defendants.	On Certiorari. Reasons.

The prosecutor presents the following reasons for setting aside the order made by the Board of Public Utility Commissioners on the first day of April, A. D. nineteen hundred and fourteen, and brought up for review by the writ allowed in the above stated cause:

1. That the Board of Public Utility Commissioners had no jurisdiction to make the order brought up for review.

2. That the Board, contrary to law and the constitution of the State of New Jersey, attempts to judicially pass upon and construe a contract and contract price.

3. That the Board of Public Utility Commissioners by the order brought up for review undertook to judicially decree a specific performance of a contract, which is a matter wholly within the jurisdiction of the courts.

4. That the City of Plainfield is a municipal corporation and is a political subdivision of the State fully under the control of the legislature, and any rights it possessed under and by virtue of the agree-

Reasons.

ment bearing date the twenty eighth day of November, A. D. eighteen hundred and ninety-eight, referred to in the proceedings brought up for review, were subject to disposition by the legislature and had been surrendered and abolished by it.

5. That under and by virtue of chapter 195 of the laws of 1911, being "An Act concerning public utilities; to create a board of public utility commissioners and prescribe its duties and powers," any rights or interests which the City of Plainfield had or might claim under and by virtue of the aforesaid agreement were surrendered and abolished.

6. That under and by virtue of chapter 14 of the laws of 1913 the prosecutor was forbidden to do, and it was made unlawful for the City of Plainfield to have or receive the service in said agreement named, and by said Board ordered, free of charge and on the terms named therein.

7. That the order brought up for review is in contravention of paragraph 12, section 7, article IV of the constitution of the State of New Jersey.

8. That the effect of the order brought up for review is to take the property of the prosecutor for public use without just compensation, in violation of praagraph 16 of article 1 of the constitution of the State of New Jersey.

9. That the order brought up for review seeks to deprive and does deprive the prosecutor of its property without due process of law, in violation of section 1 of the 14th amendment of the constitution of the United States.

10. That the order brought up for review takes the property of the prosecutor without just compensation in violation of section 1 of the 14th amendment of the constitution of the United States.

11. That the order brought up for review is in effect a judgment rendered against the prosecutor by the defendant Board of Public Utility Commissioners

Reasons.

and thereby deprives the prosecutor of the right of trial by jury, contrary to paragraph 7 of article I of the constitution of the State of New Jersey.

12. That the order brought up for review denies to the prosecutor, a corporation of the State of New Jersey and a citizen within its jurisdiction, the equal protection of the laws of said State, in violation of section 1 of the 14th amendment of the constitution of the United States.

13. That the order brought up for review is in divers other respects contrary to the constitution of the United States and of the State of New Jersey and in violation of the laws thereof and thereunder and is unjust and oppressive to the prosecutor.

The prosecutor therefore prays that the said order so brought up for review by the writ of certiorari in this cause be reversed, set aside and for nothing holden.

FRANK BERGEN,
Attorney for Prosecutor.

SUPREME COURT OPINION.

NEW JERSEY SUPREME COURT.

June Term, 1914.

PUBLIC SERVICE ELECTRIC CO.,
Prosecutor,
vs.
BOARD OF PUBLIC UTILITY COMMISSIONERS AND THE CITY OF PLAINFIELD,
Defendants.
} On Certiorari.

Before Justices Swayze, Parker and Kalisch.
For the prosecutor, Frank Bergen.
For the City of Plainfield, Charles A. Reed.
For the Board of Public Utility Commissioners, Frank H. Sommer.
The opinion of the court was delivered by Kalisch, J.:

The facts before us show that by an ordinance approved July 12th, 1898, the City of Plainfield designated certain streets in said City on which the predecessor of the prosecutor, the "Plainfield Gas and Electric Light Company," might place and maintain poles and wires and also indicating in the manner in which the poles would be placed for the distribution of electricity. That subsequently on the 28th day of November, 1898, a contract in writing, under seal, was entered into between the company and the city which recites in substance that it was understood between them before the passage of the ordinance and in consideration thereof that the company should enter into the contract for the benefit of The Inhabitants of the

City of Plainfield and all persons residing therein, and which in substance provided that in consideration of the passage and approval of the ordinance and of the sum of one dollar paid by the city of Plainfield to the company, the company agrees and covenants to and with the city that the company, its successors or assigns, will at all times hereafter, while said company, its successors or assigns, shall continue to use any of the streets of the city or any of the subways thereof, light by electricity, free of charge, certain municipal buildings, offices and rooms owned or occupied by the City officers, or that may hereafter be owned or occupied for city purposes. That from 1898 until 1913, the company and its successors carried out the terms of the contract.

On the 8th day of December, 1913, the prosecutor notified the city in writing that it could not lawfully continue free lighting of the public buildings and that it would discontinue the same on and after February 1st, 1914.

Thereupon, the city appealed to the Board of Public Utility Commissioners, which board after a hearing made an order directing the prosecutor to conform to the duties imposed on it by the contract and to furnish free of charge to the city of Plainfield such service as the agreement referred to provides and shall be furnished by it to the said city.

It is this order which the prosecutor seeks to set aside. The prosecutor rests its act on sub-division (d) of section 18 of the act of 1911, concerning public utilities (P. L. 1911, p. 381) which forbids the making or giving, directly or indirectly, any undue or unreasonable preference or advantage to any corporation or to any locality; and upon an act entitled, "A Further Supplement to the act entitled 'An Act for the punishment of crimes (Revision of 1898),' " P. L., 1913, p. 27, which in express terms denounces, **inter alia**, as a misdemeanor for any corporation or associa-

tion engaged in the production, manufacture, distribution or sale of any commodity of general use, or rendering any service to the public to discriminate between communities or cities of the State, by selling such commodity or rendering such service at a lower rate in one section, community or city than another, etc.

Whether or not this act is applicable to the case under consideration, is wholly unimportant and therefore it is not considered and no opinion is expressed thereon.

We think, however, that the public utilities act in forbidding discrimination made the performance of this contract unlawful, and that, therefore, the prosecutor could not continue to perform the contract without being guilty of a violation of that statute. Thus we have the case of a contract lawful when made, the performance of which subsequently became unlawful. It is perfectly well settled that the effect of this is to excuse the promisor from performance. Pollock on Contract, 4th ed. 406; Pomeroy on Contract 280 (Specific Performance); Parsons on Contr. 6th ed. 675; Louisville & N. R. Co., v. Motley, 219, U. S. 485.

For the city of Plainfield it is contended that subdivision (d) of section 18 of the act relating to public utilities is not applicable to the case at hand because it relates only to cases where it appears that there is undue or unreasonable preference or advantage given and that there is no evidence that the preference or advantage given is either undue or unreasonable. That in order to determine whether or not an undue or unreasonable preference or advantage was made in any given case, it would be necessary to show by evidence all the attendant facts and circumstances.

This contention clearly ignores the spirit of this legislation. One of its objects was to abrogate the granting of gratuities to municipalities and thereby

prevent reciprocal favors from being granted to the donors.

The evil sought to be eradicated was the insidious influence which might be exercised on municipal bodies and offices against the general public welfare, by the donors of such gratuities. Therefore, where it appears, as it does in this case, that the gratuity granted by the predecessor of the prosecutor to the city of Plainfield to light all its public buildings, offices and rooms free of charge forever, because it has received the privilege of placing and maintaining its poles and wires in the streets and subways of the city of Plainfield, no other evidence is required or necessary than is furnished by the contract, to demonstrate that the preference or advantage given by the contract is undue and unreasonable and within the inhibition of the public utilities act.

The fact that there was such undue and unreasonable preference or advantage given is sufficient basis to set aside the order made by the Public Utilities Commissioners.

There appears to be, however, another equally valid ground for setting it aside. The Board of Public Utility Commissioners, by the statute creating the commission has the power to enforce certain legal obligations of the prosecutor, but the language is not broad enough to confer on the Board the power to enforce specific performance of contracts. This order made directs the specific performance of the contract between the parties.

What would be the legal effect of the statute if it were broad enough to confer such a power on the board need not now be considered. Nor is it necessary to consider whether the board would have had the power to enforce the contractual relation if it had existed in the ordinance.

The order will be set aside.

RULE.

NEW JERSEY SUPREME COURT.

PUBLIC SERVICE ELECTRIC COMPANY, Prosecutor, vs. BOARD OF PUBLIC UTILITY COMMISSIONERS AND THE CITY OF PLAINFIELD, Defendants.	On Certiorari. Rule Setting Aside Order of Commissioners.

This matter coming on to be heard before the court on the return of the writ of certiorari in the above stated cause, in the presence of Frank Bergen, attorney for prosecutor, Frank H. Sommer, attorney for the Board of Public Utility Commissioners, and Charles A. Reed, attorney for City of Plainfield, defendants, and the court having inspected the return, the reasons assigned by the prosecutor for setting aside the order brought up for review, and heard the arguments of counsel, and considered the said return, reasons and arguments, and being of the opinion that the said order of the Board of Public Utility Commissioners brought up for review should be set aside and for nothing holden:

IT IS ORDERED that the order of the Board of Public Utility Commissioners entitled "In the matter of the complaint of the Inhabitants of the City of Plainfield against the Public Service Electric Company regarding enforcement of contract respecting electric lighting of public buildings," made on the first day of April, nineteen hundred and fourteen, and brought up for review by the writ of certiorari in this cause, be

and the same is hereby vacated, set aside and for nothing holden; and that the defendant City of Plainfield pay the prosecutor's costs to be taxed in this case.

Rule entered March thirtieth, nineteen hundred and fifteen.

On motion of
FRANK BERGEN,
Attorney of Prosecutor.

A true copy,
WM. C. GEBHARDT,
Clerk.

Notice of Appeal.

NEW JERSEY SUPREME COURT.

PUBLIC SERVICE ELECTRIC COMPANY, Prosecutor, vs. BOARD OF PUBLIC UTILITY COMMISSIONERS AND THE CITY OF PLAINFIELD, Defendants.	On Certiorari. Notice of Appeal.

To FRANK BERGEN, Esq.,
Attorney of Prosecutor.

TAKE NOTICE: That the defendant's appeal to the Court of Errors and Appeals from the whole of the judgment entered in this cause for the following reasons:

1. That the Supreme Court improperly construed subdivision (d) of Section 18 of the Act of 1911, concerning public utilities (P. L. 1911, p. 381).

2. That the Supreme Court improperly held that the lighting of public buildings, offices and rooms of the City of Plainfield was a gratuity.

3. That the Supreme Court improperly held that the lighting of public buildings, offices and rooms of the City of Plainfield was on an undue and unreasonable preference.

4. That the Supreme Court improperly held that the legislative intent expressed in or implied from Chapter 195 of the Laws of 1911, and the effect of said statute, was to relieve the prosecutor from its obligation, theretofore created, to light the public offices of

the defendant municipality so long as the prosecutor continued to exercise and enjoy the privileges granted by said municipality in exchange for said obligation.

5. That the Supreme Court improperly held that the Board of Public Utility Commissioners did not have the power to direct the prosecutor to continue in the performance of its obligation to the defendant municipality.

CHAS. A. REED,
Attorney for the
City of Plainfield.

Notice of Appeal of Board of Public Utility Commissioners is identical in the reasons with those given in the Notice of Appeal of the City of Plainfield.